

# SOVEREIGN IMMUNITY

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## HEARING BEFORE THE COMMITTEE ON INDIAN AFFAIRS UNITED STATES SENATE ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

OVERSIGHT HEARING TO PROVIDE FOR INDIAN LEGAL REFORM

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APRIL 7, 1998  
SEATTLE, WA

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**PART 2**

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U.S. GOVERNMENT PRINTING OFFICE

47-901 CC

WASHINGTON : 1998

For sale by the U.S. Government Printing Office  
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402  
ISBN 0-16-057380-7

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## **SOVEREIGN IMMUNITY**

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**TUESDAY, APRIL 7, 1998**

**U.S. SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
Seattle, WA**

The committee met, pursuant to notice, at 11 a.m. at the Doubletree Guest Suites, 16500 Southcenter Parkway, Seattle, WA, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Inouye, and Gorton.

### **STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN COMMITTEE ON INDIAN AFFAIRS**

The CHAIRMAN. Good morning. This committee will be in session. This committee will be in session.

This is the second of three hearings on S. 1691 introduced by Senator Gorton. Today we will hear testimony from any individuals regarding issues—let me start maybe at the last part of my statement first, and that is this: This is not the U.S. Senate, but it is a U.S. Senate hearing, and we expect that the decorum of the U.S. Senate hearing to prevail. That means there will be no signs held up when we get going. There will be no protesting. There will be no protesting in this room for either side. There will be no cheering or booing. You can do all of that outside. And if that's not acceptable to this group, we will simply recess or adjourn the hearing.

We're going to do this with the decorum that we're supposed to according to Senate rules. You have a First Amendment right to protest all you want on the issue. Do that outside. You will not do that in here.

And I'll continue. This discussion involves inherent rights of tribal immunity from lawsuits in individual civil and property rights to both Indians and non-Indians alike on the reservation. Some have alleged that the civil rights of individuals, Indian and non-Indian, are being deprived by tribal governments. The allegations are that none of these individuals are with adequate recourse under the law because of tribal immunity.

These allegations include situations involving changes in tribal membership and enrollment rules, arbitrary tribal law enforcement actions, elections challenges, and other issues.

In 1968, the Congress enacted the Indian Civil Rights and imposed on tribal governments restrictions on official actions similar to those contained in the U.S. Constitution. The Congress recog-

nized financial restraints on tribes and did not require that counsel be provided to criminal defendants nor does it require jury trials in civil matters.

In 1978, the U.S. Supreme Court decided in *Santa Clara Pueblo v. Martinez*, holding that the act was unenforceable in Federal courts except for writs of habeas corpus. The court observed that the tribal court provided a forum where relief could be granted.

With regards to 1691, section 4 of the bill would amend the Federal law to provide Federal courts with jurisdiction in any civil action or claim which arises under the Constitution, laws, or treaties of the United States. If enacted, section 4 would legislatively overturn the *Santa Clara Pueblo* case and would largely eliminate the role of tribal courts in these matters.

In addition, section 7 of S. 1691 would waive tribal immunity for purposes of Indian civil rights claims against tribal government.

Similarly, there are charges that private property rights are being deprived by Indian tribal governments, again leaving the individuals without legal recourse because of tribal immunity. These issues involve access to utilities by non-Indians living on reservations, tribal ordinances, and a number of natural resource issues.

Section 4 of S. 1691 would rule out tribal immunity from suit and give Federal courts jurisdiction to civil claims for money damages for loss of property.

As contracts can be considered property, section 4 also provides for a waiver of immunity and Federal court jurisdiction in claims for damages that involve a contract involving an Indian tribe.

It is clear that the provisions of S. 1691 constitute wide-sweeping fundamental changes in the law involving Indian tribal governments. These charges proposed in S. 1691 would unilaterally waive the immunity of tribal governments without their consent, dramatically increase the number of Indian-related cases heard by both State and Federal courts, and open the courthouse doors and subject Indian tribes to a great deal more of litigation.

I would hope that somewhere in the middle there is an opportunity for increased dialogue with this bill, and I know that we're going to hear a few war stories. I like to think that individual war stories could be handled without major changes in Federal law.

But before we begin, I want to reinforce that this is a Senate hearing and it will be conducted in that manner.

And with that, I'd like to turn to Vice Chairman Senator Inouye for his opening statement.

Senator INOUE. Thank you very much, Mr. Chairman. Looking over the crowd and the number of witnesses we have today, first I'd like to ask that my full statement be made part of the record.

The CHAIRMAN. No objection. It will be included in the record.

#### **STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS**

Senator INOUE. I'm certain that all of us gathered here realize that what we are discussing is part of the fundamental law of the United States. It concerns sovereignty of our Nation and the sovereignty of Indian nations. And oftentimes because of equal sovereignty, there may be some conflict.



I think we should keep in mind that notwithstanding the opposition that one may find in the presentation by Indian nations, our nation over the years has conducted ourselves as treaty nations, government-to-government relationship.

We have in our files 800 treaties, treaties very similar to those that we enter into with great countries: Germany, with France, with Italy, with Japan. On the same basis, our nation has entered into treaties with Indian country, 800 of them, very solemn ones, many that read: "As long as the sun rises in the east and sets in the west, this land will be yours."

Of the 800 treaties, I'm sorry to report that 430 have never been considered. They were just filed away. 370 were ratified by the U.S. Senate, and of that number, I'm sorry to report that provisions in every one of them have been violated.

This is not a great record for a great country. We do not wish to violate any more provisions in any of these treaties.

But we are here to listen to you, those who are for and those who are against. This is part of the can system. I can assure you that I'm prepared if necessary to stay all evening. The chairman has responsibilities and he has to leave this afternoon. He has asked me to continue presiding over these hearings, and if that be necessary, I will be here.

Every witness on the list will be heard. But I would hope that as the chairman has indicated, that you conduct yourself like respectful American citizens.

Thank you.

[Prepared statement of Sen. Inouye appears in appendix.]

The CHAIRMAN. Thank you.

I would like to reaffirm this is not a football game and we will just try and dispense with any of the cheering, booing, any of that. Senator Gorton.

#### **STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM WASHINGTON**

Senator GORTON. Thank you,

Mr. Chairman, the question raised by this bill is whether or not on the eve of the 21st century there should remain governments operating under the American flag and under the jurisdiction of the United States that will remain entirely irresponsible for their actions, unable to be taken to court by people who feel aggrieved by those actions or whether or not that doctrine of immunity from lawsuit abandoned almost totally by the United States and by the States is not equally an anachronism with respect to Indian tribes.

The doctrine of sovereign immunity, or immunity from lawsuits, is not an Indian doctrine; it's an English common law doctrine based on the fact in Medieval England that the king could do no wrong and could not be sued. It was adopted by the United States with the rest of the common law in 1776 and progressively abandoned in every field except Indian tribes.

It is not included in any Indian treaty. In fact, it is equally available to Indian tribes that are not treaty tribes. The Supreme Court of the United States has at least one member who has said that it's so anachronistic that it ought to be reversed as unconstitutional by action of the Supreme Court itself. The other members of the



Supreme Court have said that it is a question for Congress to decide under the Constitution. This bill asks Congress to decide, to make exactly that decision.

At the present time, if the employee of an Indian tribe is engaged in an automobile accident, the tribe cannot be sued. If that individual were the employee of a county or a city or a State, his or her employer could be sued.

The tribe cannot be sued for an assault that—on an individual undertaken by a representative of the tribe.

And in connection with land use, we have here in the State of Washington disputes over the locations of Indian casinos; a theater proposal within a few miles of where we are right now; the siting of the billboard control acts, again a few miles from where we are right now.

I emphasize that in the case of each of these disputes, I don't know whether the ability for aggrieved neighbors to bring lawsuits in State or Federal courts would be successful or not. This bill doesn't change the law as to whether or not, say, Muckleshoot theater can be built, but it does offer the opportunity for aggrieved neighbors to bring a suit against an Indian tribe exactly as they could against a county or a local government if it were engaged in that kind of activity.

The Supreme Court has declared for almost 20 years that transaction taxes between Indians and non-Indians on Indian reservations are subject to State taxation. Indian tribes continue to flaunt those decisions of the Supreme Court of the United States effectively because they cannot be sued.

Finally, of course, one element in this bill deals with the complaints of members of Indian tribes against their own tribes and the protection of their civil rights and it gives minority members within the tribe who feel they have been wronged the ability to enforce their civil rights in Federal courts exactly as citizens of the United States can against the government of United States or against the governments of the States and the various municipalities.

I emphasize once again that while there are many conflicts relating to the substantive law in the relationship between Indians and non-Indians, none of those rights, none of those legal obligations, are affected by this bill. This bill simply gives individuals who feel aggrieved by the action of Indian tribes under the law as it exists today, the right to enforce those rights, if indeed they exist in the courts of the States and of the United States of America. It gives to the people who feel aggrieved the equal protection of the laws to which they are entitled by the 14th amendment of the Constitution.

The CHAIRMAN. Now, before we start with the first panel, I want to say one other thing. The testimony I spent almost all day yesterday and last night and this morning reading it, some of it is very extensive, some running for some witnesses 35 or 40 pages. If you divide the number of witnesses we have, which are 20, into the 3-hour timeframe, even though the vice chairman has offered to stay later, that will tell you that we will not be able to let you simply read every word, but every word will be considered and will be in the record for the complete committee.



These lights up here are to kind of remind you when your time is winding down. So if you could at least try and summarize some of these very long testimonies and keep it somewhere in about a 5-minute timeframe, the committee will appreciate that.

We'll start with panel I, Dan Evans, the former Governor and former U.S. Senator from then State of Washington, and Robert Anderson, the Counselor of the Secretary, Department of the Interior, from Seattle.

And with that, Governor Evans, just go ahead and proceed at your own pace.

**STATEMENT OF DAN EVANS, FORMER GOVERNOR AND FORMER U.S. SENATOR, STATE OF WASHINGTON; DANIEL J. EVANS ASSOCIATES, SEATTLE, WA**

Mr. EVANS. Good morning, Mr. Chairman and distinguished members of the committee, and particularly my colleague for many years, Senator Gorton, and my colleague and former chairman of this committee during the time I had the privilege of acting as Vice Chairman, Senator Inouye of Hawaii.

I serve as Chairman of Daniel J. Evans Associates, a small consulting firm in Seattle, WA, but I served as the Governor of the State of Washington from 1965-77, and as U.S. Senator from Washington from 1983-89. I was privileged to serve as a member of the Senate Committee on an Indian Affairs during my time in the Senate and as a result I suspect I've been on the other side of this table more often than on this side.

My appearance is at the request of the Lummi Tribe but it's also voluntary and on my own behalf. I intend to speak on a broader perspective than just a single tribe. I'm not a lawyer, I do not intend to analyze each section of this proposed law, but rather share with you the relationships I built with tribes and the tribal leaders during the past 40 years of my public life.

We all tend to forget history. I think it may be helpful to begin by reminding citizens that they do have little idea of Indian tribal history or the U.S. Government's relationship to tribes.

As waves of European settlements swept across America, Native Americans were viewed as enemies, impediments to progress, or simply nuisances to be obliterated. The weight of immigration prevailed and tribe by tribe, the U.S. Government signed treaties and created reservations for Indian survivors of Indian wars. The reservations set aside were generally of the least productive land, of little value to white settlers. They were isolated, and thus difficult for the creation of viable industry and infrastructure for reservation residents.

In many respects, the reservations created in the United States were similar to the homelands of South Africa, created by the apartheid government of that nation for their black subjects. Treaties and reservation promises were regularly abrogated when they inconvenienced settlers and early governments, especially the Western States.

But the signing of treaties did create a special relationship with the United States that apparently once again, to some, is proving a nuisance to be obliterated.

The concept of trust relationship and the creation of the Bureau of Indians Affairs [BIA] created a dependency of tribes on the Federal Government, preventing development of coherent tribal governments in the modern sense. Our Nation in the post World War II moved away from reservations toward assimilation and the end of reservations.

During my early years as Governor, both the Nation and the State began to recognize the validity of treaties, self-governance, and the independence of tribes. The concept of assimilation changed to one of building tribal integrity and independence.

As Governor, I remember vividly the first meeting of the Washington State Indian Affairs Commission which I appointed by executive authority in 1967. Tribal leaders of the many tribes in Washington State gathered and listened solemnly and without expression to my initial proposals for closer cooperation and respect. They brought with them the century of broken promises and lies which represented their previous experience with governmental leaders.

During the time I was in the Senate, I was proud to be a prime sponsor of amendments to the Indian Self-Determination Act which we introduced in 1987. The thrust of the measure was to advance the ability of tribes to emerge from a BIA-Trustee relationship to the creation of modern, independent tribal governments and to make their own priority decisions on budgets and programs. And I'm pleased that here in Washington State tribes are among the first to take advantage of this new law.

The Lummi Tribe and others have enthusiastically adopted self-determination and governance, are building modern police forces, economic development measures, and strengthening their intergovernmental relationships. These new efforts are less than a decade old but progress is rapid.

I believe S. 1691 is a blunt instrument whose effect would be to ravage tribal independence at a time when finally, after more than a century, Indian tribes have been given an opportunity to create modern, independent governments, including responsible court systems. Are any changes needed? Perhaps. But relegating tribes to a secondary position to the Federal Government, States, and localities in terms of sovereign immunity is hardly a good place to start.

I would suggest that in 1993, Congress passed an Indian Tribal Justice Act to build a modern tribal court system. The act authorized \$57 million for this purpose and not a dime has yet been appropriated. Full appropriation to build a good tribal court system is a far better answer than stealing sovereign immunity. That would help build a responsible relationship between two parties to treaties which have existed for more than a century.

And I should remind the members of this committee that hundreds of agreements are signed each year between tribal governments and developers, banks, insurance companies, health providers, and individuals. In all of these contracts, suitable provisions have been reached dealing with the apprehensions of sovereign immunity. As the tribal justice system gains experience and as other governments, enterprises, and individual citizens gain respect for the independence and integrity of Indian tribes, conflicts should diminish.



S. 1691, I believe, is a solution seeking a problem which is or should be vanishing. I urge this committee to reject this bill and instead help provide the leadership to build respect, understanding, and friendship between fiercely independent tribal governments and the people and the government of the United States.

The CHAIRMAN. Thank you, Governor.

[Prepared statement of Mr. Evans appears in appendix.]

The CHAIRMAN. Mr. Anderson.

**STATEMENT OF ROBERT ANDERSON, COUNSELOR TO THE SECRETARY, DEPARTMENT OF THE INTERIOR, SEATTLE, WA**

Mr. ANDERSON. Thank you, Mr. Chairman, Mr. Vice Chairman, Senator Gorton.

The CHAIRMAN. A little closer.

Mr. ANDERSON. How's that?

Thanks, Mr. Chairman, Vice Chairman, Senator Inouye, and Senator Gorton. It's good to see you.

It's sort of humbling to go after Governor and Senator Evans' very articulate remarks that indicate a perspective that the administration wholly agrees with.

I am Robert Anderson, Counselor to the Secretary of the Interior. I live here in Seattle, work on a lot of Northwest issues as well as national issues. Before coming out here, I was the Associate Solicitor for Indian Affairs in Washington, DC.

The proposed legislation would provide for a sweeping waiver of tribal immunity allowing Federal courts to hear all sorts of actions against Indian tribes, under the Indian Civil Rights Act and to adjudicate certain property rights disputes. The administration opposes such a unilateral waiver of tribal immunity. The administration supports and recognizes, as the law has for a couple of hundred years, Indian tribes as one of the three sovereigns within the boundaries of the United States. We support the policy of self-determination and submit that over the past 25 or 30 years, that we have been aggressively implementing this policy of self-determination, that Indian tribes have made great strides with respect to development of law enforcement, institutions, tribal courts, and other institutions within Indian country to address the needs of tribal members and non-members alike. We don't think that stripping away tribal immunity and thus relegating tribal courts to relatively meaningless status would advance or further the cause that Congress and several administrations, both Republican and Democrat, have supported over the last 30 years.

Tribal immunity is necessary not only to protect the tribal revenues, as States and the Federal Government rely on immunity to protect their revenues, but also to prohibit undue interference with the orderly administration of governmental processes. It's not unknown in our modern society for lawyers and those who are dissatisfied with State, Federal, or tribal governments to bring litigation simply to tie up action that a party has a right to go forward with. Instead of allowing litigation to go forward that would simply delay things that people do not like, we submit that the better alternative is government-to-government negotiations. I cite as an example of that out in this region, King County's willingness to sit down with the Muckleshoot tribe and negotiate with the tribe over



various aspects of the amphitheater that the tribe admittedly has a right to build. We think that this sort of intergovernmental cooperation is essential and a waiver of tribal immunity would simply delay negotiations that take place with success and on a widespread basis now.

Another example is the Lummi Nation's water-right dispute. There has been a sharp dispute over property within Indian country of a reservation over the last year. Instead of litigating, the parties have reached an agreement in principle to resolve this property dispute. A waiver of sovereign immunity which exists with respect to water rights has simply not had any bearing on that dispute at all.

I'd also like to debunk the notion that individual Indians within Indian country are not entitled to the protections of the Bill of Rights. The Bill of Rights protects individual Indians from actions of State and Federal Governments, respectively, through the Bill of Rights directly or through the 14th Amendment. Indian tribes are not subject to the Bill of Rights.

The Indian Civil Rights Act was carefully considered in 1968. Congress balanced the interests of tribes and individual members and provided for Federal court review in habeas corpus proceedings only.

Likewise, in 1991, the Civil Rights Commission issued a report that concluded that it was not advisable to waive tribal immunity but, instead, what Congress should do is simply support further development of tribal courts and tribal institutions.

We are headed down that path. I cited in my written testimony a number of cases from the Indian Law Reporter where Indian tribes have voluntarily submitted themselves to jurisdiction of their tribal courts so that members and nonmembers alike can litigate their claims against Indian tribes.

If anything, I think that Congress should consider engaging tribes in a dialog to confirm and clarify the jurisdictional rules within Indian country, to confirm, perhaps, tribal jurisdiction over members and non-members on fee lands and to engage as part of that discussion whether or not some limited Federal court review under those circumstances might be advisable. It should be something that Indian tribes are actively involved in negotiating. And if Congress thinks it appropriate to waive tribal immunity in some circumstances, tribes, I think, would be willing to discuss that if the quid pro quo were confirmation of tribal jurisdiction over non-members on fee lands so that we could avoid the endless litigation over when and under what circumstances a tribe has jurisdiction over non-Indians on fee lands.

I'll close with indicating again our opposition to the legislation, but express a willingness to discuss all of these issues and ways in which we can improve the—the delivery of justice on tribal reservations for both members and non-members.

Thank you.

[Prepared statement of Mr. Anderson appears in appendix.]

The CHAIRMAN. Thank you. Let me just ask maybe a question of each of you.

I just came back from doing a hearing out in California with some tribes around Palm Springs and I was amazed at the coopera-

tion between tribes and the local government in that part of the country. I guess all States are different.

I come from Colorado. We have two land-based tribes, Governor, the Southern Utes and Mountain Utes. And although there may be some differences of opinion between the local communities and the tribes, they've had a terrific working relationship between the State and tribes. In fact, in our State, by statute, the Lieutenant Governor is the Commissioner of Indian Affairs, and that is the only statutory authority that the Lieutenant Governor has in our State, to act as a go-between between tribes and the State to iron out differences of opinions.

I wanted to ask you if there were steps that you would recommend to Congress to—that would build better relationships with tribes so we wouldn't have so much this confrontational and angry kind of dialog.

Mr. EVANS. Well, I think that the willingness and the ability to treat with respect and equality the leaders of various tribes and their negotiations and in their work with the Federal Government and the States in which they are located. It's a little bit more complex in our State, I think, than in yours because we have, I think, 26 or 27 tribes here in the State. They are scattered; many of them small but several with large land bases, and that makes for added complexity.

But I initiated when I was Governor an Indian Affairs Commission by executive authority precisely for that reason, to bring together this wide variety of interests. And I think we made some very substantial progress. And I think believe that's a far better way than using a hammer of law.

The CHAIRMAN. Mr. Anderson, let me ask you—I'm not an attorney, by the way. I guess I'm one of the few left back there that's not. I've been blessed. May a person leasing lands from an Indian tribe challenge rent increases or cancellation of lease through the Department of the Interior?

Mr. ANDERSON. Yes; they can. There is an elaborate administrative process that provides for challenges at three different levels within the Interior Department, and that action—final agency action—can be challenged in Federal District Court.

Frequently I get complaints from the other side of the issue that people have not made their lease payments and that the BIA was not moving quickly enough to get them off the land because of these administrative law exhaustion remedies that are available.

The CHAIRMAN. Can non-tribal people—can they bring lawsuits at any time a tribe asserts jurisdiction over them?

Mr. ANDERSON. They can bring an action under the National Farmers Union line of cases to challenge the tribe's actual regulatory authority over them. So if a non-member wants to say, Hey, I do not have to be subject to tribal law, they're required in most circumstances to proceed through a tribal court proceeding and then on to the Federal courts.

The CHAIRMAN. Tribal court and Federal court but not a State court. Thank you.

Senator Inouye.

Senator INOUE. Governor Evans, in your experience, how would the unilateral waiver of the immunity, tribal sovereign immunity,



impact upon business and commercial relationships that you referred to?

Mr. EVANS. Well, think it has to influence it very much. I think current law and current circumstances have allowed a wide variety of enterprises to be entered in on, and agreements to be reached. The Lummi Tribe is proceeding right now on—what could be a very, very substantial economic development that they would be partners in, and I don't believe that anyone who is involved from off the reservation and outside of the tribe believes that the current law and the current sovereign immunity is going to keep them from moving ahead. I mean, that's up to those who enter into agreements to understand what the rules of the game are and to make sure that as they enter into agreement, they do it with a clear head and clear knowledge of what they're entering into.

Senator INOUE. Mr. Anderson, if tribal sovereign immunity is waived, would the United States as a trustee be a party to legal actions brought against the tribes?

Mr. ANDERSON. I think we would have to be party to legal actions where trust resources were involved, land or water rights or other situations where perhaps the United States had some approval authority under the various Federal laws. So I think we would be drawn into a number of suits.

I think that in many cases, the tribes would be calling the Interior Department for assistance to help them defend lawsuits, whether or not we were legally obliged to do that and, I would expect that there would be a great deal of political pressure on the department to expend resources to provide that sort of assistance to Indian tribes if they were being hauled into State and Federal courts on a regular basis for actions that they had taken.

Senator INOUE. Does the United States or your department have the resources necessary to litigate these cases?

Mr. ANDERSON. No; I can say unequivocally, no. I think the amount of litigation that should be brought and could be brought would just overwhelm the resources. I don't think the Federal courts could handle it either.

Chief Judge Wallace of the Ninth Circuit just pointed out a couple of years ago that the Federal courts could not handle the caseload that tribal courts are presently considering and disputes that they are resolving.

Senator INOUE. Do you think the tribes have the necessary resources?

Mr. ANDERSON. No; I don't think so.

Senator INOUE. Thank you, sir.

The CHAIRMAN. Senator Gorton.

Senator GORTON. Mr. Anderson, you described a process with respect to leases on Indian lands pursuant to which the decision of the tribal governments could go through three administrative levels of appeal and the Department of the Interior, did you not?

Mr. ANDERSON. I described—it's a decision that the Bureau of Indians Affairs—they are the ones that set the lease.

Senator GORTON. And then there is—there are three levels of appeal through the department?

Mr. ANDERSON. Actually I think it's a local decision; appeal to the area director and then an appeal to the Interior Board of Indian Appeals in Washington, DC, for a final decision.

Senator GORTON. And if a person feels aggrieved by that decision, he or she has the right to go to Federal court?

Mr. ANDERSON. That's correct.

Senator GORTON. Against the Department of the Interior and Bureau of Indian Affairs?

Mr. ANDERSON. That's correct.

Senator GORTON. Does that mean the United States is not sovereign?

Mr. ANDERSON. No.

Senator GORTON. Thank you.

On another question, you pointed out that citizens of the United States who feel that their civil rights, their rights under the Bill of Rights, have been violated by a State or Federal Government, have the right to a civil rights action in the courts of the United States. You've also said that with the exception of habeas corpus actions, that right does not apply to an Indian feeling that his rights under the Civil Rights Act or the Constitution of the United States have been violated by the Indian tribe. I take it it is the position of the administration that Indians who feel that their civil rights have been violated by their Indian tribes should not have the same rights of appeal against that tribe through the courts of the United States that all citizens of the United States have against their governments.

Mr. ANDERSON. In the first instance, the Constitution's limits on—limits State and Federal actions, and by its terms the framers of the Constitution didn't make those rights applicable to the actions of Indian tribes. The administration supports the application of the Indian Civil Rights Act in those parts of the Bill of Rights that are incorporated into it. And we fund tribal courts to the tune of about \$20 million a year to assist them in hearing cases.

Senator GORTON. I think my question was—I think my question was pretty simple. My question was, is—the position of the administration is that the rights accruing to the citizens of United States against the government of the United States or against the States should not accrue to Indians feeling aggrieved by the violation of the same rights by their tribal governments?

Mr. ANDERSON. We support—the administration supports the right of individual Indians to bring those cases in their tribal courts.

Senator GORTON. But not of the courts of the United States?

Mr. ANDERSON. But not the Federal courts.

Senator GORTON. Thank you very much.

Senator Evans, is that in your view an appropriate way to defend rights, that the Indian shouldn't have the right to challenge—to bring a civil rights complaint against his—against his tribe and he—even though the tribal government whom he's complaining against appoints its courts, that it's quite sufficient for that Indian to be subjected to the tribal courts and we shouldn't change the law so that a civil rights action could be brought in Federal court?

Mr. EVANS. Certainly that's the place where things should start. Whether it should go beyond there or not, I think depends an awful



lot on whether there is an evil to be corrected and I'm not so sure there is.

Senator GORTON. Thank you, Mr. Chairman.

The CHAIRMAN. I thank both witnesses for appearing today.

We'll now start panel II, and that will be Christopher Vance, Metropolitan King County Commissioners, Kent, WA; Jeffrey Sullivan, Prosecuting Attorney for Yakima County, WA; Miss Jill Jensen, Co-president, Citizens for Safety and Environment; Bill Taylor, President of Puget Sound Shellfish Growers Association; and Alan Montgomery, Chairman of United Property Owners of Washington from Seattle.

And we'll proceed in that same order that I read your names, if you would. And I would also remind you that all of your testimony will be included in the record. If you could abbreviate it to about 5 minutes, we would appreciate it.

Mr. VANCE FIRST.

### **STATEMENT OF CHRISTOPHER VANCE, METROPOLITAN KING COUNTY COUNCIL MEMBER, KENT, WA**

Mr. VANCE. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee. My name is Chris Vance, and I am the Vice Chairman of the Metropolitan King County Council. Welcome to King County and to Council District 13, which I represent.

I would like to thank you for the opportunity to testify before you today on the American Indian Equal Justice Act. I bring to you today the perspective of an official of one of the largest local governments in the United States. King is the 12th largest county in the Nation, with a population approaching 2 million residents, a number that grows year after year.

We are bordered on the west by Puget Sound and on the east by the crest of the Cascade Mountains. King County contains the city of Seattle and 37 suburban cities within its extensive metropolitan area. In addition, King County is still home to vast tracts of rural timber and farmlands.

King County is also home to Muckleshoot Indian Reservation, a portion of which is in my district, to the south of us. The proximity of the reservation to the urban core of our State is a source of increasing controversy and frustration.

I want to thank and congratulate Senator Gorton for introducing this bill and thank the committee for holding this hearing.

Passage of the American Indian Equal Justice Act would help solve many of the conflicts I experience regularly as a local government official.

Commercial activities, such as casino gambling and the sale of cigarettes and fireworks undertaken by the Muckleshoots and other tribes have a dramatic effect throughout our county. The things the tribes do affect us all, but non-tribal members have no political ability to influence those activities. We should at least have what this bill offers: the right to go to court and be compensated for damages.

Now another even more important area of local government responsibility is being undermined by tribal activity; the area of land use planning and the protection of property rights.

In 1991, as a member of our State House, I participated in the passage of the second of two landmark bills which were cumulatively known as the Washington State Growth Management Act. This legislation directs all local governments to enact binding comprehensive plans for the expected economic and population growth in this State. From 1994 to 1997 I chaired the County Council's Growth Management committee, and served on the multi-jurisdictional Growth Management Planning Council. After years of research, hearings, debate, and hard work, we were able to adopt a set of visionary and bipartisan comprehensive plans and policies for King County. As a result, the environment and rural lands are protected, yet housing construction and business activity in the urban area can continue.

The plan is law, and citizens who do not comply with that law are subject to criminal and civil sanctions. Indian tribes, however, assert that even though they have a right to testify and lobby on growth management issues—a right they exercise regularly and vigorously—the Growth Management Act doesn't apply to them unless they allow it to. In effect, this has created thousands of acres of land within King County where the delicate balance of our comprehensive plan has been upset.

No clearer example of that exists than the 23,000 seat amphitheater being constructed by the Muckleshoot tribe just a few miles southeast of here. This massive project is being constructed in the middle an area designated agricultural and rural by King County's comprehensive plan. In fact, the people of King County voted to tax themselves, to raise their property taxes to purchase agricultural development rights so this area will be permanently preserved for rural and agricultural uses.

If the amphitheater is built and utilized to the extent that the tribe plans, massive—massive traffic jams will occur on two-lane rural roads, degradation of the White River will result, and the rural character of the land around it will be for forever changed, all in direct violation of our adopted plans and policies.

This project will affect everyone in the region, but it will have a devastating impact on the people of the city of Auburn, in my district, and on the Enumclaw Plateau adjacent to the amphitheater. They will suffer impassable roads, noise from concerts, and a dramatic decrease in their property values and quality of life.

And there is absolutely nothing they can do about it. They can't vote out the politicians who did this to their neighborhood, they can't gather signatures on an initiative, and they can't even sue to make themselves whole. The neighboring citizens around the amphitheater can be brought to Federal, superior, or municipal court by the Muckleshoots, but the tribe cannot be challenged in those same forums, even if the harm occurs off reservation.

Asking Americans to accept this level of impotence is a violation of the basic tenets of our civil culture. And it is simply wrong.

The American Indian Equal Justice Act will help correct the problem. This bill does not challenge a tribe's right to govern itself. This bill simply provides those who feel they have been wronged by tribal actions with a fair and impartial court of law to settle those grievances.



Tribal leaders demand to be recognized as equal governments, and I'm willing to accept that, but they must accept the responsibility that comes with that status.

King County—believe me, I know—King County and other local governments are frequently taken to court by citizens and the tribes. Tribal governments should expect the same if they truly want to be regarded as equal governments. When activities on land they control hurt others beyond their boundary, they should be held responsible for those damages.

In conclusion, Mr. Chairman, I know this is a difficult and contentious issue, but the increasing friction generated by tribal actions is too significant to ignore. If the tribes continue to refuse to voluntarily respect the rights of their neighbors, then those citizens need to be allowed to go to court in order to protect themselves.

Thank you again for the opportunity to testify on this bill. I'd be happy to answer any questions you may have.

[Prepared statement of Mr. Vance appears in appendix.]

The CHAIRMAN. Thank you.

Mr. Sullivan.

#### STATEMENT OF JEFFREY SULLIVAN, PROSECUTING ATTORNEY, YAKIMA COUNTY, WA

Mr. SULLIVAN. Thank you, Mr. Chairman, Mr. Vice Chairman, and Senator Gorton. It's my pleasure to be here.

I am Jeff Sullivan, Yakima Prosecuting Attorney. I've been the elected prosecutor since 1974.

I believe—that S. 1691, the American Equal Justice Act, should be passed. General sovereign immunity as applied to tribal government is wrong and the Congress should act immediately to correct it.

As the committee is aware, many of States have passed laws, as we did in Washington, to do away with general sovereign immunity. In many States, however, it was done by the judges and done by judicial fiat.

In California, Justice Traynor in 1961 said: "After reevaluation of the rule of government immunity from tort liability we have concluded that it must be disregarded—or discarded as mistaken and unjust."

The rule of governmental immunity for tort is without rational basis. None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity.

In Illinois, the Supreme Court, in 1959, stated it a different way in dealing with a school district issue. And quoted—again, as a quote from New Mexico and said, as was stated by the one court, "The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation."

On August 2, 1946, after nearly 30 years of congressional consideration, drafting and redrafting, the Federal Tort Claims Act of general applicability was adopted.

Justice Jackson, writing for the U.S. Supreme Court in *Feres 1v. United States*, stated as follows:

The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate—against—unjust consequences of sovereign immunity from suit.

As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs, wrongs which would have been actionable if inflicted by an individual or corporation but remediless solely because their perpetrator was an officer or employee of the government...The primary purpose of the act was to extend a remedy to those who had been without....

The same should happen here by passage of this bill.

The only places where this archaic and, in my opinion, unjust and totally indefensible legal maxim exists are on reservations. While the United States could abolish this doctrine, it has been reluctant to do so.

In 1968, with the adoption of the Indian Civil Rights Act, I think many people, including many of the tribal members who are here, thought that Congress had provided that authority, to redress the wrongs in court. However, the U.S. Supreme Court ruled otherwise.

You can correct that decision. Congress has that right. This aspect of tribal sovereignty like all others is subject to the superior and plenary power of Congress, but without congressional authorization the Indian nations are exempt from suit.

It has been 52 years since Congress passed the Federal Torts Claim Act. It has been over 30 years since governments at all levels in this State have been responsible for their wrongful acts.

During that time, none of the dire consequences predicted by those governments has come to pass. None of them has ceased to exist. None of them has gone bankrupt. And while many of them have had to buy liability insurance, so has everyone else.

Additionally, the advent of liability has made all of us in government more responsive and accountable. Frankly, as an attorney who represents local government in this era of shrinking budgets, I would love to have sovereign immunity back; however, that would not make it right.

In my experience, the tribal governments of this State and elsewhere ask to be treated as equal governments. They ask that they be dealt with on a government-to-government basis; however, they want all of the rights and none of the responsibilities.

I find it inconceivable that the Congress of the United States by its inaction, authorizes tribal governments to blatantly destroy the civil and property rights of United States citizens. The "king can do no wrong" has no place in the 21st century. The Congress should pass the American Indian Equal Justice Act and recognize the value and rights of all its citizens. And let me suggest one thing that I did not put in my written remarks. Maybe there is a middle ground. Maybe the Senate should shoulder the leadership in this area, do what the tribes want, fund their courts, and then allow an appeal from those courts to the—to the Federal courts of this land and the Federal district court and the courts of appeal.

Think about it. Every decision made by the simplest justice of the peace in America can be—that decision can be appealed to the U.S. Supreme Court.

The decisions of the tribal court rule in many cases; there is no appeal. And some cases there is an appeal to the tribal council. And the cases that do have appeal beyond that, there is no review by any other court.

And so maybe there is a middle ground.

Thank you.

[Prepared statement of Mr. Sullivan appears in appendix.]



The CHAIRMAN. Thank you.  
Ms. Jensen.

**STATEMENT OF JILL JENSEN, CO-PRESIDENT, CITIZENS FOR  
SAFETY AND ENVIRONMENT, ENUMCLAW, WA**

Ms. JENSEN. Good morning. My name is Jill Jensen, and in addition to myself I am here this morning representing my husband, Rob, and our three daughters. Together we own a small family farm on the rural Enumclaw Plateau, where our children, who are active in 4-H, tend their own flock of Suffolk sheep. Soon our oldest daughter, Kara, will earn her first license to drive.

In addition to my family, I'm also before you representing over 8,500 citizens and 120 local businesses, members of the grass roots non-partisan group, Citizens for Safety and Environment.

We are gravely concerned about the construction of the 23,000 seat White River amphitheater being built on land owned by the Muckleshoot Tribe. We are alarmed because we fear the amphitheater will cause unmanageable traffic jams, intrusive noise levels, delayed emergency response services, increased trespassing, destroyed salmon habitat, and eroded property values.

Who will be responsible when our air becomes polluted by 10,000 idling cars? When our loved ones are injured on roads ruled by intoxicated concert-goers? When we become prisoners in our homes to blaring music and vandalism? These are all valid concerns. Under normal circumstances, we would have the means available to us; laws, policy, and guidelines, if you will, that would address our worries. But because this facility is being built on tribal lands, our hands are tied.

To date, despite many violations of land use, zoning, and regulatory laws, construction continues without comprehensive review by King County, the State of Washington, or our Federal Government. CSE has pursued all of the proper channels. We've written letters to elected officials, met with county leadership, asked questions of all appropriate agencies, and asked to meet with the Muckleshoot tribal council.

We now have 34 separate Federal, State, and local elected officials, agencies, and municipalities who have stepped forward asking for environmental review. I would like to submit a collection of those letters to you today as part of my testimony.

The CHAIRMAN. No objection. They will be included.

Ms. JENSEN. Thank you.

The CHAIRMAN. Any additional information you have will be included.

Ms. JENSEN. Thank you.

Yet 1 year later, we still do not have an environmental impact statement; 1 year later, we are still citizens without representation, shut out of our right to due process.

CSE's goal of environmental review has nothing to do with who is building this project. A few years ago local residents successfully halted plans by a private developer to construct an amphitheater called Diamond Claw. While the community was busy fighting one amphitheater, the tribe was busy planning theirs. They already knew that opposition existed to their idea. Diamond Claw failed. It failed because the legal and environmental policies and laws in

place which most citizens must abide by fell short. Just as with Diamond Claw, the opposition to the White River amphitheater is a land-use issue only.

The Muckleshoot Tribe has chosen to cloak themselves in a blanket of sovereign immunity, which means they do not have to follow the law. The tribal council entered into this project knowingly evading national environmental policy act guidelines. Is this fair? Sovereign immunity places the tribe above the law. It limits any legal recourse citizens or local governments may have to enforce compliance with land-use laws or hold the tribe accountable for any negative consequence resulting from this project. Immunity renders citizens and government powerless to mitigate, stop, or be compensated for any damage, no matter how severe or obvious.

We need a tool in our government-to-government mandated relationship which will hold all parties accountable for their decisions. Had such policy already been in place, we would most certainly not be embroiled in the current amphitheater dilemma.

I would like to relate to you a story I was told this week by a retired employee of a major corporation and that organization's age-old decision to stop business transactions with tribal governments. Why? Because if there was an occasion of non-payment or non-compliance with contracts, the company had no recourse to collect fees or repossess equipment as immunity protected the tribe.

No one wins in this situation. Every one loses. In today's complex workaday world, we need rules to simplify how business is conducted. Many tribal governments have become extremely successful in their goal of economic self-sufficiency. They are experiencing the power that financial success can bring and the excitement of realizing the growth and development of their resources. The tribes' future successes should not hinge on past wrongs. It's time for the slate to be wiped clean.

In closing, it is not our group's intent to threaten the Muckleshoot Tribe government's right to self-determination. It is undeniable that the predicament we and many other communities face exist due to a lack of uniform rules and guidelines which all U.S. citizens must follow.

The true benefit of this bill is the guarantee that all citizens will have representation, thereby creating accountability and responsible decisionmaking.

S. 1691 will ensure that we are good neighbors to one another. Let us recognize that everyone in this room is here because we have concerns. Everyone here deserves to get answers to their questions. Everyone's concerns will be answered if such sound policy exists.

Thank you very much.

[Prepared statement of Ms. Jensen appears in appendix.]

The CHAIRMAN. Thank you.

We'll now proceed with Mr. Taylor.

#### **STATEMENT OF BILL TAYLOR, PRESIDENT, PUGET SOUND SHELLFISH GROWERS ASSOCIATION, SHELTON, WA**

Mr. TAYLOR. Thank you, Mr. Chairman, Mr. Vice Chairman, Senator Gorton.



At 45 minutes after midnight on January 19, 1995, my family's beach in southern Puget Sound was invaded by about a dozen members of neighboring Indian tribe. As a large part—as a part of a larger tribal workforce of 60 to 80 who were digging clams on an adjacent State beach, they were accompanied by two armed tribal enforcement officers. My foreman, who belongs to that tribe, told one of the tribal officers they had no right to be on our property, but the officer refused to stop them. In fact, our boundary was clearly marked every 10 to 20 feet, but the tribe's diggers ignored and even destroyed our markers. They went up to 70 feet onto our property, dug 2,000 pounds of clams worth \$4,000, and caused other damage.

If my family had not cultivated and seeded that beach, there would have been few or no clams there. Instead, our clams were much more dense than on the State beach.

Obviously the tribe sanctioned the event that led to this injury, and obviously the tribe allowed it to stand. We asked the tribe for reimbursement. To this day, my family has never been compensated.

My name is Bill Taylor. I'm a farmer of shellfish. My family has grown shellfish on the shores of Puget Sound and Hood Canal for four generations.

I want you to know that my family's always enjoyed good relations with our Indian neighbors. We share more than a community with the tribe. We hold common values, especially love of our environment. We bear no ill will toward our neighbors.

The reason we were denied justice is my family and I are merely American citizens, and therefore we have no legal recourse against the tribe. Congress continues to allow tribes to hide behind an archaic concept that no other government than America accepts. That legal barrier is absolute sovereign immunity. Elsewhere it is reserved to dictators and monarchs. In America it is unjust.

I'm also President of the Puget Sound Shellfish Growers, a group representing about 130 independent businesses, mostly small and family-run.

Mr. Chairman, I understand you appreciate the risks that underlie every farmer's existence. Like ranchers, we risk nature's whims, falling prices, rising regulations, and changing tastes. We invest in research and we are acquainted with failure. When pollution harms our sensitive crops, we have to fight for clean water. As growers, our concern with sovereign immunity extends well beyond this loss of property. You see, some tidelands my family farms today, and many tidelands belonging to our fellow growers, have been in our family for generations.

In fact, when local Indian tribes signed the treaties in the 1850s, they agreed to protect the growing shellfish industry with the commitment that stated: "Provided however, that the tribes shall not take from beds staked or cultivated by citizens."

In 1989, however, without any complaint to us over 130 years, several Puget Sound Indian tribes sued under the treaties, claiming one-half of our shellfish. Since then, we have not known whether they are going to keep the shellfish we grow or just some portion.

For nearly all of the families who grow shellfish, their entire existence is tied up in their beaches in this lawsuit—and in this lawsuit. Some face total ruin. A principal reason this immense unfairness was visited upon us after seven generations is because the tribes enjoy the legal haven the Congress and every State in America has rejected as unjust: absolute sovereign immunity.

We have yet to take our case to U.S. Supreme Court, but if the case remains as it stands today, a tribe could demand half of the natural background production from my lands. That will force me to try to prove what the natural production was before the cultivation ever began. This is unfair and an impossible burden. My great-grandfather is dead and so is everyone else who might know these answers.

Mr. Chairman, did you ever keep records on the native grasses you plowed under? The deer or the antelope your cattle displaced? Could you prove to a judge what existed 40 years ago, let alone 140? Finally, we face future jeopardies that should be equally offensive to any American. If in the future the tribes can legally sponsor a taking of shellfish on our land, but they allow their members to take too much or to damage my property again, we cannot sue the tribes for compensation. Our lawyers have raised the frightful possibility that the tribes could arrest us on our own beaches for allegedly violating their rights. If they did, would we have no mutual recourse against tribes for false arrest for damages?

Further, only tribes can sue us and not we them to determine whether any future business decision of ours is acceptable. They can—they can wait another seven generations and they can sue again.

It is not just us. If they win the shellfish case, they can sue to undo the development of tens of thousand of acres of developed tidelands, affecting hundreds of thousands of citizens. No citizen can bring the issue.

We respectfully suggest to you that the absolute sovereign immunity is unwise, unfair, and un-American. Americans do not bow to kings, so why do we allow certain citizens the rights of kings? Give us all equal access to justice. Let the tribes have the same immunity that states and Federal Government retain. That is all Senator Gorton's bill would do.

On behalf of all the families whose livelihoods depend on the Puget Sound shellfish industry, I urge the committee to support Senator Gorton's bill.

Thank you.

[Prepared statement of Mr. Taylor appears in appendix.]

The CHAIRMAN. Thank you.

Mr. Montgomery.

#### **STATEMENT OF ALAN MONTGOMERY, CHAIRMAN, UNITED PROPERTY OWNERS OF WASHINGTON, SEATTLE, WA**

Mr. MONTGOMERY. Good morning, Mr. Chairman and members of the committee.

I'm Alan Montgomery. I'm the Chairman of United Property Owners of Washington, which is a group that represents over 60,000 primarily residential private property owners in Western Washington. We are a big group of home owners.



Some of our members own waterfront private property homes many miles from Indian reservations, while others are fee land owners whose homes are located within the boundary of an Indian reservation, but which are not trust lands or otherwise owned by the tribal governments.

All of our members share the belief that we are entitled as home owners to a right of reasonable privacy and security in our homes, but we all know that occasionally that privacy and security can be violated by governmental action.

Maybe the most memorable example of that is the occasional mistaken police raid on the wrong house that might result in damages to the home, perhaps to personal injuries to the innocent occupants.

If the negligent government that sponsored that activity is a local, State, or Federal Government, then the innocent victim has the right to go to court and compel that government to compensate him for the damages that it caused. And that comports with our modern sense, the public sense, of what the justice system should do. If a government does wrong, it ought to make things right.

Not only does the public see that justice is done, but usually by holding the government accountable for wrongdoing, it becomes more careful. It reviews its procedures. It takes steps to make sure that kind of damage doesn't occur again.

Most importantly, when the public sees the government becoming more accountable, then public confidence in that government and the trust in and respect for it increases. So it actually strengthens the government rather than tearing it down.

That's why the members of the United Property Owners of Washington enthusiastically endorse the passage of S. 1691. Our understanding is that this bill simply applies to tribal governments the same standards of fairness and accountability that already apply to our local, State, and Federal Governments, as it should be.

We think there are specifically two situations affecting home owners which require the passage of this bill or a bill like it to reasonably protect home owners' rights.

The first one relates to the private waterfront property owners who are also involved in the shellfish proceeding that Bill Taylor described for you. And that case is still ongoing. We don't know yet how it's going to turn out. But it may be that private waterfront property owners will be compelled involuntarily to open their residential properties to tribal governments to exercise recently expanded shellfish treaty rights.

That may ultimately involve allowing access down private driveways, across side yards of private residences to get to the shellfish beds that are like the front yards of these waterfront homes. It could involve bringing equipment to harvest and transport the shellfish from the site. All of these activities increase the risk of damage to the homeowner's property and perhaps personal injuries. If motor vehicles are operated in a negligent fashion, perhaps someone could be injured.

Since these home owners may be compelled involuntarily to have this transaction with a tribal government, they need a real viable remedy if in fact these kinds of damages occur. Having recourse against individual tribal members is not a realistic remedy. First,

it may be difficult or impossible for a home owner to prove which particular individual was responsible for the damage. And even if you can prove that, that person may or may not be financially responsible, may not have the resources to pay the damages. The tribal governments clearly do have the resources to pay those damages and in fairness ought to be the ones who pay them because they are responsible for organizing and supervising those shellfish harvest activities in a safe fashion.

The other situation relates specifically to the home owners who are fee land owners. Their lands are private property. They are not trust property, are not subject to jurisdiction of tribal governments, yet with increasing frequency some of the tribal governments threaten these fee land owners with having utilities shut off, having roads blocked so that they cannot access and use their properties. They're even threatened occasionally with what we feel are illegal arrest and incarceration simply for using their property in a manner that's completely legal under all applicable local, State, and Federal laws.

Those types of activities raise serious questions about violation of legal rights and civil rights of these owners, and presently they feel they have no adequate remedy to use against it.

In short, that's why we so strongly endorse the passage of this bill. Unless the victims of tribal government wrongdoing have a real, viable remedy that can be asserted directly against the offending tribal government, it's extremely unlikely that that government will ever correct its behavior.

Thank you.

[Prepared statement of Mr. Montgomery appears in appendix.]

The CHAIRMAN. Thank you.

Let me ask a question of each of you. Mr. Vance first.

Maybe you're the wrong person I'm addressing this to, but I thought you might tell me since you spoke at length about damages and the—this land that is supposedly being put in place for the Muckleshoot amphitheater.

Do you know if that land was purchased and then put in trust or was it—was it always within the reservation boundaries?

Mr. VANCE. My understanding, Mr. Chairman, the land it is being built on is so-called fee land purchased and then put into trust.

The CHAIRMAN. Was it contiguous to this reservation?

Mr. VANCE. I believe it was.

Ms. JENSEN. Excuse me? May I comment on that?

The CHAIRMAN. Yes.

Ms. JENSEN. The land originally was owned by the tribe. It was then allotted off. It was owned for a number of years by a non-Indian member of the community. It was then purchased back, but it has not been put into trust status. It is still fee land.

The CHAIRMAN. Mr. Vance, is the—King County party to the action that's being pursued by the Citizens for Safety and Environment?

Mr. VANCE. No; unfortunately, Mr. Chairman, my government is very divided over this issue. The council members who represent the districts surrounding the amphitheater are obviously concerned. Other council—we're a very big government and other



members and other politicians farther away from that amphitheater don't share that concern. The executive doesn't share that concern.

So no, they are not. In fact, that's one of the reasons why we need this bill, Mr. Chairman, in my view. In this case, the citizens were not protected by their elected officials. My understanding—and Mr. Sullivan can speak to this—is local governments actually have the ability to enact local land-use regulations on so-called fee land. Most local governments do that here in the West. King County chose not to.

The citizens are actually suing us for not doing that. They are also—but they can't sue the tribe. It makes very little sense.

The CHAIRMAN. I see. Thank you.

Mr. Jensen, in your testimony you suggested there may be some type of insurance provided as a way to address claims of the kind we're talking about today. Would you elaborate on that just a little bit for me.

Oh, excuse me. That was Mr. Sullivan. I intended that question for Bill Jensen. Let me ask Bill Jensen that question.

Mr. SULLIVAN. Sure.

The CHAIRMAN. Jill Jensen. I apologize, 80-hour weeks will do you.

Ms. JENSEN. I'm sorry. Could you please repeat your question.

The CHAIRMAN. Yes; you talked about some type of insurance that might be provided as a way to address the claims that you were addressing, did you not? I have that in my notes.

Ms. JENSEN. One of our—one of the ideas is an idea that Mr. Sullivan had previously brought up was the—was the notion of providing Federally backed liability coverage so that—for tribes who do not have the resources available to them, that they would still have that as an opportunity for—for themselves.

The CHAIRMAN. Okay. I apologize. I guess I should have asked that of Mr. Sullivan in the first place.

Let me go back to you. As a county prosecutor, what has your relationship been with tribal governments on law enforcement, as an example?

Mr. SULLIVAN. In the law enforcement area, Mr. Chairman, we have a very good relationship. My relationship with the tribal police and the tribal council in that area has been very, very good. For years, as I indicated initially—I've been the elected prosecutor since 1974.

However, in recent years, as the law changed in Washington and we got to the issue of signing mutual aid agreements, which is a method by which we all—all local government is trying to share the responsibility for law enforcement, we had an indemnity clause in all of the mutual aid agreements. And unfortunately, the Yakima Indian Nation would not sign that agreement, even though we had for years cooperated with the joint commissions and those kinds of things. But when we asked the tribe to sign this interlocal agreement that would say, "We will indemnify you if one of our officers in enforcement of county or State law makes a mistake," and they refused to do it because they did not want to waive sovereign immunity.

So on the whole, we've got a very good relationship, but this issue comes up over and over again.

The CHAIRMAN. Is there a cross-deputization, for instance, of the police officers?

Mr. SULLIVAN. We did for years, although in recent years we have not because of this issue of indemnity and the agreement to hold each other harmless. And the tribe's refusal to do that because they—in order to do that they would have to voluntarily waive sovereign immunity and they just don't feel that they want to do that and take the risk that they could be sued.

The CHAIRMAN. I'm going to go back to Mrs. Jensen. I'm writing notes on everybody's testimony here.

Did you say that the Muckleshoot development was in violation of EPA guidelines?

Ms. JENSEN. No; I did not.

The CHAIRMAN. In violation of EPA?

Ms. JENSEN. The issue for us has been that the land which has fee status was—and this is in the words of the Muckleshoot tribal attorney lawyer Iara Lavi—the land was intentionally not transferred into trust status because in doing so, they would be subject to all national environmental policy act guidelines.

And so we don't have the opportunity to see that this project does meet those guidelines.

The CHAIRMAN. Okay. Sorry I got that mixed up.

Mr. Taylor does your land border the reservation or is that State land that you lease?

Mr. TAYLOR. It is State land.

The CHAIRMAN. It's State land. And there are other owners also suffering, as you put it, the same problems?

Mr. TAYLOR. I'm not sure if there are other owners, that I'm aware of, that have similar problems as to what we've had.

The CHAIRMAN. You mentioned you estimated it cost you \$4,000 at one time. Has that been the only time that's happened.

Mr. TAYLOR. It's the only time where a number of—a number of tribal members—a large number of tribal members crossed over the border, tribal—or the property line.

The CHAIRMAN. Thank you.

And Mr. Montgomery, the extent of tribal rights under the Stevens Treaty is in litigation; is that right?

Mr. MONTGOMERY. That's correct.

The CHAIRMAN. Would you have this committee do something before the courts rule on the appeal in that case?

Mr. MONTGOMERY. Not with respect to that case. I think everyone has to wait until the appeals are final before anybody knows what the next step will be.

The CHAIRMAN. Okay. I think I also heard you say that at one time that—that people actually were arrested by tribal police and incarcerated and there was a seizure of property.

Mr. MONTGOMERY. I mentioned situations of fee land owners being arrested and incarcerated for using their property under permits issued by—

The CHAIRMAN. Arrested by whom?

Mr. MONTGOMERY. By tribal police.

The CHAIRMAN. And incarcerated? You also used that word.



Mr. MONTGOMERY. Yes.

The CHAIRMAN. They incarcerated non-Indians in tribal jails is what you are saying?

Mr. MONTGOMERY. That's exactly right.

The CHAIRMAN. And the what was the seizure of the property? Who seized it?

Mr. MONTGOMERY. There was no seizure of property. The—the owner who was operating, I think, a gravel pit under permits issued by local government, county government, was told that he needed permits from tribal government, and he said, No, I don't, I'm not a member of the tribe. You're not my government. I've got the proper authority.

And my understanding was that he was arrested and incarcerated and had no remedy for that. As far as we know, that was completely illegal.

The CHAIRMAN. If you have any documented proof of that, would you turn that in to this committee?

Mr. MONTGOMERY. We certainly will.

The CHAIRMAN. I thank you.

Senator INOUE.

Senator INOUE. Thank you.

The subject matter being discussed is a bit complicated here.

Mr. VANCE AND Mr. Sullivan, I presume both of you are lawyers.

Mr. VANCE. No, sir; I'm not.

Senator INOUE. I'm certain we all agree that tribal lands do not own the fee, that the fee is held in trust by the Federal Government. Is that correct?

Mr. SULLIVAN. Senator, I don't believe so. Normally when we—when we talk about lands on the reservations in the West, primarily we talk with trust lands which are held in the name of the Federal Government in trust for the tribe. And fee lands are those lands which—to which a deed has been issued and are owned by both tribal members, by non-tribal members, and by the tribe itself. Those lands can be freely alienated by each of the people who own them, just as you and I own property.

Senator INOUE. But those lands held in trust by the Federal Government cannot be alienated.

Mr. SULLIVAN. No; they cannot. That's correct.

Senator INOUE. If sovereign immunity is waived, would the State cause jurisdiction over these trust lands?

Mr. SULLIVAN. I think that if—if sovereign immunity were waived, then we would look to the normal rules dealing with jurisdiction, and the lawsuit would then be brought probably in Federal court because that would be of primary Federal interest because they are the owner of the property. So the—so if the tribal lands were involved—just as if I were to bring an action against the Senate of the United States for some reason, I wouldn't be able to probably do that in State court; I would have to do it in Federal court because of the rules dealing with diversity.

Senator INOUE. Can you bring it to the Federal court if the Federal Government does not waive its sovereignty?

Mr. SULLIVAN. We cannot bring any action against any tribal government unless the Federal Government waives immunity. The

Federal Government—we can sue the Federal Government because it waived immunity in 1946, but we——

Senator INOUE. If it waives its immunity?

Mr. SULLIVAN. If it waives immunity today against the—so that the tribal—if the Congress were to allow suits against tribal government, then we could bring that action in Federal court as soon as the—as soon as the President signed the bill.

Senator INOUE. Is the Muckleshoot tribal lands trust lands?

Mr. VANCE. Senator, we dealt with that in the earlier question. The land that is actually being built is on fee land, not trust land.

Senator INOUE. Who holds—you mean the—the Government of the United States is not a trustee to those lands?

Mr. VANCE. It's a different status: Fee land versus trust land.

Senator INOUE. But if they were trust lands, could you sue the Federal Government?

Mr. VANCE. Not presently. Under the bill I think we could.

Senator INOUE. Even under the bill, could you?

Mr. VANCE. Yes.

Senator INOUE. You can if the Federal Government should waive its sovereign immunity.

Mr. VANCE. The Federal Government has waived sovereign immunity long ago.

Senator INOUE. Against the Muckleshoot land?

Mr. VANCE. No, no, no. That's the point of the bill.

Senator INOUE. Would the State of Washington be able to exercise jurisdiction over military lands, Mr. Jensen—Mr. Sullivan?

Mr. SULLIVAN. The State of Washington does not exercise jurisdiction over military lands, although there are limited instances in which we have some control. The military, for example, with respect to death investigation—I have a large military reservation in my county in which——

Senator INOUE. With an agreement?

Mr. SULLIVAN. Well, I'm not sure it's with agreement. The fact is that there is no ability. The death investigation within the State of Washington is done by the county coroners and there is no equal entity within the Federal Government.

But for the most part, you're correct. We have no jurisdiction over the Indian—excuse me—over the Federal reservations that are owned by the Federal Government.

Senator INOUE. Yakima County has a cooperative arrangement with the Yakima Tribes or law enforcement; isn't that correct?

Mr. SULLIVAN. That's correct.

Senator INOUE. Do you have any problems that you would need a waiver of sovereign immunity to carryout this agreement?

Mr. SULLIVAN. Yes; right now my sheriff is—is refusing to sign the mutual aid agreement which we've had for a number of years because of the tribe's refusal to sign the indemnity agreement. We have had a number of operations in which there were joint operations with the sheriff and the tribal police acting in concert in good law enforcement. And—and then what happened—and then the citizen who feels aggrieved because they didn't think that we did it the right way has brought suit against Yakima County. The tribe has said, Oh, well, we can't be sued. So they're immediately out of the suit and we're left with the entire responsibility for the



liability if the decision by that tribal officer is wrong, when the authority is given to him by the sheriff. And so under that basis, we're now having a problem where we didn't have it for a number of years.

All we're saying is if you do away with immunity, then the tribal government is on the same plane and has the same responsibility for its actions as Yakima County does and its employees. And we just think it's a fairness issue as it relates to law enforcement throughout the entire Nation, just not in our county.

Senator INOUE. Coming back to the initial question. If you are hoping to sue lands held in trust by the United States reservation lands, you would have to get the government of the United States to waive its sovereign immunity; isn't that correct?

Mr. SULLIVAN. I think it's two separate issues. The Federal Government has already waived its immunity and if we could find that the primary responsibility is with the Federal Government as opposed to tribal government, I think we could sue today. We could sue the Federal Government as it relates to the actions it takes. But to actually be able to execute on the land, for example, which are now held in trust, yes, I think that we would have to have this bill passed.

And so it's clear that sovereign immunity has been waived in order for us to be able to bring an action at least—not necessarily to bring action against the government but to execute against the Federal—these lands.

Senator INOUE. Well, will this bill waive the sovereign immunity of the U.S. Government?

Mr. SULLIVAN. Well, again, I think that—in some respects to the extent that they are able to stand in the place of the tribe, yes. I can't think of a circumstance in which that will happen, but I think that's possible.

Senator INOUE. So it will not.

Mr. Montgomery, you have posed the specter that Indian tribes are going to have the right to come on private lands to harvest shellfish and they may be—there may be significant damage to private property, but is it true that the District Court has specifically ruled that tribes cannot come on or to cross private property without consent of the owner?

Mr. MONTGOMERY. That's the posture of the case right now, but that issue has been consistently appealed by the tribes. And I think all parties to this suit expect it to be appealed to and ultimately decided by the U.S. Supreme Court.

Senator INOUE. So you are suggesting that even in this period they are crossing your lands?

Mr. MONTGOMERY. Not during this period because—because the present ruling at the Ninth Circuit Court of Appeals level would only give them the right to do that if a hearing—if it was preceded by a hearing in which they demonstrated there was a need for it.

Senator INOUE. In other words, at this moment you are not suffering any damage?

Mr. MONTGOMERY. I think generally that is true.

Let me qualify that by saying the access to shellfish beds can be inherently damaging to property because you dig for clams and if the holes that you dig are not properly restored, the shellfish bed

can look like a moonscape with craters in it and be effectively destroyed for future cultivation.

So those types of damages are right now a real issue for tideland owners.

Senator INOUE. Mr. Taylor, you have referred to the uncertainty of what tribal rights are as they refer to shellfish. Isn't it true that the District Court has ruled that the tribes do not have the right to harvest shellfish you have cultivated?

Mr. TAYLOR. That again is—the tribe—or the court has said that those shellfish that are on our property that are from our efforts, the tribe does not have rights to harvest at the present time. However, those shellfish that were there as a natural background prior to beginning cultivation, that they do have rights to those shellfish.

Senator INOUE. There is no uncertainty as to the rights, then?

Mr. TAYLOR. I wish it was—I wish it was very clear-cut. The problem is that a lot of these lands were taken up over 100 years ago. There was no records taken at that time, or at least that I am aware of, as to what was on those beds. We're being asked—or told by the court that we have to go back and prove what existed at that time. I don't have at this point in time any way to do that or do I know anyone that can to come up with what was actually there for shellfish, if there was any at that time. So it's one of those things that time has gone by and there has been no—no one has said anything and we've continued in our businesses for 100 years or longer.

Senator INOUE. But before you began your cultivation, the tribes had rights to take shellfish; isn't that correct.

Mr. TAYLOR. You know, when—when the beds were taken up, no one—no one said anything whether it was tribal members or—or anyone—any other officials. We were allowed to go in, work the beds, farm the beds. We've done that, taken care of them, you know, killed predators, fought—had lawsuits over pollution. Farms seeded the beds, you know, done numerous activities for 100 years. In many cases changed those beds substantially from their natural condition. We've put gravel on them. We've diked them. We've done numerous things. And at this time, you know, it's difficult for us to go back and resurrect what would have been there—what was an actual background 100 or 140 years ago.

Senator INOUE. Are Indians harvesting your cultivated shellfish?

Mr. TAYLOR. Not outside of the incident that I related to you. They have not been harvesting cultivated shellfish on—on growers' properties at this time.

Senator INOUE. So the ruling of the District Court brings about certainty as to your rights, then?

Mr. TAYLOR. I would—I would not say that I feel a lot of certainty at this point in time. Trying to determine what this background amount is and trying to determine then what rights the tribes have. If you have crops also besides the—we oftentimes grow a couple of crops; where there might be a crop of oysters, say, on top of a crop of clams that is underlying that bed.

It's—it's difficult to say who has the rights, who has the—the right to those shellfish and at what time they have the right to



those shellfish. And those are things that obviously will have to be worked out through the courts.

Senator INOUE. Isn't the court trying to do that now?

Mr. TAYLOR. We're still in the—we're in the appeals phase, Ninth Circuit. I—this is something that will probably end up having to be done through some implementation portion of the lawsuit.

Senator INOUE. So you've been able to do this even without the waiver of sovereign immunity?

Mr. TAYLOR. Can you repeat that again, please?

The CHAIRMAN. Please, now, let's not have the applause, please.

Mr. TAYLOR. Can you repeat the question again?

Senator INOUE. You've been able to go to the district court and now to the Ninth Circuit without tribes waiving the sovereign immunity.

Mr. TAYLOR. Yes; I understand your question now.

Yes; actually I'm a defendant in the case. We actually—we—we—in fact, we were very concerned because we weren't—the State didn't have a very good record winning lawsuits against the tribes. And so as growers, we were very concerned that our rights—what will happen to our rights. And so we went in—I can't remember the word, but we went in and applied to the court for standing in the court and were granted that.

Senator INOUE. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Gorton.

Senator GORTON. You were a defendant in the lawsuit? It wasn't one that you brought, isn't it?

Mr. TAYLOR. That's right.

Senator GORTON. But when you had the invasion of your property, you couldn't sue the tribe?

Mr. TAYLOR. We—no, we couldn't.

Senator GORTON. Did—Mr. Chairman, with all respect to my longtime friend Jeffrey Sullivan, I think I can answer Senator Inouye's question perhaps a little more clearly than he did. The United States has waived its sovereign immunity, as he pointed out. You can sue the United States for all kinds of things. People do that every day. They get judgments against the United States every day, but they can't enforce those judgments by seizing the Washington Monument.

And if this bill were to pass, an individual could sue the Yakima Indian Nation. Mr. Sullivan could under certain circumstances, but he couldn't enforce the judgment by seizing trust land. He would have to have the judgment satisfied in some other fashion. The ability to bring the lawsuit is separate from the way in which any judgment could be enforced. And this bill would no more give him the right to seize trust land than the Tort Claims Act gives a citizen the right to seize the Washington Monument.

A question for both Mr. Vance and Ms. Jensen. I trust you were deeply comforted by the remarks of the representative of the Secretary of the Interior that you had all of the rights that you needed because certain negotiations are—are now going on involving the tribe and the county.

Mr. VANCE. Senator, I wish I could say I was comforted. To my knowledge, there are no meaningful negotiations going on. Negotiations imply that both sides are dealing with each other as equals

to mitigate impacts as to whether or not the amphitheater is going to be built. I think what County Executive Simms is negotiating with the tribes is terms of surrender. There's no real negotiations going on that any of the citizens groups are a party to or know anything about.

And the fact about this project is its very existence is such a total violation of the Growth Management Act and King County's adopted plans and policies, you can't mitigate the impacts. The only way—one example, the only way to mitigate the traffic impact, under our Growth Management Act projects are not allowed to go forward until they get a certificate of concurrence demonstrating that the road network is sufficient to handle the traffic generated. Basic law of land-use planning.

The only way to mitigate the traffic would be widen Highway 164 which leads to the amphitheater. Highway 164 goes through the rural area. It is a violation of the Growth Management Act and King County's adopted plans and policies to have a road at urban standards going through the rural area. Therefore, it's absolutely impossible to mitigate the traffic impacts of the amphitheater. There is nothing to negotiate. The amphitheater is a total, blatant violation of the adopted State Growth Management Act and King County's plans and policies.

County Executive Sims' so-called negotiations are nothing but window dressing and trying to keep a campaign promise he made before the election.

Senator GORTON. Mrs. Jensen, your group is not a part of those negotiations?

Ms. JENSEN. That's correct. I would like to say that our group went before the King County Council on five separate occasions starting last June. We were promised right before Mr. Sims' election that we would become a part of that negotiating process. The day after the election, we have not heard from him since and we are very upset about that.

Senator GORTON. I want to get—a little more narrow. Your group is not a part of any negotiations at this point?

Ms. JENSEN. The point is that, no, we are not and those promises have been broken. Currently he's working on plans to do—to protect the salmon habitat and yet this project has had a landslide on it that has blocked a salmon-bearing stream. So on the one hand, where he's working diligently to try to save the White River, landslides are destroying it.

He has also stated publicly that he wants the amphitheater to be put in place and that the goal is to mitigate the problems later.

Senator GORTON. Excuse me. My point is a somewhat different one. You're not a part of those negotiations?

Ms. JENSEN. Absolutely not.

Senator GORTON. You cannot sue the tribes for any violations of law you think may exist. And so you aren't particularly comforted, I take it, by the statement of the person who works for your government of the United States and the Department of the Interior that everything is really okay and you don't need any additional rights. You don't take a great deal of comfort from that statement, I gather.

Ms. JENSEN. No; I do not.



Senator GORTON. Thank you.

Mr. Sullivan, just wanted to make it very clear. You as the representative, the legal representative of Yakima County, defend numerous lawsuits brought against Yakima County by citizens of your county and elsewhere, I take it.

Mr. SULLIVAN. That's correct.

Senator GORTON. And you've been sued by members of the Yakima Tribe and I suspect by the tribe itself on occasion, have you not?

Mr. SULLIVAN. We have, yes, sir.

Senator GORTON. But you cannot sue the tribe?

Mr. SULLIVAN. No; we cannot.

Senator GORTON. And that's what this bill is designed to accomplish, an even playing field.

Mr. SULLIVAN. This bill is designed to accomplish that on behalf of individual citizens and on behalf of the county and both members and non-members of the tribe. It will allow them to address the violations of their civil rights in a court of law.

Senator GORTON. Mr. Montgomery, let's assume that ultimately the Supreme Court in this shellfish lawsuit determines that Indians have no right to access to tidelands over the uplands, over the—the drylands.

Well, let's assume that. Then that is the situation through the Ninth Circuit, is it not?

Mr. MONTGOMERY. That's correct.

Senator GORTON. And let's assume that that set of rights is violated consciously by representatives of one of the Indian tribes.

What recourse would you have to enforce a right granted to you by the Supreme Court?

Mr. MONTGOMERY. I don't feel that we obviously would have any legal recourse against the tribal governments, but perhaps if the Supreme Court rules that that is not a right that is a treaty right, we can enforce State trespass laws by calling our local sheriffs and asking for their protection.

Senator GORTON. But you would not be able to sue the tribe to—and enjoin it from preventing or authorizing its members to go on the property.

Mr. MONTGOMERY. That's right. And in many of our members' situations, they may be 50 miles from the closest law enforcement, so the—they are effectively denied any remedy unless they can prevent the—the occurrence at the time, but they can't do anything about it after the fact.

Senator GORTON. Okay. Thank you.

I thank you, Mr. Chairman.

The CHAIRMAN. Okay. I thank this committee very much. I appreciate your appearing.

We'll now go to Panel II-B: Jose Quintana, Town Manager, Town of Ignacio, Ignacio, CO; Clement Frost, Chairman, Southern Ute Tribe of Ignacio; Henry Cagey, Chairman of the Lummi Indian Nation, Bellingham, WA; Susan Williams, Esq., Williams and Janov, Albuquerque, NM; and Joe DeLaCruz, Former President of Quinault Indian Nation.

If you could come and take your seats to where the other committees—they can sit anywhere they want, but I'd like to start in the

order—first Mr. Quintana, then Clement Frost, then Henry Cagey, then Miss Williams, and then Joe DeLaCruz last. You can speak in that order, but you can sit anywhere you want.

I take it Chairman Frost did not come.

As with the other panels, all of your testimony will be included in the record. If you could keep your verbal comments to down somewhere around 5 minutes or so, just summarize them, we would appreciate it.

We'll start with Jose.

## STATEMENT OF JOSE QUINTANA, TOWN MANAGER, TOWN OF IGNACIO, COLORADO

Mr. QUINTANA. Thank you, Chairman Campbell.

With me today is Mayor Jihardo Silva. We have checked with your staff and we're kind of probably going away from protocol somewhat. And he brought you a little gift that he'd like to present to you. We believe it reflects the makeup of the community very accurately, and it's just a very simple gift of appreciation for you allowing us here today.

Mr. SILVA. Good morning, Senators. Just a few seconds and then we'll turn it over to the Town Manager. But I just wanted to give you these shirts as a quick symbol to show you how our unity for 97 years has been through the community of the town of Ignacio with the government of the Southern Ute Tribe also working together for the past 97 years and we look for working together with the tribe into a peaceful solution and to live together and work in harmony for the next 97 years and beyond.

The CHAIRMAN. We will probably have to leave those there. I don't know, frankly, the rules of the Senate hearing, but I have a hunch that receiving gifts, even if it's a T-shirt, in a Senate is probably inappropriate.

Mr. SILVA. Okay, Mr. Chairman. We wondered about that.

Mr. CAMPBELL. Well, I'll just rule on that, but thank you very much.

Mr. QUINTANA. Thank you, Senator.

Good afternoon, Chairman Campbell, Senator Inouye, Senator Gorton.

With me today, as I said, is Mayor Silva and Town Attorney, Dirk Nelson. My name is Jose Quintana. I'm the Town Manager. Mr. Chairman, you know me as Belty. I'm the Town Manager of the town of Ignacio.

Chairman Campbell, on behalf of the town of Ignacio, Mr. Silva and I would like to thank the committee for affording us the opportunity to testify before you today.

The town of Ignacio was incorporated in 1913 and it's surrounded by lands of the Southern Ute Tribe in Southwestern Colorado.

Our Native American neighbors are a very important part of our largely tri-ethnic community and we value their numerous contributions to our community.

For the most part, over the past many years we've been able to work local agreements between the town and the local government. Recently, however, we're facing problems associated with the doctrines of Native American Government immunity.



The CHAIRMAN. Pull that microphone over a little closer, will you, please?

Mr. QUINTANA. That negatively impacts our town in relations with our neighbors. We do not believe that the tribe is doing anything that is not within what is allowed by law, but we believe that the field is tilted to favor them, a very rich and powerful nation.

Living on a ranch as you do, Senator Campbell, I know you understand the saying, "good fences make good neighbors."

We are before you today asking that you work toward developing public policy that would serve to assist our two communities to better work together.

Mr. Chairman, we are citizens of the town of Ignacio in the State of Colorado. We are also citizens of the United States of America. The majority of our fellow citizens support self-government and self-determination for our neighbors in the Southern Ute Tribe. We also believe that while being citizens of other tribes, our neighbors should be citizens of America and if they live within the boundaries of State of Colorado and our town, should be citizens of those two entities as well.

We also understand that developing a clear, concise policy which is equitable to all concerned will not be an easy task. While as a Nation we have been committed to the general concept of Native American sovereignty, the Supreme Court has struggled to define the concept for over 170 years.

Beginning with the era of Chief Justice John Marshall, the guiding principles of the Marshall trilogy, have resulted in a paradox of tribal sovereignty. The U.S. Government recognizes American tribes as sovereign nations, but the U.S. Congress is recognized as having the right to limit the powers of sovereignty.

Because of this paradox, the rights and responsibilities of the town and tribe are not always clear and workable in a manner which promotes good relations. Some examples of problem areas are: No. 1, land acquisition by a tribe and put into the U.S. Government trust. This action not only serves to remove land from local property tax rolls and land-use requirements, but also opens the door for U.S. Government representation on the part of the tribe, which further unevens the field when a grievance surfaces between the tribe and small local governments such as ours.

No. 2, jurisdiction. When laws are violated within the boundaries of our town and we are compelled to treat individuals different, it becomes next to impossible to have equal justice. Tribal court does not recognize our police officers as officers under their judicial system. There is no requirement for tribal members to have automobile liability insurance even when driving on State highways within the exterior boundaries of the reservation.

The revocation of a driver's license is also an issue which consistently draws the communities apart. The lower State court has ruled that Ignacio officers have no legal right to stop a tribal member for a traffic infraction in Ignacio. Thus probable cause for stopping tribal members which could be involved in more serious crime is effectively eliminated.

We have submitted additional written testimony with your staff which more further—which further explains our concerns. And we would be glad to answer any questions that you may have.

[Prepared statement of Mr. Quintana appears in appendix.]

The CHAIRMAN. Your complete testimony will be included in the record.

For the record, since you're speaking for Chairman Frost, will you identify yourself by your full name for the record.

**STATEMENT OF HOWARD RICHARDS, ON BEHALF OF CLEMENT FROST, CHAIRMAN, SOUTHERN UTE TRIBE, IGNACIO, CO**

Mr. RICHARDS. Mr. Chairman and members of the committee. I'm Howard Richards, Council Member with the Southern Ute Indian Tribe of the Southern Ute Indian Reservation, speaking on behalf of Mr. Clement Frost, who turned ill yesterday and could not take part in the testimony. We appreciate your invitation to participate in these proceedings and hope that will assist the committee. You have requested that I address civil rights and property rights in Indian country. In doing so I must call upon my own experience and that of my tribe.

Our reservation is a checkerboarded reservation consisting of approximately 700,000 acres in Southwest Colorado. Almost one-half of the reservation is owned by the United States in trust for the tribe. Additionally, we own several mineral estates reserved in patents issued by the United States to homesteaders between 1909 and 1938. Because of the landownership patterns, non-Indians are often close neighbors of members of my tribe.

The small town of Ignacio, which is a tri-ethnic community of Hispanics, Anglos, and Utes, is located within the reservation not far from my tribal headquarters.

For many years members of our tribe and other members of the community lived in harmony, attended public schools together, helped one another, and respected each other. For a number of reasons, our relationships have become strained. Respect has been replaced by resentment. Mutual concern for one another has often turned to distrust and suspicion. As a person and as a tribal leader, I'm saddened by the increasing tensions that continue to grow. While many Indians and non-Indians seek to save the cooperative spirit of the past, racism and ethnic division are spreading on all sides. Racism is evil and destructive. It is born in ignorance and nurtured by fear and greed.

One factor leading to the decline in our relationships has been the tribe's success. With the frequent encouragement of Congress, we have actively pursued economic improvement. Where 25 years ago we were poor, we have taken advantage of the energy resources underlying our lands. Today the tribe's payroll exceeds that of any other employer in La Plata and Archuleta Counties. We employ almost 1,000 residents of the Four Corners. Our tribally owned natural gas company is the fourth largest producer in the State of Colorado. In partnership with KN Energy, we are the majority owner of a gas-gathering and treating system that collects and transports natural gas from hundreds of wells located within our reservation.

While energy-related revenues account for more than 90 percent of our annual general fund, we also receive revenues from a small casino which we own and manage in accordance with our compact with the State of Colorado.



We are proud of our accomplishments and have a right to be. This committee should also take pride in our accomplishments. Our success, however, has also fostered jealousy and envy by area residents who do not understand the barriers we faced in reaching our goals and objectives. They liked us better when we were poor.

In 1972, Congress passed legislation authorizing our tribes to sell land and to purchase lands within our reservation. Under that law, purchased lands are to be titled in the name of the United States in trust for the tribe. Increased tribal revenues have permitted us to make occasional purchases of reservation land. While initially purchased by the tribe in its own name, we have followed procedures set forth under Federal regulations to have the lands taken into trust. Acquired lands have been used for a variety of purposes, including expansion of educational programs and other facilities that have served not only our tribal members but other residents as well.

Fueled by concern that these few purchases signal reacquisition of the entire reservation, local officials feared that we would be destroying the local property tax base. In response to those fears and in settlement of litigation regarding taxation, in 1996 we negotiated a taxation compact with the State of Colorado and the county government. Under the compact our tribe agreed to make volunteer contribution to the county government to help offset negative tax consequences associated with our purchases. The lost tax revenue associated with our acquired tracts is less than \$5,000 per year in a county with an annual operating budget of more than \$30 million.

More significant but seldom mentioned is a fact that energy-related tax revenue derived from tribal lands provides La Plata County with approximately one-fourth of its annual tax revenue.

The fear that the tribe will reacquire all lands within the reservation are grossly exaggerated. As a chairman of the committee will attest, many non-Ute residents within the reservation have no interest in selling their lands, and we certainly cannot force them to do so. Yet acquisition of five small tracts of land within a town of Ignacio and their placement into trust has spurred a panic among town officials who have appealed to the Interior Board of Indian Appeals.

As elected leaders of our tribe, we hear from and listen to our tribal member constituents. Over the past 2 years, we have heard repeated allegations of excessive force against our tribal members by town police officers. Those reports include assertions that officers beat tribal members and in some cases held loaded revolvers against the heads of members already restrained by handcuffs. The allegations were frequent and appeared to be verified by witnesses. We met with town officials and proposed creation of a citizen review panel to investigate complaints of police abuse brought against town and tribal police. Our suggestions were rejected yet the allegations persisted.

We support law and order, but there is nothing more damaging to community relationship than repeated police brutality. In order to end those abuses, we authorized our attorney to file a lawsuit against officials and officers of the town for civil rights violations. The filing of that lawsuit has further widened the gulf between In-

dian and non-Indian citizens in our area. We make no apology for filing the lawsuit. However, we remain hopeful that the lawsuit will be settled in a manner that will provide all citizens, Indian and non-Indians alike, with the assurances that town police are not above the law and are there to serve and protect all members of the public.

Because of the checkerboarded nature of our reservation, jurisdiction is complex. In an effort to help remove some of that confusion, we have worked with State and local officials to resolve issues that have led to lengthy litigation on other checkerboarded reservations. The compromises we reached were approved by Congress in 1984, with the enactment of Public Law 98-290. That Act confirmed the boundaries of our reservation, disclaimed tribal jurisdiction over non-Indians and on non-Indian lands, and confirmed the town of Ignacio's criminal jurisdiction over tribal members.

New town officials who have moved to Ignacio from other States do not understand the long and complex history that—

The CHAIRMAN. I need you to start summarizing here.

Mr. RICHARDS.[continuing]. Led to the legislative compromise. We hope that our presence here today will mark a new day in our relationship with a town in which constructive discussion can replace litigation.

And in conclusion, our governmental status as an Indian tribe is very important to us. We intend to maintain our tradition and our differences. We have been promised those rights and have earned them. For our sake and the sake of our children, our differences should be respected and not serve as the basis for hatred or jealousy.

I hope that the committee will not turn its back on the promises they have made to the Indian people. Our sovereignty should not be diminished. At the same time, however, we will remain willing to discuss ways in which the rights and expectations of non-Indians can be accommodated without sacrifice of our governmental status.

Again, we thank you for the opportunity to appear before you today, Mr. Chair, Vice Chair, Mr. Gorton, and I will be happy to answer any questions.

[Prepared statement of Mr. Frost appears in appendix.]

The CHAIRMAN. Thank you.

Mr. Cagey.

#### **STATEMENT OF HENRY CAGEY, CHAIRMAN, LUMMI INDIAN NATION, BELLINGHAM, WA**

Mr. CAGEY. Thank you, Mr. Chairman. My name is Henry Cagey, Chairman of the Lummi Nation, and also President of Affiliated Tribes and Northwest Indians.

We'd like to present our views on S. 1691. And for the record, the Lummi Nation opposes this bill and feels that there has to be other solutions and remedies for this committee to look at before this bill is even considered to go forward.

Let me begin by explaining to the committee that the—that the Lummi Nation signed the Point Elliot treaty in 1855. And in the early 1960's and 1970's, over half of the reservation was lost to non-Indians. For the last few years now the reservation—the tribe has been able to acquire over 80 percent of the reservation; it's ei-



ther owned by the tribe or the tribal government. What's happening today on the reservation is that we have a mixture of non-Indians and tribal members within our reservation. And what we see, Mr. Chairman, is a lot of the non-Indians support what the tribes are doing on the reservation.

We have with us—we're aware that Tom Richardson, one of the property owners who lives on the reservation, has submitted testimony expressing his concerns over 1691. And we ask that the committee take a look at his testimony and review what's happening from his views as a non-Indian on the reservation.

What we see on our reservation is a small minority of individuals, non-Indian property owners who live up at Sandy Point. And this is—what we see is also—this is an age-old story of non-Indians wanting more and more of our land and more and more of our resources.

What we see right now, Mr. Chairman, is that—in our testimony you'll see, for the record, a flyer that we picked up from Sandy Point. And in it, you'll see a Lummi signed water pact. And this is something that I think we need to—to explain to the committee and Mr. Gorton and different individuals that—that the water agreement was brought together on a government-to-government understanding. And what we've tried to do is really ensure that the integrity and all of the non-Indians and all of the members were reassured water for existing homes on the reservation. We've done this for the last 4 or 5 years and now working to resolve this problem on the reservation. Water is a big issue for the people. But if it's not protected and it's not managed well enough, we're not going to go anywhere.

But within this agreement on the water pact, what happens if the State of Washington or the property owners don't honor this pact? What happens is the government becomes victims. We're blamed for things that the State of Washington or the people at the table should be negotiating in good faith.

These are the things that we'd like to have individuals understand. A lot of these things aren't caused by the tribal government. They are acts by either good old-fashioned greed or good old-fashioned reaping of the resources. Non-Indians want more and more. And we see it every day. I also want to share with you, Senator Gorton and Senator Campbell, of an example of what's happening on the reservation today. In the 1970's, we began to construct a water and sewer treatment plant for the reservation. This treatment plant was constructed by the tribe using Federal, State, and tribal resources, and it was built over 14 years ago—16 years ago. I'm sorry. And in the last 16 years there's only been one appeal to this water and sewer board. And that appeal was done by one of our former—current county council member, Marlene Dawson. And she went through the system and went through the tribal court and chose not to go any further because—that was just it. She chose to just go that far.

And also, Mr. Chairman, we'd also explain that this board is made up of Indian and non-Indian members. And it is working and people are satisfied with the treatment they are getting from their—from their system.

One of the issues on property rights, Mr. Chairman, is we have an issue with property owners up at Sandy Point today. What's happening is that we have a problem with a—lease agreements. Up in our reservation our reservation is surrounded by water. And what's happening right now is that the non-Indians that are using the beaches, using the channels, have really chosen not to go into lease agreements that compensate the tribe for the use of those tidelands. And this has been an ongoing issue with the Lummi Nation and the property owners up at Sandy point.

And if this committee is going look at due process and look at equal justice, that these non-Indians really need to take a serious look at honoring their own, I guess, integrity of themselves. What we've seen so far in the last several years is this isn't happening on our reservation, and something needs to be done about it, I agree. But I think both property rights and treaty rights, both need to be protected and preserved. But I think in order to do this, all governments, all individuals, have to have high integrity, honesty, and the ability to resolve problems.

With me, Mr. Chairman and Mr. Gorton, is that this legislation does nothing more than destroy the tribe's integrity and honesty. What you see behind me is some of our children on the reservation. And this bill leaves nothing more for these children to look at into the future.

You mentioned the new millennium. This bill is not going to leave nothing for these children, nothing for the elders.

I urge this committee not to do anything with this bill until further solutions and remedies can be come up with.

Thank you.

[Prepared statement of Mr. Cagey appears in appendix.]

The CHAIRMAN. Mr. DeLaCruz. You can proceed.

Excuse me. I did skip you Ms. Williams. You were next on the list there, phase proceed.

#### **STATEMENT OF SUSAN WILLIAMS, ESQUIRE, WILLIAMS AND JANOV, P.C., ALBUQUERQUE, NM**

Ms. WILLIAMS. Good afternoon, Mr. Chairman, Vice Chairman, and Senator Gorton.

My name is Susan Williams. I have represented Indian tribes for almost 17 years and I'm here to testify in opposition to S. 1691 for really two simple reasons. One is that the parade of horrors that has been described by a number of the witnesses here today in my experience just is not happening on Indian reservations throughout this county. I have to tell you—

The CHAIRMAN. Okay. That's enough of that, please.

Ms. WILLIAMS. I have to tell you that there are examples in which wrongdoings have occurred. Just like in State governments and Federal Government forums, I would not be credible if I sat here today and said there are no problems here that need solution. However, the problems that have been described are not predominant on the Indian reservations and it's very important at this time and at this juncture in history that this U.S. Government proceed very, very carefully in looking at its time-honored, long-standing obligations in the treaties that they signed with the United States—United States signed with the Indian tribes. To modify



those treaties lightly I think would do this government a great dishonor.

This U.S. Government does not go around entering into treaties with foreign nations and then abrogating them lightly. That is not what this government's honor is all about, and I would not like to see that happen in the case here before us.

And let me come back to my—my concession, Mr. Chairman, that there are problems on Indian reservations that may not have been solved. And I want to come back to that in a moment. But before I do, I want to address a number of the misstatements of law that have been made in this hearing in order to have a clear and correct record for this committee to make its decision.

First of all, it is not true that the U.S. Government has completely abrogated its own sovereign immunity from suit. It's not true that the States have completely abrogated their sovereign immunity from suit. And that's exactly what this legislation would do with respect to Indian tribes. Rather than focusing on the real problems facing the Indian communities, this legislation is a blunderbuss when in fact what we need is a surgeon's knife to really look at these problems and try to solve them in a way that's fair to all of the citizens of this United States. Because we, after all, are all citizens of the United States. Some owe some allegiance to States. And in the case of Indian tribes, we owe some of our allegiance to our Indian nations. But all of that was contemplated in the constitutional plan of this country.

There have been numerous legislation that Congress has passed to terminate the existence of Indian tribes; and then in another era, to support tribal sovereignty. We are in an era in which the U.S. Government recognizes its treaty obligations to protect tribes' rights to govern their own reservations.

Let me start with the Federal Government's sovereign immunity. There are at the present time many, many immunities which the U.S. Government continues to enjoy, and it's very important to the success of the U.S. Government to continue with these varying immunities.

Similarly, with respect to States—in fact, there are at least 10 States that haven't waived any sovereign immunity at all. There are many other States that waive sovereign immunity only to the extent of a very limited insurance policy. There are many other States that don't waive sovereign immunity for so-called discretionary functions.

I could go on and on and on to demonstrate that the Federal Government and the State governments have very much retained the doctrine of sovereign immunity. Now, let me say that that doctrine is increasingly in disfavor. I will concede that; that is, the Federal Government is increasingly waiving its sovereign immunity from suit, as are the States. That is the trend indeed. And in fact, Senators, that is the trend on the Indian reservations as well.

If you look on a national basis, you will see that increasingly, like the State and Federal Governments, Indian governments are waiving their immunity. In contract actions, in tribal laws, there are APA-type forms of relief offered by Indian tribes under current law. Some tribes have in their constitutions waivers for Indian Civil Rights Act claims, waivers of tribal sovereign immunity. And

the stories and the actions by Indians tribes waiving their own immunity are countless out there.

And that's exactly why we think that that trend should be allowed. We've not suggesting that the United States should waive any more of its immunity. We're not suggesting that the States should. And similarly, the tribes should be given the right to waive their immunity.

Now, I said that there are situations and there are stories that we've all heard where there hasn't been a solution to the problem found. And what do we do about that? Well, let me just say, given the 5-minute timeframe that we have, there isn't any possible way we could have a very good dialog on those situations.

I would turn you to the testimony that I have submitted for the record. It's much more lengthy on this issue. But this is the issue that the non-Indian citizens sitting here in this room have at their heart. And I want to say I understand and I sympathize with their concern.

It is a bit of an oddity in this Federal system that a non-Indian can live on an Indian reservation and not have the right to vote, not participate in tribal juries, and not have what they call a fair and neutral forum because they cannot go outside of the tribal court system.

Those are serious concerns that have been created by U.S. policy inviting them on the reservations. I must say they did come onto the reservations knowing full well that they were coming onto Indian land and that there was an Indian government there, and there should be no sympathy for anyone who says, You know, I don't—I'm not—I don't—I don't have any allegiance to a tribal government. They knew about it at the time.

I suggest that one option the Congress might want to consider is resolving their concerns by providing a Federal court forum for limited Indian Civil Rights Act appeals from the tribal courts in exchange for confirming and clarifying tribal sovereignty, both criminal and civil, over all non-Indians on the reservation.

I would suggest that this bill initially be on a voluntary basis so that a tribe could opt in and get that jurisdiction back that the U.S. Supreme Court has taken away because of the concerns about nonparticipation in tribal elections and the lack of so-called fair and neutral forum.

Much debate still needs to occur and I encourage that to be taken in the light of day and not in the context of appropriations riders where we cannot have a full and fair policy debate on some very real issues here.

Thank you.

[Prepared statement of Ms. Williams appears in appendix.]

The CHAIRMAN. Mr. DeLaCruz.

#### **STATEMENT OF JOE DELACRUZ, FORMER PRESIDENT, QUINULT INDIAN NATION, HOQUIAM, WA**

Mr. DELACRUZ. Mr. Chairman, members of this committee, Senator Inouye, and Senator Gorton. I've been sitting in these hearings for a long time. And I want to thank the Senator, Senator Gorton, for sending out the flyer and inviting a lot of the people here. I think it's important to point out to people that it was only three



decades ago that Indian leaders were able to come before a committee in Congress and tell our side of the story.

And although I have 5 minutes, I'm going to try to walk us through five minutes of history from our perspective of what happened to our people.

We have a history of bad legislation. And I have a prompter; one of my tribal members put a map up. There's bad legislation and good legislation. And we have a history of bad legislation.

In 1855, the Quinault Indian Nation signed a treaty with the U.S. Government called the Treaty of Olympia. Later on, an executive order set up—set aside the defining of the Indian reservation boundary. If you will look at that map. The treaty of the executive order said exclusively for the use and occupation of Quinault Indian people. In 1891, when the United States completed a survey of the reservation, they diminished 17,000 acres. That was the first violation of their own contract with us.

In 1887, the United States passed the Dawes Act, and it was called the "conquer and divide law," and was to make farmers out of the Indians. Again, Indian people weren't at the table.

Non-Indian people, if you look back from treaty times, are going to their congressmen, to their local politicians—I call it "from the courthouse to the White House politics"—saying to allot Indian people, Give them this land; 25 years they'll no longer be Indians.

Quinault Indian Nation, when the United States finished plotting that land in 1907—1905, by 1932 they had allotted the total reservation. The lake and the fire tower was all that was left for the tribe. There was a couple of lawsuits that opened the reservation for continued allotment when the tribe stopped it for forestry land.

Then we ended up with the Reorganization Act in 1934 to strengthen tribal governments again. The tribe gained back a few acres at that time. From the Dawes Act up through the RIA Act, even though that was allotted, people went to their congressmen and got similar contracts to be laid out in the 30-year contract. And there is a long history of that. Indian people didn't have a lot to say about it.

Indian people and non-Indians got along pretty well. Even we were logging together, working together, and fighting together. We never had any problems until 1953, when Congress passed Public Law 280 and we had Concurrent Resolution 108 to terminate Indian people.

And when that happened, States looked into moving jurisdiction into Indian country. That's the first time I came on the scene with a bunch of other young people. I think the Senator was a young man back then.

And the State of Washington passed HP-404 in 1957 to assume certain areas of jurisdiction into Indian country. In 1963, they did some events to further come into Indian country. And I put into my report by the American French Services Committee of the nightmare that was created when these conflicting jurisdictions because of Public Law 280, when you talk about law and order and some of the things that have been spoken about. But the other thing that happened, when you look at the swarm of reservations—now, we

were mostly all on Indian land, originally allotted. The executive order said all Indians. We had a lot of Indians there.

But after 1953, the Termination Act comes along, it appears that people that were pushing this law were lined up at the border. The Bill turned so much land in then years it was amazing. All of the land in white now belonged to timber companies and speculators and people that have come into the reservation. Tribes didn't have any say about it.

From 1953-65, the tribe lost and Indian people lost 50,000 acres. That's a story across Indian country. This could be any tribe's story that had a land base.

And where the real problems begin with this—it wasn't with the timber companies; we were suing them and they were suing us. We've been sued a lot, Quinault has. There's been a lot of lawsuits. It was the real estate developers. And we have a couple of plots that were approved back in the 1960's. The Quinault tribe was working with the Grays Harbor County. Regional Planning Commission was responsible for planning for that area. We were not avoiding but developing our zoning ordinances, but the county happened to approve some plots on the reservation in 1962, 1964, 1967, and 1969.

That's a later map there. There's some good legislation. This is bad legislation. I'll get to that.

That was—that was the turnaround since 1988 on—on return of the north boundary by Senator Evans. Do you see the change in the contrast to the map to try to purchase back 50,000 acres by people trying to help the tribe? Remember, I'm speaking about now the plat that was developed where the problems ended up for Indians and non-Indians alike.

The tribe objected to that plat because there was no sewer system planned on it. It's a slide area. It's clay. That why clam beaches are there.

But the county went ahead and approved the plat. The developers went ahead. By 1968, they sold—from 592 lots they sold 75 of them. The county stamped their septic tanks "Subject to approval of the Quinault Indian Nation." We couldn't approve those—approve those septic tank systems. And no septic tank systems; no development.

So they turned on the tribe as the bad guy. They were victims as we were victims. And they organized, Quinault property owners. I followed this—this—I call it an anti-Indian movement. Port Madison, Lummi.

The CHAIRMAN. Your 5 minutes are up, please conclude.

Mr. DELACRUZ. And it went on and on, anti-Indians because of what happened there.

And in researching this testimony, I found out that—and I don't know; it could be further facts for research for Gorton. I'm assuming he was part of the Green Acres Development Association that developed that—some of the property of those tribes. Because they couldn't develop most of it, those lots diverted to the company or the people there.

To me, the only ones that can solve that problem would be the ones, the tribes, put the best foot forward and let things happen. There would be 600 raw septic tanks run into our clam beaches.



Quinault Nation and county together, we worked with Grays Harbor and Jefferson County. We tried to cover all aspects of people's rights. We've never had a problem. We've been sued. There are suits by Seacrest, by Snow, by Harden for different things. We've never avoided people in court. There's due process.

Before tribal front, people appealed to the Federal court, Federal court sent things back to the tribal court. People could exhaust their remedies.

Some of these things I hear here today, I probably could go on, but I know you're——

The CHAIRMAN. All of your testimony will be included.

Mr. DELACRUZ. The other thing, Mr. Chairman, I want you to have, because I have a record of tribes in this State working with industry and environmentalists and everything else. What we do in TFW. This is another about 2-year project.

The CHAIRMAN. Okay. It will go in with your written testimony.

Mr. DELACRUZ. That's responsible governments working with other governments. I want that on the record.

[Prepared statement of Mr. DeLaCruz appears in appendix.]

The CHAIRMAN. Okay. Let's—let me ask a few—a couple of questions. I was looking—I'm going to start with Howard Richards—and the attachment that you also submitted on behalf of Chairman Frost. And the attachment is Tribal Economic Contributions to the Regional Economy and Human Service Programs in the area of Ignacio and La Plata County. And I was struck by the numbers, the amount of money; for instance, \$8 million tribal payroll, which includes Indian and non-Indian; \$11 million for a wastewater treatment that handles water for the town; charitable contributions. And it goes on and on. \$260,000 for Head Start and on. Great deal of money.

I have to tell you that I'm really struck with this amount of cooperation, because I'll bet every single one of them required some kind of a dialog with the—back and forth between the tribe and the town. I can't believe that you could go through all of that work to reach some kind of an agreement that's equitable for both the tribe and the community and you can't find a solution to the problem with law enforcement. Let me ask you—first of all, I'll tell you that as I understand it, there are less than 10 communities nationwide that are landlocked within reservations, less than ten. I may be wrong, but that's what I've heard.

There are some Indian tribes that are landlocked within others, like the Hopis are landlocked within the Navajos. Certainly there are Indian tribes surrounded by State lands and other lands, too. But only 10 or less communities that can't grow beyond the border that they have, whatever acreage they have, because they are landlocked. And obviously the ways to get in and out are through State highways or Federal highways or something else.

So let me ask you a couple questions, maybe both of you. In dealing with, first of all, hot pursuit. When you talk about law enforcement, what kind of an agreement does the town of Ignacio have with the surrounding counties? Or since that's only a few miles from the New Mexico border, what happens if a city policeman—you know, a car comes blowing through town and the city police-

man gets after him and follows him, with these other jurisdictions, like county and State and so on? What happens?

Mr. QUINTANA. If it's a non-tribal member, we can pursue through the hot pursuit.

The CHAIRMAN. How do you know—how do your policemen know when they are chasing a car?

Mr. QUINTANA. We don't.

The CHAIRMAN. So do they go ahead and pursue them or not pursue them?

Mr. QUINTANA. We pursue until we make a stop. And at that point in time, we have no jurisdiction if it's determined that it's a tribal member.

The CHAIRMAN. Does that mean you call a tribal policeman or do you let them go?

Mr. QUINTANA. Our current procedure and arrangement with the tribe is that we call the tribal officials, if it's a tribal member.

The CHAIRMAN. Let me ask Mr. Richards.

Does the tribe have any agreement with the State or tribal rule and regulations dealing with licenses? Having a valid driving license or insurance on the vehicle?

Now, the city manager said tribal members don't have to have licenses or insurance.

Mr. RICHARDS. Mr. Chairman, on the Southern Ute Reservation, any tribal member or Native American who is subject to jurisdiction of the tribal court through the State of Colorado is issued a driver's license to operate a motor vehicle.

The CHAIRMAN. Is it a State driver's license or a tribal driver's license?

If you'll identify yourself for the record. You might know more about this since it's a legal matter.

#### **STATEMENT OF THOMAS SHIPPS, GENERAL COUNSEL, SOUTHERN UTE TRIBE**

Mr. SHIPPS. Mr. Chairman, my name is Thomas Shipp. I'm a general counsel for the Southern Ute Indian Tribe, and I have been there for about 18 years.

With respect to driver's licenses, tribal members as citizens of the State of Colorado are entitled to apply for and obtain Colorado driver's licenses.

The CHAIRMAN. They take the same test as anyone else?

Mr. SHIPPS. Same test everybody else does. With respect to drive—use of their driving privileges off of the reservation, they are required just like any other citizen to comply with State law. Once they are in Indian country, however, unless the—unless Congress has authorized or unless the tribe has conceded or ceded its civil jurisdiction over the regulation of its members within the boundaries of that Indian country, then the civil laws of the State of Colorado do not necessarily have applicability. And in that regard there have been several cases that were referred to by the town in which—

The CHAIRMAN. What is the disposition if a Federal or State highway goes through the reservation?

Mr. SHIPPS. The answer is the same with respect to a Federal or State highway. With respect to the regulation of non-Indians, it



may have a much different result. But with respect to regulation of tribal members, that's—that is the result that would follow by strict application of law.

Now, there have been cooperative arrangements between the tribe and the State patrol, for example, in which there have been shared powers or recognition that a State officer can come in and testify or file a complaint in tribal court for that substantive violation.

[Prepared statement of Mr. Shipps appears in appendix.]

The CHAIRMAN. If a tribal member is off the reservation, as I understand your testimony, if he accumulates points for speeding or whatever, his license—his State license can be taken away?

Mr. SHIPPS. Certainly.

The CHAIRMAN. But then can he still drive without that State license on the reservation?

Mr. SHIPPS. Unless the tribe requires that a State license be obtained or—

The CHAIRMAN. What does the Southern Ute Tribe require?

Mr. SHIPPS. The Southern Ute does require that State driver's license be issued to have driver's privileges on the reservation.

The CHAIRMAN. So that means even on—if he has his license pulled off the reservation, technically he can't drive on the reservation unless it's pulled?

Mr. SHIPPS. Not without being in violation of tribal law. I believe that's correct, Mr. Chairman. If it's different—

The CHAIRMAN. Would that also apply within the community, too?

Mr. SHIPPS. I beg your pardon?

The CHAIRMAN. Does that also apply to a community within the reservation? If he's in Ignacio—

Mr. SHIPPS. Yes.

The CHAIRMAN[continuing]. If he goes through with an invalid license?

Mr. SHIPPS. No; because the—then you have a difficulty in the enforcement provisions and the State's civil regulatory authority. The tribal—driving without a license within the—within the boundaries of the reservation under tribal law may be something quite different than affirmatively delegating to State officials the authority to impose their own civil standards, even though the standards themselves may be identical. And that's where these issues become very complex.

The CHAIRMAN. If your people if your city police chase somebody to the New Mexico border, can you go into New Mexico under the hot pursuit law?

Mr. QUINTANA. I don't believe I'm qualified to make that statement, Senator. I've got legal counsel here if you—I could have him answer that.

The CHAIRMAN. I'm don't want to get too far into that area, but I would like you to provide that information to the committee on what kind of jurisdictional agreements you have, because there's something like nine jurisdictions, as I understand it, in that area: county police, State police, city of Ignacio, tribal police, and so on. I would like the committee to know more about that.

Susan, you are an attorney. Did you—one of the committee people asked, didn't you testify in the first hearing on taxation in Washington a few weeks ago?

Ms. WILLIAMS. No; I did not.

The CHAIRMAN. You did not.

Ms. WILLIAMS. But I have testified previously, I think a year ago, on this same subject.

The CHAIRMAN. Okay. You talked about waiving sovereignty. Do you've know how many times tribes have waived sovereign immunity? I understand it's a considerable amount.

Ms. WILLIAMS. Every single one of the tribes that we represent—and that's probably 15 to 20 tribes—have waived their sovereign immunity.

The CHAIRMAN. What is the advantage to the tribe to waive sovereign immunity?

Ms. WILLIAMS. There is a great advantage in commercial agreements because you have more interest in pursuing economic development on the reservation. But it's just that, a tribal waiver and a tribal choice.

The CHAIRMAN. That means if a company wanted to sign some contract or agreement with the tribe, that they will—they will be worried about lawsuits, so they might enter into an agreement with the tribe. If the tribe wouldn't waive, they simply wouldn't get the factory built.

Ms. WILLIAMS. That's correct.

The CHAIRMAN. I see.

Ms. WILLIAMS. These waivers are rather routine, Senator. I just want to say, ten years ago there was a lot of concern by tribes not waiving their immunity, just like there was concern with the United States and State governments about not waiving immunity. But that for at least 10 years now is not the trend. I—it's very routine to have a sovereign immunity waiver in commercial agreements and tribal law.

The CHAIRMAN. In the case of this—the *Seminole* decision, which was basically dealing with gaming. But I was wondering, can—can Congress waive State immunity?

Ms. WILLIAMS. The United States has the power to abrogate State immunity in certain contexts. What is very clear is that in the context of the Indian Gaming Regulatory Act, the Supreme Court has said that the States' sovereign immunity stands and there will be no lawsuits authorized against the States. That is a serious sovereign immunity problem. There's one for the Congress to tackle.

The CHAIRMAN. We're trying. It's tougher than this one, believe me.

And the last question, could you explain to the committee why legal distinctions concerning tribal members are not considered racial classifications in the Supreme Court?

Ms. WILLIAMS. In 1974, the U.S. Supreme Court in the case of *Morton v. Mancari* said that when the United States deals with Indian tribes, it is not making racial classifications, these are political classifications; therefore, judicial scrutiny is much diminished with regard to Congress's power to deal with Indian tribes.



The CHAIRMAN. Let me ask Mr. DeLaCruz. Does the Quinault Tribe include—I heard you say something about local—local bodies.

Does the Quinault Indian tribe include non-Indians in any government—governance policies or administrative bodies?

Mr. DELACRUZ. When the tribe—when the Quinault Nation was working out the planning—land-use planning for the Quinault Nation back in the 1960's was Grays Harbor original planning commission. We had non-tribal members on that planning commission. In fact, one of the gentlemen who chaired it for years was a non-tribal member.

And we still have non-tribal members on that planning commission and there are landowners on it. They are appointed by the tribe just like the county appoints their planning commission.

I asked a couple of them on the record to submit for the record their tenure and their experience on there. They've moved. They live in Montana and other places, but I've contacted them.

The CHAIRMAN. How do the Quinaults handle this—you have a checkerboard reservation. How do you handle the jurisdictional problem that the police have?

Mr. DELACRUZ. It's been a long history and a complicated one.

The CHAIRMAN. I don't want a long history answer.

Mr. DELACRUZ. The Quinault Nation has maintained that there is nowhere that Congress of the United States can show us that we gave up our power to govern our territory, meaning exterior boundaries. And there's been a lot of court cases over that and we won't get into them.

But we've maintained that and we try to, you know, keep in mind other people, landowners.

The CHAIRMAN. Does that mean you have—the Quinaults have no agreement with any outside jurisdictions?

Mr. DELACRUZ. We have agreements with the county. It's kind of interesting when you ask county people questions because things are political. We tried to work for years with the cross-deputization of sheriffs.

The CHAIRMAN. You cross-deputize now?

Mr. DELACRUZ. Well, sometimes politicians are like wind socks. It depends where the wind is before they'll go into the agreement. We've had them off and on.

The CHAIRMAN. Okay. I think that—I've probably used up more time than I should have.

Mr. INOUE.

Senator INOUE. Thank you very much. Just for clarification now. As you know, we're hearing—this hearing is on property rights and civil rights and the impacts of what S. 1691 would have upon them, these two rights. Listening to the testimony of Ignacio town and the Southern Utes, it's not quite clear.

Are you in favor of the passage of S. 1691?

Mr. QUINTANA. Are you speaking to the town, Senator?

Senator INOUE. Yes.

Mr. QUINTANA. We did not come here in support of that bill. We are in support of establishing public policy that will work toward helping us live together. Whatever that policy may be, if it simplifies things, it would be great. It's a very difficult issue and I—we certainly don't claim to be any kind of experts on the complex-

ities of tribal law, but whatever you folks can do to simplify our abilities to work and have better relations would certainly be appreciated.

And, no, we are not here to formally support the bill.

Mr. SHIPPS. Mr. Chairman, the Southern Ute tribe opposes 1691 in its written format.

Senator INOUE. Miss Williams, can the State court assume jurisdiction over tribal lands that are held in trust by the United States Government if the government of the United States doesn't waive the sovereign immunity?

Ms. WILLIAMS. No; they cannot.

Senator INOUE. Thank you. In the interest of time, Mr. Chairman, I will ask no more questions.

The CHAIRMAN. Senator Gorton.

Senator GORTON. Chairman Cagey, you have in your written testimony about half a page on the subject of tort claims. And the first sentence of one of those paragraphs reads: "This New Tort Claims Procedure"—that is, S. 1691—"ignores the fact that Congress has already effectively dealt with the problem of tribal government liability for tort damages." And then you go on with certain explanations of that.

Does that mean that the Lummi Tribe can—can be sued in a Federal court for any tort in which the United States could be sued under the Tort Claims Act?

Mr. CAGEY. Well, I don't claim to be an attorney, Mr. Gorton, but I—but we do know—what I do understand as a councilman is that we are covered with the Tort Claim Act, and why we're covered through that is that we have 638 contracts and we have a self-government compact, and within that we do have that coverage.

I do have my attorney here so she can help me answer this question. But what we do understand, Senator, is that, yes, we do have insurance and people can have the ability to sue the tribe.

Senator GORTON. To the same extent that they could sue the United States under the Federal Tort Claims Act?

Mr. CAGEY. Can I have Sue help me answer that.

Senator GORTON. Sure.

Would you identify?

Ms. WILLIAMS. The answer is that the insurance carrier can be sued in any court of competent jurisdiction. It cannot raise the sovereign immunity defense.

Senator GORTON. And is that coextensive with—

Ms. WILLIAMS. With the types of liability, yes.

Senator GORTON. The types of liability that are under the Federal Tort Claims Act?

Ms. WILLIAMS. Yes.

Senator GORTON. So for all practical purposes insofar as this bill relates to tort claims, the tribe would be no worse nor no better off if the bill were to pass.

Ms. WILLIAMS. Right. Yes, the problem with—Senator, with 1691 is that it goes far beyond 638, because 638 limits the tribal liability for tort to the insurance coverage and your bill would not do that.

Senator GORTON. All right. So they have certain limitations on liability, but those are limitations on liability that don't apply to the United States under the Federal Tort Claims Act?



Ms. WILLIAMS. There are many, many limitations on Federal liability.

Senator GORTON. But 638 limitations.

Ms. WILLIAMS. They are very similar.

Senator GORTON. Pardon? Mr. Cagey, I thought, answered that question.

Mr. CAGEY. You know, Senator, I was—I just was concerned over the remark that was just made, you know, that this bill wouldn't make any difference. What we understand with this bill is that—it puts the tribes really—assets and things at risk.

If we would have had some of our children standing up here looking at what was happening is that it's the tribal future, I think, that you are putting at risk with this bill. And what we'd like to come up with—and we've been talking to different people within the—in your—your office and within this committee—is that there has to come with some better solutions here to deal with conflict. And I heard it come from each one of the Senators up here, is that there is a lot of conflict and misunderstanding of the tribal government. There is a lot of misunderstanding of what—who the people—Indian people are.

This bill does not do that. This is bad legislation and there's got to be better solutions to deal with this issue.

Senator GORTON. You do not object to the tribe being held responsible for its actions in—for its actions in tort.

Mr. CAGEY. No, sir; we have high integrity for our tribal government. We have high integrity for our tribal court.

Senator GORTON. On the next page of your testimony, on a separate subject, Chairman Cagey, you have a table listing under the title "We Are Not Tax Evaders", and listing payments in 1997, you know, of taxes under five categories there. Aren't most or all of those taxes Federal taxes?

Take number one, the employer portion of payroll taxes. Those are Social Security taxes, are they not, and perhaps unemployment compensation taxes, unemployment taxes?

Mr. CAGEY. That's true. One of the things we're responding to, in our testimony here, is that—you know, we were back in the hearing of March 11th and we watched the Petroleum Marketing Association, we watched the convenience store owners call the tribes tax evaders. We became very concerned that the perception that these property owners are creating about tribal governments is that we don't pay our taxes.

And the point we are trying to make here is that the tribes do pay taxes. And there is a lot of misunderstanding amongst the general public; there is a lot of misunderstanding on the Hill. That tribes do pay their taxes.

Senator GORTON. I don't think anyone is—held the proposition that the tribes don't pay their Federal taxes, because of course they have no immunity from the Federal tax collector; they do have immunity from the State tax collector. And I was just wondering whether any significant portion of this \$2 million worth of taxes paid last year was paid to the State as against the Federal Government.

Mr. CAGEY. Well, as you can see—to the State?

Senator GORTON. Yes.

Mr. CAGEY. Well, as you see with the fuel tax, we have \$308,000 we paid for the fuel tax.

Senator GORTON. Well, there's both a Federal and State fuel tax.

Mr. CAGEY. That goes back to the State. And with the cigarettes, we have over \$180,000 that was paid back to the State through the stamp that I think that we have to have in selling the cigarettes.

Senator GORTON. Okay. So in your tribe at least, you put the State tax stamp on all of the cigarettes that you sell to non-Indians?

Mr. CAGEY. That's correct.

Senator GORTON. Very good. Then you're certainly not in violation of the law there. And under those circumstances, the loss of sovereign immunity to the Lummi Tribe for payment of the State taxes would have no effect on it. You wouldn't be paying any more.

Mr. CAGEY. That's correct.

I think the other point we wanted to make here, Senator, is that, you know, all tribes pay this tax. We're talking about a small minority of tribes that have some problems in getting to the cooperation and getting to the table and getting to the State to deal with the government-to-government efforts in good faith.

Senator GORTON. Well, that seems rather curious, Chairman Cagey, when the newspapers have reported in the last 6 weeks a huge number of seizures of non-taxed cigarettes that—headed for Indian reservations in the State of Washington.

Mr. CAGEY. Do you know that they were going to reservations?

Senator GORTON. Yes.

Mr. CAGEY. Do you know?

The CHAIRMAN. If I would interject: Our last hearing dealt primarily with taxes and contracts.

Senator GORTON. Yes; that's a—that's appropriate. I don't think—

The CHAIRMAN. Well, no, I was just going to add—

Senator GORTON. I don't think the prosecutor of Yakima County would agree with the statement that all tribes are paying for it.

The CHAIRMAN. But some States did testify last time that there may be as much as \$65 million a year not being paid to States. That shouldn't be a catchall, that all tribes are not paying.

Senator GORTON. Evidently, according to Chairman Cagey, he is paying, and I commend him for that.

One other set of questions. Is the Lummi Tribe a party to the shellfish litigation that the previous panel discussed?

Mr. CAGEY. Yes.

Senator GORTON. And in—connected with the testimony of Mr. Montgomery there was a table apparently taken from that—from that litigation about Federal Government support of Indian tribes who were parties to that litigation, based on audits for the years either 1991 or 1992. It indicates for your tribe that the Federal Government payment to the tribe was something over \$11 million. At the time there were 531 households on the reservation.

Would you say offhand that's an accurate—that's accurate? I presume it came from—from you all. Would that be approximately the level of support from the Federal Government for the tribe in the early 1990's per year?



Mr. CAGEY. I don't understand your point, Senator. I guess I'm—

Senator GORTON. My question is how much money do the Federal taxpayers, the Federal Government, pay to the tribe for the— the conduct of tribal governmental and social and other activities a year? Is the \$11 million figure here for 1991 roughly accurate?

Mr. CAGEY. That's roughly accurate, yes, sir.

Senator GORTON. And is it out of that—

Mr. CAGEY. Say that again, Senator. I'm sorry.

Senator GORTON. Is it out of that payment that you pay for your attorneys in that shellfish litigation?

Mr. CAGEY. Some of it, yes, sir. And—yes.

Senator GORTON. And does—does the Department of the Interior also represent the position of the tribes in that litigation?

Mr. CAGEY. Well, I'm getting into legal sort of questions here, Senator, and I'm going to have to defer to Sue and Judy here to help me answer these questions.

Senator GORTON. Okay. Well, I'd be happy to have them do that.

Ms. WILLIAMS. Senator, if I followed the first question, it was how much does the Lummi Nation get. And you suggested a figure, and I guess—we don't have that information here. But let me just say that assuming it was 11 million, under the self-governance compact, that is money that the United States is paying the tribes to do the United States' job. Okay? That's what's going on here.

And so we—we get the money that you would spend for your officials doing your job protecting trust resources and it's just given to the tribe under the self-governance legislation does it itself.

Senator GORTON. That's a novel description of what the money goes for, but I'll accept it as your view.

My question simply was whether or not portions of that money are used for the legal representation, and specifically in this shellfish case, and whether or not a similar position is also taken by the lawyers of the Department of the Interior.

Ms. WILLIAMS. Again, we don't have any actual figures of how much of that—whatever money—

Senator GORTON. I'm not asking how much it was. I asked whether that's the source for the payment of the lawyers.

Ms. WILLIAMS. No; typically tribes have to compete for very, very scarce Federal dollars to get Federal money for attorney fees. Those are separate accounts and those are not—they don't come necessarily as part of that package.

Senator GORTON. I'm sorry I didn't ask this question of the previous panel.

But my point was that these sovereign nations have their lawyers paid for by the Federal Government; the shellfish owners and the property owners pay for their own lawyers out of their own pockets.

Ms. WILLIAMS. And that's there because of the trust resources that the U.S. Government is responsible for.

Mr. SHIPPS. Senator Gorton.

The CHAIRMAN. Do you have a comment to add to that?

Mr. SHIPPS. Senator Gorton, on behalf of the Southern Ute Indian Tribe, I can say that in situations where the tribe's opinions have differed with those of the Department of the Interior, the

tribe has been forced to spend millions of dollars of its own funds not only against other litigants but also against the United States as well.

And it's also very, very difficult to sue the United States in those contexts because of the United States' sovereign immunity.

Senator GORTON. But not as difficult as it is for an individual citizen to sue the Southern Ute Tribe, which is impossible.

The CHAIRMAN. Just for the record, identify yourself, too.

Mr. SHIPPS. Tom Shipps.

Senator GORTON. Miss Williams, you did testify I guess about 1 year and a half ago before this committee on similar issues. I didn't find this testimony in your—in your formal written statement here today, but I want to ask you whether or not 1½ years later this still represents your point of view.

Is your policy point of view, as against your legal point of view, that—that you think that tribes should have unquestioned sovereignty over all persons on their reservations and their territories, criminal and civil?

Ms. WILLIAMS. That's correct.

Senator GORTON. Okay. I just wanted to get that in context for the—for the audience here.

In other words, that they should be and for all practical purposes, not the—the domestic dependent sovereigns that the Supreme Court has described but full sovereigns inside their own territories?

Ms. WILLIAMS. Well, when tribes signed treaties, the State of the law was that States had no jurisdiction whatsoever on Indian reservations in the United States and the tribes had exclusive jurisdiction. We think that makes sense. That's the back to basics that this Congress should reinstate. It's just too difficult, Senator, you can well imagine, to have three or four sovereigns trying to govern land use and policies of water use, et cetera, on Indian reservations. Tribes have to have that primary authority.

Senator GORTON. So there should only be one sovereign?

Ms. WILLIAMS. That's correct.

Senator GORTON. Now, how does that accord with Washington with the treaties signed with the tribes here in the State of Washington which—all of which say, I believe—the—said—said the tribes—that the tribes agree to abide by the laws of the United States? Is that not—is that not correct?

Mr. DELACRUZ. Well, Mr. Chairman, there's a—the question is on cost of legal stuff. I have a chronology of cases Quinault has been in since 1880 I want to submit for the record. And we are paying for the attorneys, the tribe protecting itself on different issues and rights that are challenged since about 1880. The only time we got help is when we convinced the United States—they had—as a trustee they had to help us when they came into the *Boldt* Decision. We were paying for it.

Senator GORTON. I've got two more questions—one more question, I think for Mrs. Williams.

You correctly point out that the waiver of sovereign immunity on the part of the United States and the States is not total. It applies in some areas and does not apply in others.



Would you accept a bill of this sort at least related to sovereign immunity from suit in the courts of the—in the Federal courts if it were precisely coextensive with the waiver of sovereign immunity of the United States for suits against itself?

Ms. WILLIAMS. No, Senator; I think that Indian tribes should be given the opportunity to make those decisions themselves, just like the United States and States make those decisions for themselves.

Senator GORTON. And finally, you based much of what your—your position on the nature of tribal treaties. Would it be appropriate to treat differently Indian tribes that are not treaty tribes, that have no treaty relationships with the United States at all?

Ms. WILLIAMS. U.S. policy has long, long gone beyond that and has treated Indian tribes throughout the country in a very similar fashion with or without treaties.

Senator GORTON. So we're not dealing with something that relates in treaties and we're dealing with public policies?

Ms. WILLIAMS. In many, many instances we are dealing with something that relates to treaties.

Senator GORTON. But there should be no distinction?

Ms. WILLIAMS. There should be no distinction. The same kind of honor, the same kind of respect. In fact, the court cases have found that the United States mysteriously took Indian land into trust with or without treaties. So that's your obligation now.

Senator GORTON. Thank you.

The CHAIRMAN. And I thank this panel. We have to—while the next panel is being seated, the recorder is going to have to change her tape. So I'll go ahead and call you to the witness table.

And thank you for appearing, this panel.

The panel, III-B—

If you keep the discussion down, please, so we can seat the panel.

The panel will be Colonel Caleb Johnson—my apologies. We skipped one here.

This will be Michael Pablo; Sue Shaffer; Roy Bernal; and Mary Wynne.

As with the other panels—we're only about halfway through, so we're going to have to move this along a little bit.

This one will deal with civil rights. And we'll start in the order that I said, and that will be Chairman Pablo, followed by Sue Shaffer, followed by Roy Bernal, followed by Mary Wynne.

And if you would proceed. And all of your testimony will be included in the record, if you could abbreviate your comments.

Before we do, we need to have order. I don't want to clear the room, but we will if we have to. We need to have it quiet in here so the people who are testifying can be heard.

Chairman Pablo, please proceed.

#### **STATEMENT OF MICHAEL T. PABLO, CHAIRMAN, CONFEDERATED SALISH KOOTENAI TRIBES, PABLO, MT**

Mr. PABLO. Mr. Chairman and Mr. Vice Chairman, the Honorable Senator Gorton.

I'm Michael Pablo, Chairman of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana. The first—

The CHAIRMAN. Pull that microphone a little closer.

Mr. PABLO. Sorry.

Michael Pablo, Chairman of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana.

And I apologize to the committee. When my testimony was copied, they copied an earlier draft and not the final, so if you kind something to grill me on, pretend it's not in there.

Mr. Chairman, in 1942, the Ninth Circuit Court of Appeals ruled that the Flathead Tribes owned the beds and banks of Flathead Lake. And then in 1982, the Ninth Circuit again confirmed the tribes owned the beds and banks of Flathead Lake. And in order to implement those regulations, the tribal council at that time appointed a seven-member board, four tribal members and three non-tribal members. The tribal—non-tribal members picked at that time were the Lake County commissioners. Tribal council felt if the Lake County commissioners were there, non-Indians would have an opportunity to have an election for the non-member participants and regulation of tribal property.

Also we—as a Stevens Treaty tribe, we have the exclusive right of taking the fish on the reservation. In order to protect that habitat, we have an Aquatic Lands Conservation Ordinance 87A. That's the regulation—regulatory board for that is the same board as the Shoreline Protection Board. Since the implementation of those two ordinances, Shoreline Protection has approved 1,707 permits for structures on the south half of the lake. 1,601 of those permits are to nonmembers. On the Aquatic Lands Conservation Ordinance, there have been 891 permits issued, 267 to non-members, 156 to other tribal programs, 39 to State agencies, 48 to counties and towns, and 286 to other government agencies. And there is no charge for those permits.

When we contracted under Public Law 93-638, Mission Valley Power of the electrical distribution system on the reservation, which distributes power to all homes and businesses on the reservation plus some off-reservation, we established a utility board and a consumer council for operation of the utility and for setting regulations for rates. Those are our nonmember and member participants on those boards.

We also have cooperative law enforcement agreements between the tribes, State of Montana, all cities on the reservation, and with three counties on the reservation except one. Lake County refused to the sign that agreement. This agreement went into effect in 1994 and provides for cross-citation authority, stop-and-detain provisions, and emergency powers for law enforcement officials. Our tribal officers are also cross-deputized with the Montana Highway Patrol. This agreement is working very well as evidenced by the enclosed article from the Missoulian of April 26, 1996. As stated by Captain Richard Chase of the Montana Highway Patrol's Missoula office: "The program is working exceptionally well for us."

Mr. Chairman, knowing that government action will necessarily impact activities permitted on the reservation and in recognition of the fact that many non-tribal members live on our reservation, we have taken steps to provide everyone the opportunity to play an active role in promulgation and implementation of our governmental regulations and ordinances.



Our Tribal Administrative Procedures Ordinance provides for direct public participation in the regulation process, access to the governmental information similar to the Federal Administrative Procedures Act, and provides anyone who believes an agency has caused them injury the right to appeal that action to an administrative law judge. We have repeatedly changed proposed tribal regulations because of the non-Indian input in the public review process.

We have utilized tribal funds to greatly expand and improve our justice system by development of an independent prosecutor's office, a defender's office. And all of those are attorneys. We provide counsel for civil and criminal matters. We've expanded our appellate court. The appellate court has three panels of attorney justices who are all licensed by the Montana bar. The three attorneys are non-Indians and we have two tribal members who are lay justices. In 1995, we also adopted Tribal Governmental Immunity Act, an ordinance which provides limited waivers of immunity for injunctive, declaratory, or mandamus relief for tribal government infringement of any civil and constitutional rights arising under the tribal constitution and bylaws for any civil rights act or so forth.

And Mr. Chairman, we are very familiar with the distrust, anger, and fear associated with lost property and property rights. When we signed the Hellgate Treaty of 1855, we ceded to the United States 21 million acres which was known as Western Montana and reserved the reservation for ourselves. However, since that time, the Flathead Allotment Act has been amended approximately 80 times and each time we lost more and more. So with that, Mr. Chairman, I'd like to request the committee carefully consider this issue and to consider tribal sovereignty by giving tribal governments the resources necessary to build more protections into government and not to tear down tribal sovereignty by removing sovereign immunity. Mr. Chairman, let's continue to follow President Ronald Reagan's Indian policy statement of 1983 to strengthen tribes

By removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies. Tribal governments, Federal Government and the private sector will all have to play a role. Our policy is to affirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.

I'll conclude by saying I've also included for the record a proclamation from our Governor, Marc Racicot, recognizing tribal sovereignty —

The CHAIRMAN. No objection. That will be included in the record. [Prepared statement of Mr. Pablo appears in appendix.]

The CHAIRMAN. Chairperson Shaffer.

#### **STATEMENT OF SUE SHAFFER, CHAIRPERSON, COW CREEK BAND OF UMPQUA TRIBE OF INDIANS, ROSEBURG, OR**

Ms. SHAFFER. Thank you for allowing me to speak here today on behalf of the Cow Creek Tribe —

The CHAIRMAN. You have to speak right into that microphone, as we've found.

Ms. SHAFFER. On behalf of the Cow Creek tribal government and to be a voice for other tribal governments as well. However, it's

saddens me, saddens me greatly to be here to testify today under such bleak circumstances.

S. 1691 forces tribal governments to step forward to defend themselves against this brutal attack on tribal sovereign immunity.

I wish to thank you, Chairman Campbell, for conducting these hearings which allows the voice of Indian country to be heard. I ask at this time that my oral comments be entered into the record speaking in opposition of S. 1691.

I want to quote from our Honorable Senator Mark Hatfield from the great State of Oregon in a speech that he made in 1987, which was honoring our Tribal Chief Miwaleta, and I quote:

There has been justice denied for many generations; stains on the history books of our Nation which relate to the Cow Creek Band of the Umpqua Tribe...but the wonderful thing is, even though we cannot remove those stains on our history, we can rewrite history. And we have the freedom, and the privilege, and the responsibility to rewrite history to correct the wrongs of the past, to compensate through restitution and other methods that are open to us for the things that have happened in our country and in our history for which we are not very proud.

Presidents Nixon, Carter, Reagan, Bush, and now President Clinton have all recognized and strongly supported the rights of sovereign tribal governments.

In an attempt to erase the past injustices, President Nixon was a driving force behind self-determination for Indian people. Tribal governments were included in the humanitarian efforts of President [sic] Carter.

After 128 years of the U.S. Government ignoring the Cow Creek Band of the Umpqua Tribe of Indians, President Reagan signed into law our Restoration Act in 1982.

President Bush further recognized tribal sovereignty in his March 3, 1992, proclamation stating, and I quote:

This year gives us the opportunity to recognize the special place that American Indians hold in our society, to affirm the right of Indian tribes to exist as sovereign entities, and to seek greater mutual understanding and trust.

President Clinton in his strong support invited tribal leaders to the White House, affirming the government-to-government relationship between the U.S. Government and sovereign tribal governments.

The actions of our past five presidents demonstrate their awareness of the need to lift up the conscience of America as it relates to Indian people and their sovereign governmental rights.

S. 1691 has been said—stated to be the American Indian Equal Justice Act, as if sovereignty is not workable between tribal governments and other levels of government.

Cow Creeks are proof that sovereignty works. It works. We have negotiated numerous contracts and agreements with the EPA, the State of Oregon, and the Tribal State Compact, the Oregon State Police for regulatory oversight, the Oregon Department of Transportation, the Douglas County Building Department, Douglas County Forest Protective Association, the city of Canyonville, local fire departments, and countless vendors, builders, and service contracts.

At the present time the tribe is very active in supporting a child care center in our small town. We're working with not only our city but the surrounding cities to finish a much needed child care and learning center.



In addition to these formal agreements that we have had, our reputation has allowed this tribe to conduct many sizable business transactions, including property purchase on a handshake and our word.

Again, I State sovereignty works. Those who are elected to the United States Senate hold a high office, and each and every one must be responsible to the needs and the rights of every citizen, and that includes the rights of Indian people.

In Senator Hatfield's statement, he mentioned the stain on the history of America. I would hope and truly pray, truly pray, that we not darken that stain but rather that we eliminate it.

I must speak in opposition to S. 1691.

Thank you.

[Prepared statement of Ms. Shaffer appears in appendix.]

The CHAIRMAN. Chairman Bernal.

### **STATEMENT OF ROY BERNAL, CHAIRMAN, ALL INDIAN PUEBLO COUNCIL, ALBUQUERQUE, NM**

Mr. BERNAL. Chairman Campbell and Honorable Members of Senate Committee on Indian Affairs.

My name is Roy Bernal. I'm the Chairman of the All Indian Pueblo Council, the prehistoric alliance of the 19 Pueblos located in what is now the State of New Mexico. I appreciate the opportunity to appear before the committee to share some of the observations and concerns of the Pueblo tribes of New Mexico. I am not going to go over verbatim with my statement. I will be skipping because—for the sake of time.

The Pueblo peoples have lived in the Southwest region the North American continent for thousands upon thousands of years. Since time immemorial, our peoples have lived in well-organized communities. When the Spanish colonizers entered the region in the 1500's, there were well over 40 independent Pueblo Nations living along the great Rio Grande River.

The significance of Indian self-government was acknowledged from the outset of European contact. The Pueblos hold as evidence of their sovereign powers, the Canes of Authority, presented to the autonomous Pueblos by the governments of Spain in 1620, by Mexico in 1821, the United States of America in 1863, and the State of New Mexico in 1990—1980. The Lincoln Cane, presented to the Pueblos in 1863 by the United States, symbolizes to all of the world the perpetual acknowledgment and commitment of the United States to honor our sovereignty, protect our resources, and enhance our welfare, in the spirit of trusteeship, honesty, and equality. And likewise, our Pueblo Canes are symbols to our peoples that all power and authority exist in their own form of government, that their government is responsible to the people, and that they own allegiance to the United States of America.

The existence, independence, and sovereignty of Indian government was recognized not only in the U.S. Constitution but also in various commonwealth documents predating the Constitution, such as the Articles of Confederation.

In the *Wheeler* case, the U.S. Supreme Court observed that tribal sovereignty does not consist of delegated powers granted by express acts of Congress, but rather of "inherent powers of sovereignty

which has never been extinguished." For Congress to contemplate interfering with his ancient doctrines, great caution should be employed.

Doubtless certain persons have complained about having being treated unfairly by tribes and have asked Congress to step forward and take drastic action. A few disgruntled persons should not carry the day. We submit that these complaints are unique and not the status quo.

Let us remember, in any controversy or case there are at least two sides. Any non-prevailing party is usually angered and sometimes embittered. He will continue to attack his opponent, his opponent's lawyers, and his own lawyer. He will attack the system as being unjust, immoral, and unconstitutional. He will allege unblushingly that the trier of facts have been bribed, is in league with the devil, or both.

To heed a few disappointed persons such as those complaining to Congress and other authorities with their wrongful assertions or inevitable exaggerations, would Congress upset existing tribal sovereignty, the concept of self-governance, and the necessary independence that tribes enjoy? Are non-tribal courts better, fairer, more learned, better informed, more conversant with Indian tradition? The answers to these queries are, of course, a resounding no.

It is a sad fact that multitudes of persons who live—who believe they have been treated fairly and even-handed by tribes do not feel compelled to come forward.

Without any command from Congress, tribes have already dealt with issues of property rights and civil rights. Because of the diminishing Federal dollars, the New Mexico Pueblos must pursue businesses aggressively to generate funds to provide services to their members and to protect tribal lands. Our businesses include gaming enterprises, Indian arts and crafts shops, tribally owned truck farms with patrons harvesting for themselves, and other retail operations. Business judgments are exercised on the basis of practicality rather than Congressional mandate. A member of the public patronizing a tribally-owned business, who suffers an injury, typically a slip-and-fall instance, expects care. We clearly understand the denial of responsibility involved in the denial of property right. The insurance companies providing liability coverage are instructed by tribes to deal with such cases and not raise any immunity defenses. If these cases are not settled amicably—the vast majority are—they are arbitrated and the arbitrations are enforced by tribes. We submit that Congress should acknowledge that the tribes have a sense of priority which is at least equal to that of the United States. One—one need not speculate as to the harmful effects of removing sovereignty. From 1968 to 1978, the United States Tenth Circuit Court of Appeals adopted the view that the 1968 Civil Rights—Indian Civil Rights Act permitted such suits against tribes by aggrieved plaintiffs alleging violation of civil or property rights. Lawyers artfully characterized many causes to fall into these categories.

During this decade, brought to close by the holding by the Supreme Court in *Santa Clara Pueblo v. Martinez* case, there were—there was a proliferation of cases in Federal courts which assumed immediate jurisdiction (the plaintiff not having first to proceed



through any other court systems, including tribal court, the logical forum). These matters included contract disputes, routine personnel matters, brief incarcerations by police, et cetera.

I'm sorry that we have a time limitation to this. But the proposed forum of S. 1691 would—would involve the condemnation of tribal properties by other governments ranging from the United States to local utilities. Not only would tribal lands be threatened, but also the integrity of the boundaries would be ignored. And I would like to conclude by saying that Congress must not strip tribes of tribal immunity. This would be the antithesis of the government-to-government relationship, the announced national policy of the United States, and would be an exercise of unbridled power over reason.

I would like to say officially, too, that the All Indian Pueblo Council of New Mexico adamantly opposed this particular legislation.

Also I would like to conclude further by saying, in all fairness, I think it would be good if the committee and the Chairman would consider holding a hearing in the Southwest so that you all can get a different perspective on these issues.

Thank you.

[Prepared statement of Mr. Bernal appears in appendix.]

The CHAIRMAN. Normally—I might tell you that normally there are two hearings done, one in Washington and one somewhere in the field, but because of the magnitude of this bill, we've expanded that to three. We probably won't be able to put another one in because we have some budgetary constraints, too, with the committee traveling. But certainly any additional information from people in the Southwest will be included in the record if they will send that in.

Judge Wynne.

#### **STATEMENT OF MARY WYNNE, TRIBAL JUDGE, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, NESPELEM, WA**

Ms. WYNNE. Good afternoon, gentlemen. My name is Mary Wynne. I'm the Chief Judge of the Colville Confederated Tribal Court. And I want to start out by extending you greetings from the National Indian Court Judges Association, where I'm the Vice President, and the Northwest Tribal Court Judges Association, where I am the President.

I'm here today to speak against S. 1691 and to present my views on property and civil rights in Indian country. And I want to start out by saying I only have five minutes. I am a lawyer. I'll admit that. And I am an Indian, and that means that I'm incapable of saying anything in 5 minutes, even though I tried a bunch of times last night in front of the mirror.

I'm also a judge, and so I prefer to approach monumental issues, which I consider this one to be, based on the facts and not on individual war stories.

So the net result of that, Mr. Chairman, is that you have a huge packet of materials in front of you that I personally put together and sent to you containing those facts. I'm going to touch on those

very, very briefly, and then when that light turns yellow, I'm going to turn to something else.

The facts are that tribal courts are dealing with civil rights and property rights every day and they are dealing with them as fair and impartial forums, capable of adjudicating justice in Indian country.

Contained within your packet is the case count of the Colville tribal court. It's one of 350 tribal courts, but you can see from that case count that the Colville tribal court handles 3,000 to 4,000 cases a year. Of those, 30 percent handle cases involving non-members those are folks who vote with their feet. They come into tribal court and they appear and they adjudicate their issues and resolve their disputes, and they include the State of Washington, who comes in and appears in the Colville tribal court. Of that 30 percent, the case count that my clerks did showed that about 50 percent of those non-members are winning.

Included also in your packet is the system—that by which we pay for adjudicating those disputes. The Colville Tribe gets about one-sixth of the budget of the nearest county court to adjudicate those cases and a fraction of the budget of the nearest Federal court.

If, in fact, you are considering turning over the caseload at Colville to the nearest county court, you better be considering turning over more than \$1 million to them to handle those cases and over \$4.6 million to the nearest Federal court, as well as answering to your constituency, who will have to travel farther to get those same disputes adjudicated and who were perfectly willing to come into court before and get them handled.

You also have in your packet the Colville Tribal Civil Rights Act and the cases interpreting and applying that. Under that act, you will see that civil rights are alive and well and being adjudicated every day in tribal courts. You're going to see where the court awards both civil and criminal judgments based on that Civil Rights Act. You're going to see where the court has certified class and enjoined the Colville Tribes from raising rents on their tribal housing. The court has instituted employees back into work. The court has granted money damages to employees. The court has litigated cases against the Colville Tribes and is able to provide impartial—an impartial forum that provides justice, including non-members. And I do mean the community and not just members.

And finally, when you're looking at your package—that light turned orange; I'm going to switch—the one thing that you need to remember out of all of the things that I've said is that I did not get an opportunity to say nearly enough.

And when I was standing at my archaic fax machine at the tribal court trying to make it get all of those pages through to—to Senator Campbell and praying that they would, it occurred to me that I had not said nearly enough.

The packet that I put together for you, gentlemen, contains the stories of the people who walk through that tribal court. And it does so through the cases, through the laws, and through the opinions that are in that packet. I attempted to put together a packet that would allow you to choose to stand in a tribal courtroom for 1 day, to walk in the moccasins of a tribal court judge for 1 day.



And it occurred to me after I was faxing it off, that it wasn't enough, so I searched and searched and I found a quote that I want you to keep in mind as you review that packet. And it was from a—an address to the New York Bar Association, which is a strange place to get a quote, but it applies equally well. Here it is.

We expect courts to encompass every reach of the law and we expect the law to encircle us in our earthly sphere and to travel with us to the alien vastness of outer space. We want courts to sustain personal liberty, to end our racial tensions, to outlaw war, and to sweep contaminants from the globe. We ask courts to shield us from public wrong and private temptation, to penalize us for our transgressions, and to restrain those who would transgress against us, to adjust our private differences, to resuscitate our businesses, to protect us prenatally, to marry us, to divorce us, and if not to bury us, at least to see to it that our funeral expenses are paid.

Tribal courts are no different than any other court. We are doing our best.

When you are considering S. 1691, I ask you to consider the fact that you have the power to start a national dialogue related to tribal courts and what can be done with the limitations that they face every day in trying to adjudicate the disputes of all of the people who walk in the courthouse doors.

When you are considering that, look at the solutions contained in your packet, fund them adequately, enact legislation that supports them, not disembowels them. And in that way, you will justice in the Indian country throughout this Nation.

Thank you. And I'll be pleased to answer questions.

[Prepared statement of Ms. Wynne appears in appendix.]

The CHAIRMAN. I'll pass my questions in the interest of time.

Senator INOUE.

Senator INOUE. All of you agree that sovereignty works, that there is no need for passage of additional legislation such as S. 1691?

Thank you.

The CHAIRMAN. Senator Gorton.

Senator GORTON. Mr. Pablo, you indicate—I'm on page 4 of your—of your written testimony—that your tribal government has exercised a limited waiver in connection with civil rights actions?

Mr. PABLO. Yes, sir.

Senator GORTON. Does that mean under some circumstances at least, you allow an appeal from a tribal court to a Federal court based on the Indian Civil Rights Act?

Mr. PABLO. What we do is, anything that goes through after the waiver of the sovereign immunity under the ordinance, that can be tried through tribal court, and from tribal court, it goes to our appellate court system. It does not go into the Federal court.

Senator GORTON. Oh, I see.

So that you have not waived sovereign immunity so as to be subject to suit or appeal outside of the tribal court system?

Mr. PABLO. Correct. Just like the State, within the State court system, we as the tribe deal with that in the tribal court system.

Senator GORTON. I see. Thank you for that clarification.

Chairman Bernal, you are—I'm on page 5 of your testimony—when you speak directly to immunity, you talk about the fact that the Tenth Circuit for roughly 10 years interpreted the Indian Civil Rights Act as—as authorizing lawsuits and—in Federal court until the Martinez case was decided, correct? Do you see where I'm at?

And you say parenthetically there that—first you say that there was a proliferation of cases in Federal courts. And then the plaintiff not having first to proceed through any other court system including tribal court the logical forum.

Would your view on enforcement of the Indian Civil Rights Act and, for that matter, the Bill of Rights in Federal courts be any different if the—if the complaining party first had to go all of the way through the Indian court system itself?

Mr. BERNAL. Senator, I'd like to answer that question, but I'm not a lawyer and I think you're phrasing this question a certain way, so I'd like to turn to someone else—

Senator GORTON. Sure.

Mr. BERNAL [continuing]. And perhaps someone else that can help me respond to that.

The CHAIRMAN. Will you identify yourself for the record again.

Ms. WILLIAMS. I'm sorry, Senator. Could you please repeat the question?

Senator GORTON. Well, let me read what his statement says.

"During this decade,"—that is, the time that the Tenth Circuit was allowing Indian civil rights actions to be brought in Federal courts—

There was a proliferation of cases in Federal courts which assumed immediate jurisdiction (the plaintiff not having first to proceed through any other court system, including tribal court, the logical forum).

I was asking the Chairman whether his views of—of the proposition that cases brought under statutes of the United States—that is, the Indian Civil Rights Act or the Constitution of the United States, the Bill of Rights—if his view would be any different if the claimant had to exhaust all remedies of the tribal courts first and only to the appeal thereafter to Federal courts.

Ms. WILLIAMS. I think the view of the Pueblos certainly has been that the tribal forums are fair. They may look a little different in some instances than the State and Federal forums, just like a lot of State courts look very different, depending on which State you're in. But it is our view, that they are fair forums. They are very misunderstood in our country. A lot of people don't use them or they use them and get an answer they don't like, so they criticize them. And that's wholly unfair.

We do acknowledge that the tribal courts are very, very much operating at a deficit. A lot of the tax base on Indian reservations just isn't there. It's already overtaxed by the States and the counties. It gives us very little revenue stream to fund our courts. That's why the Indian Tribal Court Justice Act was so important to us to so they can improve their performance. We think that if that were done, people would begin to see that the tribal forums are fair.

Now, as I have suggested earlier in my testimony—it's only my personal view; it is not the view of any of my clients—that this problem of not being able to appeal out of the tribal forums is one that U.S. Supreme Court has noticed, and I think has—has decided that perhaps there are some areas where tribes may not have regulatory authority over non-Indians because our courts and our forums look so different.

Well, if that's the case, and we're going to be subject to Federal court review of our tribal court decisions, it seems to me, Senator,



in fairness, the tribes' sovereignty over non-Indians, civil and criminal, should be restored as part of that process.

Senator GORTON. Okay. That's a—that is the answer you gave me 1½ years ago. It wasn't an answer to the question that I asked, but—

Ms. WILLIAMS. I was saying I do not think that just simply providing an exhaustion requirement alone is enough.

Senator GORTON. All right. That was the question that I asked. Thank you very much.

And Judge Wynne, yours is an impressive record here of the Colville courts. I'd like to ask you the question, in how many of the cases that you list here as your caseload in which a non-Indian appeared as a voluntary plaintiff, I gather, in the tribal court, in how many of those cases could that non-Indian plaintiff successfully have brought such a—such a lawsuit in either the State or Federal courts?

Ms. WYNNE. I'm sorry, Senator. I didn't do that analysis. I had 1 week I had very limited clerks and I didn't do that type of analysis.

Senator GORTON. Okay. Maybe I'll try to make the question a little bit easier, then.

Were the non-Indians there in—in that court because it was the only forum they had, that if they had sued in State courts, the sovereign immunity doctrine would have been imposed and the court would have been barred from hearing the case?

Ms. WYNNE. I can clearly answer that. No; they were not all there because they couldn't file at any other court. One of—one of the groups of people who appears regularly in the Colville tribal court is the State of Washington Office of Support Enforcement. And they're capable of suing in other forums on child support issues, but they appear in Colville tribal court. There are numerous instances where that occurs, including banks coming on reservation and suing out on loans. They usually choose to use the tribal court because of improved chances at recovering on a judgment, which, as you know, is a whole separate issue after getting the judgment.

Senator GORTON. And nothing in S. 1691 would prohibit that from continuing.

Ms. WYNNE. S. 1691 is the most destructive piece of legislation in the sense that it scoops up those cases from tribal court where tribal courts normally hear those cases and places them in a foreign jurisdiction.

Senator GORTON. I don't believe it does. My question was that these cases that you've described, where either a State agency or an individual could have brought the action in the State court but chooses to come to your court would not be affected at all by S. 1691. They would still be able to choose your court if they wish, would they not?

Ms. WYNNE. You could choose to look at only a small percentage of cases where that was true and in fact that statement would be correct.

Senator GORTON. Okay. So the cases at issue here are the ones in which the non-Indians have come to your court because it's the only place that they could possibly go; they'd be barred by statute

and by sovereign immunity from bringing the case in any other court.

Ms. WYNNE. You're misstating the record, Senator. You asked me whether or not any of the folks who walked into that court had other available forums.

Senator GORTON. I'm sorry. I don't mean to be misleading you. I think what you said, some of the people are there because they'd rather be there than another court.

Ms. WYNNE. That is correct.

Senator GORTON. Some are there because it's the only court they can go to.

Ms. WYNNE. That's correct.

Senator GORTON. I'm now speaking about the latter group. I'm now speaking about the latter group. They are there because they would be barred—at least most of them would be barred—by sovereign immunity from bringing the suit in a State court or a Federal court; is that correct?

Ms. WYNNE. I'm sorry. Can you restate your question? You lost me on some of the people and some of the people and there there.

Senator GORTON. You've told me that some of your caseload are cases brought by non-Indians in the tribal court even though they could have brought those cases somewhere else.

Ms. WYNNE. Yes.

Senator GORTON. And some of them are brought in tribal court because it's the only place they could have been brought.

Ms. WYNNE. Yes.

Senator GORTON. Okay. In the latter case, I assume the reason for that answer is that the tribe, if the tribe was the defendant, would have interposed the defense of sovereign immunity had the case been brought somewhere else.

Ms. WYNNE. You're asking me about cases where there's no subject matter jurisdiction in Federal or State court?

Senator GORTON. No; I'm asking whether or not—maybe I—putting it simple.

Are none of these cases in which the defendant is the—is the—is the Colville Tribe?

Ms. WYNNE. Oh, yes, there are cases where the defendant is the Colville tribe.

Senator GORTON. If the defendant is the Colville Tribe and the case were brought in the superior court in Okanogan, the tribe would interpose sovereign immunity as a defense, would it not?

Ms. WYNNE. Oh, I see what you're getting.

Yes; in the materials submitted to you, Senator, there is a case where, for instance, a non-Indian sued the tribe and recovered both a money judgment and being reinstated as an employee of the tribe. And in that particular case, the tribes had waived sovereign immunity for that case to be filed in tribal court. Is that what you are asking about?

Senator GORTON. No; I was asking if that case had been brought in the superior court in Okanogan County—the State court in Okanogan County, the tribe would have entered the defense of sovereign immunity and the case would have been dismissed, would that not be the case?



Ms. WYNNE. As a former Assistant U.S. Attorney, if I were representing the government in any case in a State or Federal court, I would—I would look at the defense of sovereign immunity. As a judge, I would tell you that I will not enter a judgment on behalf of a State or a Federal judge. Those are issues that those judges need to look at.

Senator GORTON. All right. I thought my question was easier than—simpler than what it appeared to be.

But in—in any event, in those cases where the only forum is the tribal court, because sovereign immunity would be invoked if the case were brought in State or Federal court, what is the difference when you're telling a non-citizen of the tribal—you know, of the—of the Colville tribe that they must pursue a cause of action even though it may have arisen outside of the reservation in the tribe? What's the difference between that and—and a doctrine saying that if you want to sue Airbus over an accident in the United States, you can only sue them in France?

Ms. WYNNE. I don't practice international law. I practice—I sit in tribal court system.

The CHAIRMAN. Okay.

Ms. WYNNE. And you're asking me international law questions. I know that—

Senator GORTON. No; let's stipulate to this point, that if you sue Airbus, you would sue it in the United States, that France can't say, This is a French Government matter, we have sovereign immunity, you can only sue us in France.

I just want to know why forcing citizens of the United States to go into a court in which they aren't represented, in a tribal court, is any different than a doctrine that says we would have to go to France to sue a French corporation doing business in the United States. Is there a difference?

Ms. WYNNE. People who come into the tribal court come into the tribal court because they have—under regular rules, they have entered into contracts on the reservation, they have sufficient contacts on the reservation, they are doing business on the reservation, or they have some way consented to the authority of the tribes by coming into the tribes, coming into that government and doing business or undertaking some transaction. And for that reason, they end up in those tribal courts, which I submit to you is a proper forum for them.

And I also would like to direct you to the materials that have been submitted to you, Senator. In those materials it does provide on these civil cases that nonmembers are entitled to jury trials, and on those jury trials they are entitled to select from all of the members of the reservation community, not just members.

So in fact, the implication of your question that I'm hearing, which is that the nonmember would come in and face only members, is—is not correct.

Senator GORTON. I thank you very much.

Ms. WILLIAMS. Mr. Chairman, if I could just say one thing.

Senator a State only waives its immunity into its own State court; it does not waive its immunity into another State's court.

I don't really follow the question, but let me just put that on there, if I followed the question.

Senator GORTON. I don't follow your answer, so we're dead even.  
Ms. WILLIAMS. So we're both in the dark.

The CHAIRMAN. We have no further questions. I appreciate your attending today.

We'll now proceed to the last panel.

Col. Caleb Johnson, Hope Tribal Council Member; William Lawrence, owner and publisher of the Native American Press; Roland Morris, President of All Citizens Equal, Ronan, Montana; Craig Greenberg from Huffman, Usem—I can't read this whole thing without my glasses, but I'm sure Mr. Greenberg is here.

If you will take your seats. We will continue in that order—Johnson, Lawrence, Morris, and Greenberg—as we did with the other committees.

The CHAIRMAN. Colonel Johnson is a little bit late, so we'll go ahead and start with Mr. Lawrence. As with the other committees, all of the testimony will be included in the record. And you are encouraged to abbreviate and watching that light.

If you'd like to go ahead, Mr. Lawrence.

Mr. LAWRENCE. Mr. Chairman, members of the committee, good afternoon.

My name is Bill Lawrence.

The CHAIRMAN. Could you keep your voices down. If you'd like to talk, if you can go outside the room here, we'd appreciate it.

Go ahead, Mr. Lawrence.

#### **STATEMENT OF WILLIAM J. LAWRENCE, OWNER/PUBLISHER, NATIVE AMERICAN PRESS/OJIBWE NEWS, BEMIDJI, MN**

Mr. LAWRENCE. I'm an enrolled member of the Red Lake Band of Chippewa Indians in Northern Minnesota.

I'm here in Seattle on my own time and at my own expense. I'm not on any Federal or tribal payroll.

I have worked 30 years in Indian affairs at the tribal, State, Federal, and private levels. For the past 10 years I have been the owner and publisher of the Native American Press/Ojibwe News, a weekly newspaper published in Bemidji, Minnesota.

The greatest injustice the Federal Government has imposed on Indian people during the 20th century is to make us citizens, but deny us most of the basic rights of citizenship.

In 1968, Congress recognized this injustice and enacted the Indian Civil Rights Act. But in 1978, the U.S. Supreme Court in the poorly considered *Santa Clara v. Martinez* decision ruled, in effect, that it's up to each tribal government to decide if and to what extent reservation Indians have any civil rights.

S. 1691 would, among other things, correct this injustice by amending the Indian Civil Rights Act so that we can hold tribal governments accountable when they deny us our rights.

Democracy is not simply the existence of free and fair elections, which I would argue often do not exist in tribal elections. Democracy is also defined by limiting the powers of government by such things as a rule of law, separation of powers, checks on the power of each branch of government, equality under the law, impartial courts, due process, and protection of the basic liberties of speech, assembly, press, and property. These do not exist on Indian reservations. A given tribal government may claim these protections



do exist, but closer analysis usually reveals that claim to be charade. And where one tribal government may extend some rights to its citizens, the next regime may not be so kind and can instantly reverse or ignore any tribal law or tribal constitutional protection they want, in the name of self-determination, and with the defense of sovereign immunity. James Madison, a founding father and signer of the U.S. Constitution, said that government with no separation of powers and no checks and balances is the very definition of tyranny. That is what we have on America's Indian reservations. Tribal government opposition to a free press in Indian country is very strong. Over one-half of Minnesota's tribal governments do not allow the Native American Press/Ojibwe News to be sold on their reservations, and tribal interests have harassed and attempted to intimidate our advertisers and retail outlets. The paper has been confiscated from newsstands on numerous occasions.

We are currently in State court fighting charges of trespass against one of our reporters for attending a meeting of the Minnesota Chippewa Tribe at a casino on the Mille Lacs Reservation. He was arrested, handcuffed, and put in jail until the meeting they did not want him reporting on was adjourned. The State recognizes and enforces tribal police actions such as this.

Tribal sovereign immunity gives Indian people less rights and more government corruption, unaccountable—discord, and abuse of power.

With the Indian Gaming Regulatory Act, which has overlaid a multi-billion dollar cash industry on top of an unaccountable government, the abuse of power has taken on new ferocity.

Federal Reserve Chairman Alan Greenspan said recently: "The guiding mechanism of a free market economy is a Bill of Rights enforced by an impartial judiciary." There can be no denying that the lack of civil rights, the lack of legitimate courts, and the lack of government accountability is the single biggest reason there is so little economic activity on America's reservations.

I first exposed the abuses of the Red Lake tribal court in 1972 in a Law Review article. Even after the U.S. Civil Rights Commission put the BIA on notice of these abuses, the BIA's only response was to increase funding to the tribal courts.

Since then, I've personally been the victim of the Red Lake Tribal Council's use of the sovereign immunity defense on five occasions.

On four separate occasions, I have tried to get tribal financial statements which, according to our constitution, are supposed to be available to tribal members. The tribal officials would order hearings to be postponed seconds before they were scheduled to occur, switch judges without notice, deny a right to a jury, change from a scheduled pretrial hearing to a full trial without notice, deny an opportunity to call witnesses, and come to the first day of trial with a typed decision already in hand. Needless to say, I was denied my right to see tribal financial records.

In 1994, three tribal members asked me to represent them in Red Lake tribal court in an election dispute. Despite my legal background and eligibility in every way, the tribal council denied me a license to represent people in my own court. They were afraid I would take cases against the council for violating people's rights.

The 1990 U.S. Civil Rights Commission Report was published without one word about the abuses in the Red Lake court, in spite of the fact that their investigation resulted in a 31-page description of civil right problems at Red Lake. They left it out of the final report because the Red Lake government didn't want it made public.

Former Washington Congressman Lloyd Meeds wrote a well-thought-out dissent to the 1977 American Indian Policy Review Commission Final Report, in which he said:

If Indian governments are to exercise governmental powers as licensees of the United States, it is imperative that they be fully answerable for the improper exercise of those powers. Tribal sovereign immunity...should not be allowed to interfere with Federal court enforcement of Federally protected civil rights.

And a 1989 report of the Senate Select Committee on Indian Affairs made the following accurate observation:

Since Congress has the ultimate responsibility for Federal Indian policy, we in the Senate and House must accept the blame for failing to adequately oversee and reform Indian affairs. Rather than becoming actively engaged in Indian issues, Congress has demonstrated an attitude of benign neglect...By allowing tribal officials to handle hundreds of millions of dollars in Federal funds without stringent criminal laws or adequate enforcement, Congress has left the American Indian people vulnerable to corruption.

Let it be said right now that sovereign immunity has nothing to do with Indian culture or tradition. It's a concept that developed in the Roman Empire and was used by European monarchs to protect them from challenge or criticism. Tribal sovereign immunity has essentially told a generation of tribal leaders that once they are in office, they are above the law and can do whatever they please. The only culture that tribal sovereign immunity is protecting is a culture of corruption, oppression, and unaccountability.

In closing, I would like to quote a great American, the late Dr. Martin Luther King. He said: "Injustice anywhere is a threat to justice everywhere."

Thank you.

[Prepared statement of Mr. Lawrence appears in appendix.]

The CHAIRMAN. Why don't we go ahead with Colonel Johnson since he was on the list to speak first, and then we'll go on with Mr. Morris.

#### **STATEMENT OF COL. CALEB H. JOHNSON, HOPI TRIBAL COUNCIL MEMBER, KYKOTSMOVI, AZ**

Colonel JOHNSON. Good afternoon, Mr. Chairman and the committee.

I am Caleb H. Johnson—

The CHAIRMAN. Pull the microphone over close to you, Colonel Johnson.

Colonel JOHNSON. I am Caleb H. Johnson, a member of the Hopi Indian Tribe in Arizona. I am now serving my third 2-year term on the Hopi tribal council as a representative from the Village of Kykotsmovi. I was certified—I was a certified candidate for Chairman of the tribe in its election of late 1997.

I am a graduate from UCLA. I also have a master's degree from Princeton Theological Seminary. I have served in the U.S. Army for 28 years on active duty and in the Reserves. I retired as a full Colonel in 1989 at Fort Huachuca, AZ, with full military honors.



Before I make my comments, let me make it absolutely clear that I'm not speaking on behalf of the Hopi tribal council. I'm here as an individual citizen of the United States whose rights of due process have been violated by the Hopi tribal court. I'm here to testify to the fact that I have filed a complaint against the Hopi election board and in the U.S. District Court of Arizona for the violation of my rights under the Indian Civil Rights Act of 1968. My complaint against the Hopi election board results from their conduct of the previously mentioned tribal chairman election. Severe irregularities occurred in the conduct of the election, so severe that I went from being one of the leading vote-getters, to not even making it into the runoff election. A copy of my complaint is attached to my testimony and I request that it be included in the hearing record.

The CHAIRMAN. No objection. It will be included.

Colonel JOHNSON. In discussing my complaint with my legal counsel, Richard M. Grimsrud, I have been advised that it will most likely be dismissed due to the doctrine of sovereign immunity claimed by the Hopi tribal government. The fact of the matter is, that if that should occur, then I will have no legal remedy. Despite the fact that the Fifth Amendment of the U.S. Constitution guarantees that no person shall be deprived of life, liberty, or property without due process of law.

When I was in Vietnam from June 1968-69, with the 17th Combat Aviation Group in I Corps, some 400 to 500 military personnel were dying each month defending the U.S. Constitution and its Bill of Rights. It's rather ironic when I consider my situation today, that the Indian Civil Rights Act was enacted into law in the same year, but here I am today being denied my civil rights some 30 years later. What this situation tells me is that something is absolutely wrong and that something needs to be corrected expeditiously.

I have no knowledge of how tribal courts operate in other Indian tribes, but I do know how it operates in the Hopi tribe. My complaint makes it very clear that the tribal court deliberately delayed stamping my complaint filed until 30 days had passed so that the court would dismiss it as not being filed on a timely basis.

I'm also very confident that the legal counsel for the election board will argue before the Federal District Court that my complaint be dismissed because of the doctrine of sovereign immunity of the Hopi tribe, leaving me again without any legal remedy for the violation of my rights of due process under the Indian Civil Rights Act of 1968.

It is for these reasons that I'm here today to support section 7 of Senator Gorton's legislation, which would waive tribal sovereign immunity so that actions may be brought by Federal—in Federal court under the Indian Civil Rights Act.

In addition, I would like to make two recommendations for your consideration. First, I recommend that the word "original" be inserted before the word "jurisdiction" on page 10, line 14 of the bill. Second, I recommend that this section be enacted into law by the Congress and the President of the United States, who is my Commander in Chief.

In conclusion, I'm deeply grateful to Senator Gorton, who made it possible for me to bring this matter to your attention. Thank you. And God bless the United States.

[Prepared statement of Colonel Johnson appears in appendix.]

The CHAIRMAN. Thank you.

Mr. Morris.

# **STATEMENT OF ROLAND MORRIS, PRESIDENT, ALL CITIZENS EQUAL, RONAN, MT**

Mr. MORRIS. Good afternoon, Mr. Chairman and members of committee.

My name is Roland Morris, Sr. I'm a board member of the Citizens for Equal Rights Alliance [CERA] and President of All Citizens Equal. Although opposition has labeled these groups harshly, both are grass roots, multicultural racial groups dedicated to the promotion of equal rights for all citizens within Indian country.

I am a full-blooded Anishinabe American citizen. Originally from the Leech Lake Band of Minnesota Chippewa, I now live in Montana.

Thank you for the opportunity to appear before you to testify on American Indian Equal Justice Act. It is my hope that you will discern the truthfulness of my message by examining both my heart as well as my words.

I believe current Federal Indian policy coupled with tribal government behavior is taking a bigger toll on tribal members than most people admit. On the reservation, State and Federal constitutional rights can be denied me. I become a second-class citizen. On a reservation there is no guarantee the U.S. Constitution and the Bill of Rights will control. There is no guarantees of the Civil Rights Act legislation against age or gender discrimination will be honored. There is no guarantee the Veterans Preference Act, no Civil Service classification to protect tribal government employees, no guarantees of Americans with Disabilities Act, no guarantees against blanket nepotism or a fair and orderly process concerning access to reservation housing, no guarantee of freedom of press or freedom of speech. In other words, basic human rights other Americans take for granted, that allow people to live in dignity with their neighbors, are not guaranteed on Indian reservations under the present version of sovereignty.

Second, are dependent upon Federal Government help. Through this dependency, many tribal governments have become corrupt with unchecked power and money. Because of corruption and unwillingness to let go of power and money, tribal governments themselves, in some cases, are keeping their people in the bondage of poverty and oppression.

It cannot be denied that Federal current policy is such that tribal governments financially benefit from the general membership's poverty level staying as it is. The plight of the average Native American is what keeps money flowing from the coffers in a large tribal government.

Thus, tribal government needs to keep in control of its members, even to extent of demanding from Congress that "the tribe shall retain exclusive jurisdiction over any...Indian child..." as it is written



in the Indian Child Welfare Act, which States further that tribal interests are "independent of the interests of birth parents."

Now, Indian Civil Rights Act mandates that no Indian tribe in the exercise of powers and self-government shall violate various basic civil rights. However, when there is no separation of power within tribal governments and tribal sovereign immunity protects tribal governments from civil rights claims, tribal members are left without a recourse.

And many tribal members say nothing publicly. Cronyism, nepotism, and ballot box rigging are all part of political reality on many reservations. Everyone seems to accept it as a given. And because tribal governments control tribal jobs, HUD housing, tribal loans and land leases, many members are reluctant to speak up. Tribal government controls most everyone's strings, not to mention the judicial system.

Getting on the bad side of the government can mean a loss of jobs or home. Some have even been threatened to have their home members lose their jobs.

Further disabling, to membership outcry is the manipulation used to keep control. I have seen tribal governments pressure members to rally for their cause and political goals through misinformation, bullying, even bribes. I have had many tribal members come to me in confidence and relate their concerns and fears. I even had a tribal council member come to me to discuss these issues.

But I see tribal elders feeling defeated. Many of those within local government won't listen to the elders. Seeing this disrespect it is hurtful to me and pains many other tribal members that these things are going on.

It is no wonder that many Indian people are tired and depressed. Not only do many feel alienated from the United States Government and the rest of society, but many tribal governments can't be trusted either. This situation has become a hopeless fact of life, along with poverty and other factors, has bred depression and loss of trust.

Senator Gorton's bill, the American Indian Equal Justice Act, is wonderful news for anyone, either tribal or non-tribal. By providing Federal District Courts jurisdiction over civil cases brought under the Indian Civil Rights Act, tribal governments will be held accountable for these actions. This bill will not hurt tribal members, it will only hurt corrupt tribal government.

While nonmembers all over the country are gathered in support of this bill, this is actually one of the best bills that can happen for the tribal members. This is bill will give members the right to sue tribal government when they are denied their members' rights.

If tribal government looks on the plus side of this bill, it will also improve the economy for everyone on our reservation. And that's industry—

The CHAIRMAN. I've tried to be lenient with this, but just we need to move on.

Mr. MORRIS. Industry will be willing to come and build businesses on the reservations. Our relationship with the so-called outside world will improve. If tribal government looks at the plus side

of the bill, it will see that it will provide encouragement and hope for everyone on the reservation.

I thank you.

[Prepared statement of Mr. Morris appears in appendix.]

The CHAIRMAN. Mr. Greenberg.

**STATEMENT OF CRAIG D. GREENBERG, ESQUIRE, HUFFMAN, USEM, SABOE, CRAWFORD AND GREENBERG, MINNEAPOLIS, MN**

Mr. GREENBERG. Thank you. Let's see if I can say something new after 3½ hours.

Good afternoon, Mr. Chairman, members of the committee. Thank you for the opportunity to speak to you about these very important issues.

My name is Craig Greenberg, and I am an attorney in private practice in Minneapolis, MN. I have been in practice for 10 years, concentrating on business, employment, and real estate matters. I have also somehow developed an Indian law practice representing people with legal problems associated with tribes, tribal corporations, and in particular tribal sovereign immunity. I did not specifically set out to become involved in this area of law. Prior to 1993, I had no knowledge or expertise in this area. Furthermore, I had no personal grievances with any tribal governments or tribal members.

However, in the summer of 1993 a client came to my office, after he had sold his business, a bus tour business, to a Minnesota tribe. The tribe quickly breached the agreement and refused to pay my client sizable compensation under the contract.

There was also a very serious discrimination issue involved in that case. Insiders in the tribe informed my client that his business was bought and put out of business in order to actively try to keep black and Asian customers from visiting that particular casino. I was shocked. Even though the contract in that case contained clear written waiver of the immunity defense, 3 years of litigation persisted over that issue and only that issue.

We were successful in winning that case, and we received a relatively rare decision from the Minnesota Court of Appeals. But once that case was reported in the media, my phone began to ring off the hook. I received calls from around the country. In the last 4 years, since that initial case, I have received hundreds of calls from Indians and non-Indians alike with legal problems associated with tribal sovereign immunity that have been absolutely across the board. Every imaginable type of legal claim, I've heard about.

These cases include civil rights claims, injury claims, and contract claims. And in order for any of these people to address their rights, number one, they had to call a hundred law firms before they could find someone like me to even talk to them, because no one is interested in representing people with claims against Indian governments. And number two, they have to be prepared to litigate sovereign immunity for two to 3 to 4 years.

The vast number and variety of the calls to my office, my one small law office, together with the abnormally egregious nature of many of these cases, have led me to an unavoidable conclusion: there is a severe systemic problem with tribal sovereign immunity.



Abuse and corruption occur at an alarming rate because tribal sovereign immunity and the associated sense of being above the law or outside the law create a safe haven for the proliferation of legal wrongs against tribal members, employees, and patrons of tribal businesses.

The root cause of this problem is not the people, not the tribal people; it's a governmental system which does not demand accountability.

The problem is also growing as we speak. Along with the expansion of tribal gaming and tribal gaming industry, we are experiencing an exponential increase in contacts between non-tribal members and tribes.

In Minnesota, tribal casinos constitute the ninth largest employer group in the State, yet the employees have no civil rights protection, no protection of employment laws, and they have nowhere to legitimately bring their cases. I have brought cases in tribal court. After being in State court I was told to go to tribal court. Once I got in tribal court, after the tribe had asked me to bring the case in tribal court, they raised the sovereign immunity defense even in the tribal court. My clients have no recourse.

I currently have a handful of cases. One lady was shot in the head sitting in a casino parking lot. I'm just starting that case. And we're in for a battle.

I have another gentleman, who is a 60-year-old Native American, with a very, very valid age discrimination case. He works at a casino. He has to bring his case in tribal court and he has not found anybody willing to represent him in tribal court. Most of the lawyers admitted in that particular court represent the tribe.

I also am I just starting my representation of a family whose daughter was killed on a reservation.

And presently I have one case pending at the U.S. Supreme Court. It's entitled *Gavle v. Little Six*. It's the most egregious employment and civil rights case that I've personally seen as an attorney. Miss Gavle was an employee of a tribal casino operation, and we applied to the Minnesota courts for redress and were denied even though the corporation in—the tribal corporation in this case had clearly waived sovereign immunity. The Minnesota Supreme Court in that case said this:

While the time may well come or even be upon us now that a tribal-owned corporation operated for profit should as a matter of fairness and equity be subject to the same liabilities as a non-tribally-owned operation, it is not for this court to make that decision in absence of some change in Congressional policy or direction from the U.S. Supreme Court.

Now, it is my sincere hope that the American Indian Equal Justice Act is in fact the change that the courts have been asking for. I've thoroughly reviewed the proposed legislation, and as a lawyer I find it directly on point.

This legislation is a legal necessity. Civil rights must be applied equally for all citizens, all disputes must be resolved through unbiased court systems.

As a member of the bar and as a United States citizen, I fully support the American Indian Equal Justice Act, and I urge the committee and Congress to approve the same finally make civil

rights and accountability in government the law of the land everywhere in the United States.

And one final note. I know that by passing this bill, my little subspecialty in Indian law will fade away into mainstream legal practice and you will essentially be putting me out of the Indian law business. This is a result that I will willingly accept in the name of justice for all.

Thank you.

[Prepared statement of Mr. Greenberg appears in appendix.]

Senator GORTON. We don't want to put you out of work. We need a lot more lawyers.

The CHAIRMAN. Let me make an observation since we're on our last panel before Senator Gorton asks some questions.

I would like to make this observation. First, I'd like to compliment everyone in this room who has observed the decorum of the Senate hearings so our witnesses could be heard. I think very frankly that people of goodwill really need laws because they subscribe to a higher order, something called the 10 Commandments.

But clearly, we can't pass a law to make you love your neighbor. Nobody can do that. The piece of paper written by anyone who forms a government, no matter how smart they are, can mandate that you agree or love your neighbor.

I know that there are some shrill voices that will tell you that there's got to be a winner and a loser, that there's no equitable answer for people, and only fits our needs of we win or you lose, whichever side you are on. But I would hope that the quieter, more thoughtful voices will tell you different. And I really believe that we as an American people, if we can go to stars, for crying out loud, we can go across the street to our neighbors.

We face a lot of problems in America, as you probably know. And I might mention a couple that you are all aware of.

We have major problems with giving a quality education to our children; all of our children, not the Indian kids at the expense of the non-Indians or the non-Indians at the expense to the black kids or something else, but all of them. We have to improve our health care opportunities for all Americans, regardless of their station, regardless of their color, regardless of where they come from.

And certainly drugs doesn't have any racial preference, kills everybody with equal indiscrimination.

And Colonel Johnson, I'm glad you wore your uniform here. I was a military man myself. And I know, as you do, that soldiers who protect our freedoms come in all sizes, shapes, and ethnic backgrounds. And when they are on a field of battle, whether it's in Southeast Asia or the sands of Kuwait, when they die, the blood that runs out of their veins is all the same color. And I'm glad you're here.

Colonel JOHNSON. Thank you.

The CHAIRMAN. We have a very, very interesting form of government. It's kind of a grand experiment. It's only 209 years old. Most of you know that. That's really in it's infancy compared to some cultures.

I live near a place called Mesa Verde in Colorado about 40 miles east of what's called cliff dwellings. People lived in the cliff dwellings and on the mesas surrounding them when Christ walked this



Earth 2,000 years ago. They were there. It was centuries old before Columbus arrived, as most of you know. And they lived there four times longer than we've had a form of government in the United States.

And for centuries they raised their crops, they prayed to their lord, they raised their kids, and they died and returned to the earth with every decade. And now if you go there where once 40,000 people lived, only stones and spirits remain. Forty thousand people. There were four times more people then, 1,000 years ago, than live in that part of Colorado than live there now. What happened to them? Historians will tell you that first the crops failed; then it got worse because their leaders disagreed; and then it began to collapse when they began to blame each other for their problems. And now, 800, almost 900 years later, since they all left that area, only ruins remain where a vibrant people once were.

I just point that out to you to tell you in all honesty to all of you, I would hope that all of you take care that this American culture doesn't suffer the same future.

With that, Senator Inouye, did you have any questions or comments?

Senator INOUE. I just want to commend you, Mr. Chairman, for your fine statement.

The CHAIRMAN. Senator Gorton.

Senator GORTON. Mr. Greenberg, one question for you. The petition for certiorari in the *Gavle* case has as its sole issue or sole grounds for granting certiorari the right to challenge sovereign immunity on constitutional grounds?

Mr. GREENBERG. We're—we're challenging—the primary issue in that case is really the reach of tribal sovereign immunity off reservation. My client actually worked for this tribally owned corporation off the reservation.

They had in addition filed, as most foreign corporations do, as a foreign corporation in Minnesota, obtained the authority to do business in the State, agreed in writing to be bound by all of the laws of the State, and agreed to be subject to the jurisdiction of the courts in the State.

To me with my limited knowledge of waiver of sovereign immunity, that to me looked like a pretty good case. So that's the—

Senator GORTON. So you're not—you're not in this case challenging the entire doctrine but simply its applicability to an off-reservation, Indian-owned corporation?

Mr. GREENBERG. I could add that there is a companion case, one that I'm not handling, that was filed 3 months ago with mine with the same casino defendant. That's an injury case. And their attack has been much broader in line with economically based arguments.

Senator GORTON. Well, Mr. Chairman, I want to thank you. I want to say, here I think we see in the real world the impact of the illustration of this abstract legal doctrine on real people.

In the case of Colonel Johnson, a feeling that an election was held unfairly. We don't know whether it was held unfairly or not. He wants the opportunity to have a neutral court to make that decision.

Mr. Lawrence, I gather, wants to protect primarily his First Amendment rights to publish a newspaper and allow people to pur-

chase it and—that newspaper, among other things. Mr. Morris, I think, spoke more in general terms, but basically that you're more likely to be successful in a society that's ruled by laws that are objective and universal than you are otherwise.

And Mr. Greenberg, representing clients who, I think it's safe to say, could not have received justice for the claims that they make in the tribal court, which was a part of an organization that committed the alleged wrongs.

I want to join with the Chairman, as we terminate this—this hearing, in thanking this very large and interested audience, obviously on both sides of the issue, for the courtesies that they've extended to us and to—and to the witnesses who were here.

And to say my own friends in the audience, that the Chairman of the committee and I may disagree on a few issues, we probably agree on more than we disagree on. But he's very sensitive to these issues. He recognizes that there are—there are problems.

By saying that, I may commend him to you and I may put him in trouble with some other people whose regard he seeks as well. But he is an extremely fair person.

And I can say as the host for the Senator from—from Hawaii, who is frequently here in Seattle, he knows about—I've told him privately—there is no member of the U.S. Senate with whom I disagree more and like better. He is a magnificent member of the Senate, a hero, and a patriot. And we've always been able to carry on our disagreements in a sharp but, I think, first-rate fashion in the American tradition.

I believe firmly that the fundamental constitutional doctrines under which the United States is based should offer, and should offer, every citizen of the United States the right to enforce the laws of the United States in the courts of the United States, and every citizen of the state of Washington to enforce the laws of the State of Washington in the courts of the State of Washington.

Nothing can be more fundamental to our free society than that. And it is that—at that—or for that purpose that this bill is offered.

Thank you, Mr. Chairman.

The CHAIRMAN. We—to all of those who testified in this panel and other ones, we may ask you questions in writing. If you could get answers back to us. And for those of you in the audience who may have something you would like to submit, the record of this hearing will stay for two weeks. If you want to submit it, we'll make sure it's included in record.

With that, thank you for appearing. And this hearing is adjourned.

[Whereupon, the committee was adjourned, to reconvene at the call of the Chair.]





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## APPENDIX

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### ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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PREPARED STATEMENT OF CHRIS VANCE, VICE CHAIRMAN, METROPOLITAN COUNTY COUNCIL, WASHINGTON

Mr. Chairman and members of the committee.

My name is Chris Vance, and I am the Vice Chair of the Metropolitan King County Council. Welcome to King County, and to council district 13, the district I represent. I would like to thank you for the opportunity to testify before you today on the American Indian Equal Justice Act.

Before I comment on the legislation at hand, let me briefly describe King County and the government I serve in. I bring the perspective of an official of one of the largest local governments in the United States. King is the 12th largest county in the Nation with nearly two million residents, a number that continues to grow year after year. We are bordered on the west by Puget Sound and on the east by the crest of the Cascade Mountains. King County contains the city of Seattle and 37 suburban cities within its extensive metropolitan area. In addition, King County is still home to vast tracts of rural timber and farm lands.

King County is also home to the Muckleshoot Indian Reservation, a portion of which is in my district. The proximity of the reservation to the urban core of our State is the source of increasing controversy and frustration. I want to thank and congratulate Senator Gorton for introducing this bill, and thank the committee for holding this hearing. Passage of the American Indian Equal Justice Act would help solve many of the conflicts I experience regularly as a local government official.

Commercial activities, such as casino gambling and the sale of cigarettes and fireworks, undertaken by the Muckleshoots and other tribes have a dramatic effect throughout our county. The things the tribes do affect all of us who live here, but non-tribal members have no political ability to influence those activities. We should at least have what this bill offers—the right to go to court and be compensated for damages.

Now, another, even more important area of local government responsibility is being undermined by tribal activity; the area of land use planning and protection of property rights.

In 1991, as a member of our State House, I participated in the passage of the second of two landmark bills which are cumulatively known as the Washington State Growth Management Act. This legislation directs all local governments to enact binding comprehensive plans for the expected economic and population growth in this State.

From 1994 to 1997 I chaired King County's Growth Management committee, and served on the multi-jurisdictional Growth Management Planning Council. After years of research, hearings, debate, and hard work, we were able to adopt a set of visionary and bipartisan comprehensive plans and policies for King County. As a result the environment and rural lands are protected, yet housing construction and business activity can continue. The plan is law, and citizens who do not comply with that law are subject to criminal and civil sanctions. Indian tribes, however, assert that even though they have a right to testify and lobby on growth management



issues—a right they exercise regularly and vigorously—the Growth Management Act doesn't apply to them unless they allow it to. In effect this has created thousands of acres of land within King County where the delicate balance of our comprehensive plan has been upset.

No clearer example of what I'm talking about exists than that of the 23,000 seat amphitheater being, constructed by the Muckleshoot Tribe just a few miles east of here. This massive project is being constructed in the middle of an area designated agricultural and rural by King County's comprehensive plan. In fact, the people of King County have voted to tax themselves in order to purchase agricultural development rights so that this area will be permanently preserved for rural and agricultural uses. If the amphitheater is built and utilized to the extent the tribe plans, massive traffic jams will occur on two lane rural roads, degradation of the White River will continue, and the rural-character of the land around it will be changed forever—all in violation of our county's plans and laws.

This project will affect everyone in the region, but it will have a devastating impact on the people of the city of Auburn, in my district, and of the Enumclaw plateau adjacent to the amphitheater. They will suffer impassable roads, noise from concerts, and a dramatic decrease in their property values and quality of life; and there is absolutely nothing they can do about it. They can't vote out the politicians who did this to their neighborhood, they can't gather signatures on an initiative, and they can't even sue to make themselves whole. The neighboring citizens around the amphitheater can be brought to Federal, superior, or municipal court by the Muckleshoots. But the tribe cannot be challenged in those same forums—even if the harm occurs off reservation. Asking Americans to accept this level of impotence is a violation of the basic tenets of our civil culture. And it is simply wrong.

The American Indian Equal Justice Act will help correct the problem. This bill does not challenge a tribe's right to govern itself. This bill simply provides those who feel they have been wronged by tribal actions with a fair and impartial court of law to settle those grievances. Tribal leaders demand to be recognized as equal governments, and I am willing to accept that, but they must accept the responsibility that comes with that status. King County and other local governments are frequently taken to court by citizens. Tribal governments should expect the same if they truly want to be regarded as equal governments. When activities on land they control hurt others beyond their boundaries, they should be held responsible for those damages.

In conclusion Mr. Chairman, I know this is a difficult and contentious issue. But the increasing friction generated by tribal actions is too significant to ignore. If the tribes continue to refuse to voluntarily respect the rights of their neighbors then those citizens need to be allowed to go to court in order to protect themselves. To deny them that right is simply un-American. Thank you again for the opportunity to testify on the American Indian Equal Justice Act. I'm happy to try to answer any questions you may have.

**DANIEL J. EVANS**

**TESTIMONY ON S 1691**

**U.S. SENATE COMMITTEE ON INDIAN AFFAIRS**

**APRIL 7, 1998**



## Testimony on S 1691

## American Indian Equal Justice Act

Good morning Chairman Campbell and distinguished members of the committee. I am Daniel J Evans, Chairman of Daniel J. Evans Associates, a small consulting firm in Seattle, Washington

I served as Governor of the State of Washington from 1965 to 1977, and as United States Senator from Washington from 1983 to 1989. I was privileged to serve as a member of the Senate Committee on Indian Affairs during my time in the Senate, and thus have been on the "other side of the table" more frequently than on this.

My appearance is at the request of the Lummi tribe, located in Northwest Washington State, but I intend to speak from a broader perspective. I am not a lawyer, and do not intend to analyze each section of this proposed law, but rather share with you the relationships I have built with tribes and tribal leaders during the past 40 years.

We all tend to forget history and many citizens have little idea of Indian tribal history or the United States government relationship to tribes. As waves of European settlement swept across America, native Americans were viewed as enemies, impediments to progress, or simply nuisances to be obliterated. The weight of immigration prevailed and tribe by tribe, the United States government signed treaties and created reservations for Indian survivors of the Indian wars.

The reservations set aside were generally of the least productive land of little value to white settlers. They were isolated, and thus difficult for the creation of viable industry and infrastructure for reservation residents. In many respects, the reservations created in the United States were similar to the homelands of South Africa, created by the apartheid government for their black subjects. Treaties and reservation promises were regularly abrogated when they inconvenienced settlers and early governments, especially of Western states.

But the signing of treaties created a special relationship with the United States that apparently once again, to some, is proving a nuisance to be obliterated.

The concept of trust relationship and creation of the Bureau of Indian Affairs created a dependency of tribes on the federal government,

preventing development of coherent tribal governments. Our nation in the post World War II era moved toward assimilation and the end of reservations.

During my early years as Governor, both the nation and the state began to recognize the validity of treaties, self governance and the independence of tribes. The concept of assimilation changed to one of building tribal integrity and independence.

As Governor, I remember vividly the first meeting of the Washington State Indian Affairs Commission which I appointed by executive authority in 1967. Tribal leaders of the many tribes of Washington State gathered and listened solemnly and without expression to my initial proposals for closer cooperation and respect. They brought with them the century of broken promises and lies which represented their previous experience with governmental leaders. It took several years to build the trust and respect which I now cherish.

As United States Senator, I asked to join the Special Committee on Indian Affairs and I was proud to be a prime sponsor of amendments to the Indian Self-Determination Act, introduced in 1987. The thrust of this measure was to advance the ability of tribes to emerge from a BIA – Trustee relationship to the creation of modern independent tribal governments and to make their own priority decisions on budgets and programs. I am pleased that tribes here in Washington State were among the first in the nation to respond to this act. building sophisticated governmental structures including a modern tribal court system is an essential part of true self determination. The Lummi tribe and others have enthusiastically adopted self determination and are building modern police forces, economic development measures, and strengthening their intergovernmental relationships. These efforts are less than a decade old but progress is rapid.

S 1691 is a blunt instrument whose effect would be to ravage tribal independence at a time when finally after more than a century, tribes have been given the opportunity to create modern independent governments, including responsible court systems.

Are any changes needed? Perhaps, but relegating tribes to a secondary position to the federal government, states, and localities in terms of sovereign immunity is hardly a good place to start.



Instead, we should recognize that in 1993 Congress passed the Indian Tribal Justice Act to enable the necessary resources to build a modern tribal court system. The act authorized 57 million dollars for this purpose, but not a dime has yet been appropriated. Full appropriation to build a good tribal court system is a far better answer than stealing sovereign immunity that would help build a responsible relationship between two parties to treaties which have existed for more than a century.

Hundreds of agreements are signed each year between tribal governments and developers, banks, insurance companies, and health providers, among others. In all of these contracts, suitable provisions have been reached dealing with the apprehensions of sovereign immunity. As the tribal justice system gains experience and as other governments, enterprises, and individual citizens gain respect for the independence and integrity of Indian tribes, conflicts should diminish.

S 1691 is a solution seeking a problem which is or should be vanishing. I urge this committee to reject S 1691 and instead help provide the leadership to build respect, understanding and friendship between fiercely independent tribal governments and the people and government of the United States.

**STATEMENT OF ROBERT T. ANDERSON  
COUNSELOR TO THE SECRETARY OF THE INTERIOR**

Before the Committee on Indian Affairs  
United States Senate  
Regarding Tribal Sovereign Immunity  
April 7, 1998  
Seattle, Washington

Mr. Chairman and members of the Committee, thank you for the opportunity to put forth the views of the Department of the Interior on issues of civil rights and property rights in Indian country and their relationship to tribal sovereign immunity. My name is Robert Anderson and I am Counselor to Secretary of the Interior Bruce Babbitt. I live and work in Seattle. Before moving to Seattle, I was the Associate Solicitor for Indian Affairs and as such was the lead Indian law officer for the Department.

The Administration opposes S. 1691's sweeping waiver of tribal sovereign immunity. There are many avenues currently available to deal with many, if not all, of the property and civil rights concerns occasionally raised by members and non-members subject to tribal jurisdiction. Tribal courts are dynamic and growing institutions that are increasingly well equipped to deal with grievances of members and non-members alike. Even a cursory review of the Indian Law Reporter reveals the broad range of grievances resolved in modern tribal courts. In 1995, Chief Judge Wallace of the Ninth Circuit Court of Appeals noted that federal courts would not be able to absorb the large caseload handled by tribal courts, stating that "we should respect and appreciate the tribal courts for the tremendous amount of work they do to resolve disputes."



Wallace, A New Era of Federal-Tribal Court Cooperation, 79 *Judicature* No. 3 at p. 152 (1995). Likewise, a 1991 report of the Civil Rights Commission concluded, after 13 days of hearings, hundreds of field interviews and exhaustive staff research over five years, that a waiver of tribal sovereign immunity to allow for federal court enforcement of the Indian Civil Rights Act should not be adopted. *The Indian Civil Rights Act*, A Report of the United States Commission on Civil Rights (June 1991). Instead, the Commission called for increased federal support for the improvement of tribal court systems in order that the administration of justice might be advanced in Indian country. See H.R. Rep. No. 103-205, 103d Cong. 1<sup>st</sup> Sess. 5-6, reprinted in 1993 U.S. Code Cong. & Ad. News 2426 (citing with approval to the Commission Report and quoting: “[the] Commission hopes the current trend towards the narrowing of tribal jurisdiction will be reversed.”).

Nevertheless, this hearing provides an opportunity to discuss not only the issue of tribal sovereign immunity, but also the need for congressional action to clarify and confirm the jurisdiction of tribal governments over their members and territory. Commentators have in the past discussed the possibility and appropriateness of limited federal judicial review of tribal court decisions. See C. Wilkinson, American Indians, Time, and the Law at 111-119 (1987). Any such discussion, however, must include consideration of the quid pro quo of congressional confirmation of tribal jurisdiction over non-members present within Indian country. The Supreme Court recently observed that such confirmation is within the province of Congress. See Strate v. A-1 Contractors, 117 S. Ct. 1404, 1409 (1997).

This discussion must take place against the backdrop of the well-settled jurisprudence recognizing Indian tribes as the third type of sovereign within the United States. United States v.

Wheeler, 435 U.S. 313 (1978)(Double Jeopardy Clause of Fifth Amendment not violated by successive prosecutions of tribal member by federal and state governments), citing Talton v. Mayes, 163 U.S. 376 (1896)(tribes act as separate sovereigns, not as part of the federal government). Indian tribes are immune from suit by states and states are immune from suits by Indian tribes. Blatchford v. Native Village of Noatak, 501 U.S. 775, 783 (1991). As Alexander Hamilton stated: "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent." *The Federalist* No. 81, pp. 548-549 (J. Cooke ed. 1961). In contemporary jurisprudence, the reasons supporting this general rule go far beyond the notion that "the King can do no wrong."

The Supreme Court, citing various congressional acts, has noted that tribal immunity serves the purpose of promoting the "goal of Indian self-government, including [the] overriding goal of encouraging tribal self-sufficiency and economic development." Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 510 (1991)(internal quotations omitted). See also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 (1978). States, unlike tribes, may not have their immunity waived by Congress pursuant to its Commerce Clause power. Seminole Tribe of Florida v. Florida, 517 U.S. \_\_\_, 116 S. Ct. 2028 (1996). States have generally waived their immunity from suit only in their own courts and even then, subject to strict limits on the amount of permissible recovery. See, e.g., Nevada v. Hall, 440 U.S. 410, 412 n.3 (1979)(quoting Nevada statute limiting compensatory damages in tort actions against the State to \$25,000 and barring the award of exemplary or punitive damages). Similarly, the Federal government has protected its sovereignty by limiting the extent to which it may be sued. See, e.g., 28 U.S.C. § 2680 (limiting waiver of sovereign immunity in tort suits).



This is undoubtedly due to the potential deleterious effect of large monetary awards against the public fisc. See Quern v. Jordan, 440 U.S. 332, 338-39 (1979). Tribal governments deserve, and should be accorded, the same treatment. They should be able to determine whether and under what circumstances their immunity from suit should be waived.

The Department's view is that the evidence supporting a sweeping waiver is often anecdotal and heard from quarters that are unaware of or unwilling to use available tribal, federal, or state institutions for dispute resolution. Indeed, the volume of complaints is little more than is directed against other types of governments by interests who resist regulation or taxation by any sovereign. In short, the record simply does not provide a factual basis to support legislation such as S. 1691.

### Civil Rights Issues

The Indian Civil Rights Act, 25 U.S.C. § 1302, (ICRA) makes many of the provisions found in the Federal Bill of Rights applicable to Indian tribes enforceable in federal court through a writ of habeas corpus. Id. § 1303. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Congress passed ICRA after seven years of hearings conducted by the Senate Judiciary Subcommittee on Civil Rights and other committees of both Houses. The legislative history reflects careful consideration of the need to balance tribal rights to self-government and individual rights. See Comment, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343, 1355-60 (1969). The Supreme Court noted the dual purposes embodied in ICRA of protecting the rights of individuals subject to tribal authority on

the one hand and furthering tribal self-government on the other. Out of respect for tribal government, the ICRA is enforceable primarily in tribal government forums, including tribal courts.

Partly to enable fulfillment of the Bill of Rights values in the ICRA, many Indian tribes have waived their immunity from suit. Recent reported tribal court decisions find that the tribal government and its officials are not immune from suit based on tribal court applications and interpretations of ICRA or tribal law. See, e.g., Blaze Construction, Inc. v. Crownpoint Institute of Technology, 24 Indian L. Rep. 6254 (Nav. Sup. Ct. 1997); Pazienza v. Mashantucket Pequot Gaming Enterprise, 24 Indian L. Rep. 6219 (Mash. Peq. Tr. Ct. 1996)(immunity waived to allow invasion of privacy claim to proceed); Wells v. Ft. Berthold Community College, 24 Indian L. Rep. 6157 (Ft. Berthold Tr. Ct. 1997)(waiver found in sue and be sued clause of tribal institution); Tomahawk Enterprises, Inc. v. Ft. Totten Housing Authority, 24 Indian L. Rep. 6091(Spirit Lake Sx. Tr. Ct.1997)(same); Works v. Fallon Paiute-Shoshone Tribe, 24 Indian L. Rep. 6033 (Inter. Tr. Ct. App. Nev. 1997)(ICRA abrogates tribal immunity); Atcitty v. District Court for the Judicial District of Window Rock, 24 Indian L. Rep. 6013 (Nav. Sup. Ct. 1996)(tribal housing authority not immune from due process claim). Kakwitch v. Menominee Tribal Enterprises, 21 Indian L. Rep. 6112 (Men. Sup. Ct. 1994)(finding waiver of tribal immunity in tribal constitution); Bordeaux v. Wilkinson, 21 Indian L. Rep. 6131 (Ft. Berthold Tr. Ct. 1993)(waiver found in tribal constitution for ICRA claims); Davis v. Keplin, 18 Indian L. Rep. 6148 (Turt. Mtn. Tr. Ct. 1993); Francis v. Wilkinson, 20 Indian L. Rep. 6015 (N. Plns. Intertr. Ct. App. 1993)(tribal council subject to ICRA claims); Gonzales v. Allen, 17 Indian L. Rep. 6121 (Sho. Ban. Tr. Ct. 1990)(sovereign immunity bars back pay, but not injunctive relief);



Murphy v. Standing Rock Sioux Election Comm'n, 17 Indian L. Rep. 6069 (St. Rx. Tr. Ct. 1990)(permitting action against tribal election commission); Oglala Sioux Tribal Personnel Bd. V. Red Shirt, 16 Indian L. Rep. 6052 (Ogl. Sx. Tr. Ct. App. (1983)(sovereign immunity not a bar to ICRA claim); Hudson v. Hoh Indian Tribe, d/b/a the Hoh Tribal Business Committee, 21 Indian L. Rep. 6045, 6046-47 (Hoh Ct. App. 1992)(finding limited waiver of immunity).<sup>1</sup>

These tribal court decisions illustrate the rapid growth in tribal court jurisprudence and reflect the relatively recent development of codified tribal law on a widespread basis. See, e.g., Colville Tribal Civil Rights Act, Chapter 1-5 (waiving immunity of the Confederated Tribes of the Colville Reservation); Quinault Tribal Code, § 99.02 (waiving tribal immunity under some circumstances).

These tribal court developments are in part a response to the advent of what some have called the modern era of Indian law that was ushered in 1959 with the Supreme Court's ruling in Williams v. Lee, 358 U.S. 217 (1959). C. Wilkinson, supra, at 1. In that case, the Court set out the principle that Indian country is a place where tribes have the power to make their own laws and be ruled by them -- recognizing the essential principle of self-determination for Indian peoples. Consequently, the Court ruled that state courts generally lacked jurisdiction over Indians within Indian country. Since then, tribal civil authority over members and non-members on trust land has been routinely upheld, while the exercise of tribal authority over non-members

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<sup>1</sup>The foregoing cases were taken from papers prepared by Douglas B.L. Endreson, Esq. and Colin Cloud Hampson, Esq. of the law firm of Sonosky, Chambers, Sachse & Endreson. Mr. Endreson's paper is part of this Committee's record for its September 24, 1996 Hearing on Tribal Sovereign Immunity. Mr. Hampson's paper was presented at the Federal Bar Association Indian Law Conference on April 2-3, 1998.

has likewise been affirmed in a number of cases. Tribal courts are central to implementation of this rule of law within Indian country. The proposed legislation would be a step backward.

### Property Rights Issues

Property disputes within Indian country usually fall into three categories: 1) allegations that a tribe lacks power to regulate, e.g., zone, non-Indian fee land; 2) disputes over lease terms for the occupancy of Indian lands and the correct boundaries of Indian and non-Indian land; and 3) disputes over the ownership of land and rights to use water.

In the case of challenges to tribal regulatory power, non-members are afforded the opportunity to challenge the existence of such authority as a matter of federal law, but before raising such questions in federal court, generally must exhaust tribal court remedies. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989). Courts have ruled that Tribal court determinations of federal law may then be reviewed de novo by the federal courts. See Mustang Production Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996), cert. denied, 117 S. Ct. 1288 (1997) (upholding tribal tax on non-Indian engaged in oil production on allotted land); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991) (tribal regulation of employment practices permissible); see also Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) (tribal adjudicatory jurisdiction no broader than regulatory jurisdiction). In addition, and as shown above, in many instances tribes have waived their immunity from suit to hear challenges against the exercise of tribal power over both trust and fee simple property.



Second, tribal immunity is often not a bar to resolution of property disputes when federal action is required for tribal action to take effect, or where federal action determines the rights of Indian and non-Indian parties. This is the case with respect to leases of Indian lands subject to Secretarial approval, or where actions of agencies such as the Bureau of Land Management have the effect of setting boundaries of property owners on Indian reservations.

For example, non-member lessees of the Swinomish Tribe and individual owners of trust allotments have been embroiled in a dispute for several years over the appropriate annual rent for residential properties. Appraisers employed by the Bureau of Indian Affairs are responsible for ensuring that rates in the leases are consistent with the Secretary's trust responsibility. The Secretary may not approve leases for less than fair market rental. 25 C.F.R. 162.5(b). That value may be reviewed every five years as explicitly provided in the lease terms. When the non-Indian lessees disagree with the BIA appraisals, they are free to appeal to the BIA Area Director and then on to the Interior Board of Indian Appeals in Washington D.C. Finally, they may bring an action in federal district court to challenge the administrative determinations. The same process may be followed with respect to BLM surveys setting boundaries of Indian and non-Indian land.

Finally, it has long been the law that disputes over federal reserved water rights are subject to state court jurisdiction in some circumstances. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). These cases can be very lengthy and expensive as they involve thousands of parties and the federal, state, and tribal governments. See, e.g., In re the General Adjudication of All Rights to Use Water in the Big Horn River System, 899P.2d 848 (Wyo. 1995)(case commenced in 1977). Many tribes are willing to explore the possibility of settlement

of water rights disputes, rather than proceeding immediately to court. Making it easier to proceed to litigation would not further the hope of negotiated settlements.

For example, the Lummi Nation and several non-Indian water associations on the Lummi Reservation have been in conflict for several years over the allocation of groundwater on the Lummi Reservation. All agree that there is an insufficient amount of groundwater to satisfy the future needs of either the Nation, or the non-Indians. There is sharp disagreement over who has the legal right to the use of this limited resource. The Nation, supported by the Interior Department, claims the right to all unused groundwater and a substantial portion of that being used by non-Indians at present. The non-Indian associations are equally adamant in the view that they have the right to all of the reservation groundwater they presently use, as well as at least a portion of the available yield for future use.

This is a dispute that could be litigated and indeed, there has been talk of it by all parties. The State of Washington could commence a general stream adjudication and hale the United States and the Lummi Nation into state court. On the other hand, the United States or Nation could bring an action in federal court to determine the rights to use of the groundwater. Instead, however, the federal government, the State, the Lummi Nation and non-Indian water associations have spent their energy negotiating an agreement in principle to satisfy future water supplies for all on the reservation. While no final agreement has been reached, and a good deal of work remains to be done, the parties have made real progress and are hopeful that a negotiated outcome will be achieved.

This is uniformly the case with respect to water rights controversies within Indian country. Forums in which to litigate are available, but there is little enthusiasm to do so.



### Conclusion

The case simply cannot be made that a sweeping waiver of tribal sovereign immunity is necessary or advisable. Tribal courts are well equipped to deal with issues related to both civil rights and property rights within Indian country. An increasing number of tribes are providing for judicial review through waivers of tribal immunity in tribal courts. Existing avenues for federal judicial review of the many actions requiring Secretarial approval of tribal action also provide additional opportunities for review. Rather than legislating a one-sided waiver of tribal immunity, Congress should engage the tribes in a discussion of possible confirmation and clarification of tribal jurisdiction over all land within their reservations. Such an inquiry could fairly include consideration of whether congressional action to ensure the protection of rights of all those subject to tribal jurisdiction is necessary.



## United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

August 4, 1998

Honorable Ben Nighthorse Campbell  
Chairman  
United States Senate  
Committee on Indian Affairs  
Washington, D.C. 20510-6450

Dear Chairman Campbell:

Thank you for the opportunity to testify before the Committee on Indian Affairs regarding S. 1691. Set out below are my responses to the follow-up questions you have asked me.

1. Your testimony indicated the Administration feels government-to-government negotiations are the better alternative to the kind of litigation S. 1691 would encourage, citing the Muckleshoot-King County case and the Lummi water rights dispute. What suggestions do you have to encourage the negotiation option?

Negotiations of disputes within Indian country frequently require congressional authorization and appropriation of funds. While we understand that funding for particular settlements cannot be promised in advance of review of the merits of a settlement, it is important that meritorious settlements presented to Congress be authorized and funded. There is no better inducement to reasonable settlements of disputes than a track record of congressional approval of negotiated agreements. Congress has such an opportunity before it in S. 1899, the Rocky Boys Water Rights Settlement Act, which enjoys bipartisan support from the Montana congressional delegation as well as support from the State of Montana and the Administration. It is very helpful to on-the-ground negotiators to be able to point to success in moving a settlement through Congress, especially given the lengthy negotiations that always precede introduction of a Bill in Congress.

Furthermore, we support the creation of a Joint Tribal-Federal-State Commission on Intergovernmental Affairs similar to that provided in section 105 of S. 2097. This provision and our recommendations are set forth in the Testimony of Assistant Secretary Kevin Gover before this Committee (July 15, 1998). We believe the goal of all parties should be to provide for the use of intergovernmental agreements to foster good long-term relations among governments. We should also endeavor to make Alternative Dispute Resolution services available in order to approach particular disputes that may arise among tribes and their non-tribal neighbors.



2. We have heard from non-Indians living on Indian reservations and their complaints about not being permitted to vote in tribal elections, for instance, but nevertheless being subject to tribal jurisdiction. Would you support a legislative clarification of tribal jurisdiction provided there was recourse to Federal court review of final tribal court decisions?

At the outset, it is important to note that individuals are now afforded federal court review of some tribal actions through habeas corpus proceedings.

We think that it would be worthwhile for Congress to consider confirmation of tribal regulatory and adjudicatory jurisdiction over non-members on fee lands within reservations. Such a proposal might include federal appellate court review of federal law issues that arise in such matters before the tribal courts, with a clear error standard of review for facts. Such federal appellate review would ensure compliance with due process and other protections of the Indian Civil Rights Act. In addition, it is critical that Congress support the development of strong tribal court systems through adequate funding for Interior and Justice Department programs that benefit tribal courts and other institutions.

We think that a dialogue on this subject would be useful to determine the interest among tribal leaders in substantive changes in the law.

3. Would you support amendments to the Indian Civil Rights Act so that tribal members would be assured to rights of counsel in criminal matters?

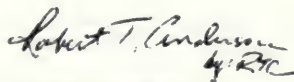
Tribal members are currently guaranteed the right to be represented by counsel in criminal matters, although Congress did not in this Act require that the Indian tribe provide such counsel, and Congress has never appropriated funds specifically for that purpose. [25 U.S.C. § 1302(6)] We believe that the decision of whether tribes should provide counsel for tribal members in criminal matters is best left to the individual tribes and should not be legislated by Congress. I understand that a number of tribes have established public defender offices that provide counsel for indigent defendants.

4. I believe a comprehensive, national survey of the health of tribal courts and administration of justice in Indian country is necessary. Would the Administration support such a survey – both rhetorical as well as financial commitments?

We believe that substantial study of the operations of tribal courts has occurred in recent years – beginning with the Civil Rights Commission study completed in 1992 and more recently with the Bureau of Indian Affairs survey of tribal justice systems and Courts of Indian Offenses, which was contracted out to a third party. Rather than spending time on more studies, we believe Congress should fund programs designed to support and, where necessary improve, the operation of tribal courts. For example, the Indian Tribal Justice Act of 1992 contains recommendations worthy of implementation and funding, but Congress rejected the Administration's request that implementation be made available. We would appreciate the opportunity to work with you and the appropriations committees on implementation of the Tribal Justice Act.

Thank you for the opportunity to respond to your questions. Please let me know if I can be of further assistance.

Sincerely,



Robert T. Anderson  
Counselor to the Secretary

**TESTIMONY**  
**OF**  
**JEFFREY C. SULLIVAN**  
**PROSECUTING ATTORNEY**  
**YAKIMA COUNTY, WASHINGTON**  
**BEFORE THE COMMITTEE ON INDIAN AFFAIRS**  
**UNITED STATES SENATE**  
**CONCERNING S. 1691 THE AMERICAN INDIAN**  
**EQUAL JUSTICE ACT**  
**PRESENTED ON**  
**APRIL 7, 1998**

I am Jeffrey C. Sullivan, Yakima County Prosecuting Attorney. I have been the elected prosecutor since 1974.

Yakima County is the second largest county in the state of Washington and is one and a half times the states of Rhode Island and Delaware combined. The Yakama Indian Reservation contains 1.3 million acres, one million of which are in Yakima County. The reservation has a population of approximately 30,000, 23,000 which are non-indians. I have appeared twice before the United States Supreme Court on issues involving tribal rights and responsibilities. I currently have a case pending before the Washington Supreme Court involving Indian Hunting Rights.

I believe S. 1691, the American Indian Equal Justice Act, should be passed. General Sovereign Immunity as applied to tribal government is wrong and Congress should act immediately to correct it.

**STATE IMMUNITY**

Mr. Justice Traynor in *Muskopf v. Corning Hospital District*, 359 P. 2d 457 (1961) at pages 458, 459 and 460 states as follows:

"After a re-evaluation of the rule of government immunity from tort liability we have concluded that it must be discarded as mistaken and unjust ...



The shifting fortune of the rule of governmental immunity as applied to hospitals is illustrative of the history of the rule itself. From the beginning there has been misstatement, confusion, and retraction. At the earliest common law the doctrine of "sovereign immunity" did not produce the harsh results it does today. It was a rule that allowed substantial relief. It began as the personal prerogative of the king, gained impetus from sixteenth century metaphysical concepts, may have been based on the misreading of an ancient maxim, and only rarely had the effect of completely denying compensation. How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.' *Borchard, Governmental Responsibility in Tort*, 34 Yale L.J. 1, 4.

The rule of county or local district immunity did not originate with the concept of sovereign immunity. The first case to hold that local government units were not liable for tort was *Russell v. Men of Devon*, 100 Eng.Rep. 350. The case involved an action in tort against an unincorporated county. The action was disallowed on two grounds: since the group was unincorporated there was no fund out of which the judgment could be paid; and "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." 100 Eng.Rep. 359, 362. The rule of the *Russell* case was first brought into this country by *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 249. There the county was incorporated, could sue and be sued, and there was a corporate fund out of which a judgment could be satisfied. Ignoring these differences, the Massachusetts court adopted the rule of the *Russell* case, which became the general American rule.

If the reasons for *Russell v. Men of Devon* and the rule of county or local district immunity ever had any substance they have none today...

The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia...

None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity."

The Illinois Supreme Court in *Molitor v. Kaneland Community Unit District* 302, 18 Ill App. 2d 11, 163 N.E.2d 89 (1959) in doing away Illinois sovereign immunity stated at pg. 94 as follows:

"We are of the opinion that school district immunity cannot be justified on this theory. As was stated by one court, 'The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the king can do no wrong,' should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.'" *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480,482. Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that "divine right of kings" on which the theory is based.

The other chief reason advanced in support of the immunity rule in the more recent case is the protection of public funds and public property. This corresponds to the "no fund" or "trust fund" theory upon which charitable immunity is based. This rationale was relied on in *Thomas v. Broadlands Community Consolidated School Dist.*, 348 Ill.App. 567, 109 N.E.2d 636, 640, where the court stated that the reason for the immunity rule is "that it is the public policy to protect public funds and public property, to prevent the diversion of tax moneys, in this case school funds, to the payment of damage claims." *This reasoning seems to follow the in that it is better for the individual to suffer than for the public to be inconvenienced.* From it proceeds defendant's argument that school districts would be bankrupted and education impeded if said districts were called upon to compensate children tortuously injured by the negligence of those districts' agents and employees.



We do not believe that in this present day and age, when public education constitutes one of the biggest businesses in the country, that school immunity can be justified on the protection-of-public-funds theory."

The Supreme Court of Florida led the way in judicial abolishment of sovereign immunity. In an opinion authored by Justice Thormal, the Court in *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (1957) which as a case involving a jailer who left a prisoner unattended while the cell filled with smoke, resulting in the prisoner's death. The trial court, following prior Florida law, dismissed the suit based on sovereign immunity. The Florida Supreme Court realized this was unjust and stated at page 131 as follows:

"We are here faced squarely with an appeal to recede from our previously announced rule which immunizes a municipal corporation against liability for torts committed by police officers. The rule against municipal liability for torts has been the subject of thousands of pages of learned dissertations. We are told that since 1900 well over two hundred law review articles alone have been written on the subject. Innumerable textbooks have made their contribution, most of them adversely critical.

Immunization in the exercise of governmental functions has been traditionally put on the theory that the "king can do no wrong but his ministers may". In applying this theory the courts have transposed into our democratic system the concept that the sovereign is divine and that divinity is beyond reproach. In preserving the theory they seem to have overlooked completely the wrongs that produced our Declaration of independence and in the ultimate resulted in the Revolutionary War. *We, therefore, feel that the time has arrived to declare this doctrine anachronistic not only to our system of justice but to our traditional concepts of democratic government.*

The immunity theory has been further supported with the idea that it is better for a individual to suffer a grievous wrong than to impose liability on the people vicariously through their government. *If there is anything more than a sham to our constitutional guarantee that the courts shall always be open to redress wrongs and to our sense of justice that there shall be a remedy for every wrong committed, then certainly this basis for the rule cannot be supported."*

In the State of Washington, this issue was dealt with by the legislature in 1961. RCW 4.92.090 Chapter 136 91961)

"The State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortuous conduct to the same extent as if it were a private person or corporation."

In 1967, this principal was extended to all local government entities. RCW 4.96.010.

### FEDERAL IMMUNITY

On August 2, 1946, after nearly thirty years of congressional consideration, drafting and redrafting, a federal tort claims act of general applicability was adopted. In basic outline, this act is simple. It subjects the United States to liability in the federal courts for money damages ... for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Mr. Justice Jackson, writing for The United States Supreme Court in *Feres v. United States*, 71 S.Ct. 153 (1950) states at page 156 as follows:

"The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. While the political theory that the "king could do no wrong" was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was involved on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown. As the federal government expanded its activities, its agents caused a multiplying number of remediless wrongs-wrongs which would have been actionable if inflicted by an individual or corporation but remediless solely because their perpetrator was an officer or employee of the government... The primary purpose of the act was to extend an remedy to those who had been without..."



Mr. Justice Frankfurter in *Indian Towing Company v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed 48 (1958) at page 68 and 69 stated:

"The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws."

It should be noted that England in 1947 passed the Crown Proceedings Act which was similar in scope to the Federal Tort Claims Act passed in 1947.

### TRIBAL IMMUNITY

The only places where this archaic, unjust and totally indefensible legal maxim exist are on Indian Reservations. While the U.S Supreme Court could abolish this doctrine it has been reluctant to do so. In *Thebo v. Choctaw Tribe of Indians*, 66 Fed. 372 (1895) the 8<sup>th</sup> Circuit held that "It may be conceded that it would be competent for congress to authorize suit to be brought against the Choctaw Nation upon any and all the causes of action in any court it might designate"

However, the court determined that congress had not done so and therefore the tribe could not be sued.

In *United States v. U.S. Fidelity and Guaranty. Co.* 106 F.2d 804, the 10<sup>th</sup> Circuit Court of Appeals stated at page 810: "...The Indian tribes like the United States, are sovereigns immune from civil suit except when expressly authorized."

In 1968 with adoption of the Indian Civil Rights Act many people through congress had provided that authority. The right to redress wrongs in court. However, the United states Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 L.Ed 106, 98 S.Ct. 1670 (1978) ruled otherwise.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. Unites States*, 248 US 354, 358, 63 L.Ed. 291, 39 S.Ct 109 (1919); *United States v. United States Fidelity & Guaranty Co.* 309 US 506, 512-513, 84 L.Ed 894, 60 S.Ct 653 (1940); *Puyallup Tribe v. Washington State Department of Game*, 433 U.S. 165, 172-173, 53

L.Ed.2d 667, 97 S.Ct 2616 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *United State v. United States Fidelity & Guaranty Co.*, supra at 512, 84 L.Ed 894, 60 S.Ct 653.

It is settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Teston*, 424 U.S. 392, 399, 47 L.Ed.2d 114, 96 S.Ct 948 (1976), quoting, *United States v. King*, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct 1501 (1969). Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in the habeas corpus action is the individual custodian of the prisoner, see, e.g., 28 USC § 2243 [28 USCS § 2243], the provisions of § 1303 can hardly be read as a general waiver of tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit."

It has been 52 years since Congress passed the Federal Tort Claims Act. It has been over 30 years since governments at all levels in this state have been responsible for their wrongful acts. In other states it has been over 40 years since this archaic legal maxim has been nullified.

During that time none of dire consequences predicted by those governments has come to pass. None of them have ceased to exist and while they may have had to buy liability insurance, so has everyone else. In fact, as stated in *Molitor v. Kaneland*, supra, "The public's willingness to stand up and pay the cost of its enterprises carried out through municipal corporations is no less than its insistence that individuals and groups pay the cost of their enterprises. Tort liability is in fact a very small item in the budget of any well organized enterprise."

Additionally, the advent of liability has made all of us in government more responsive and accountable. Frankly, as an attorney who represents local government in this era of shrinking budgets, I would love to have sovereign immunity back, however, that would not make it right.



In my experience, the tribal governments of this state ask to be treated as an equal government. They ask that they be dealt with on a government to government basis. However, they want all of the rights and none of the responsibility. In every interlocal agreement executed by political subdivisions in this state there are indemnity agreements to hold each other harmless. The tribes will not agree in most instances to this clause because they don't want to waive immunity.

Whether you are a Native American or a non-native, having a government whose decisions cannot be reviewed first by a disinterested magistrate and then by the Courts of Appeal can only be described as unjust. If a tribal government decides to build a slaughter house next door to your home, the county or state ought to be able to challenge that decision in court. If the tribe will not issue you a well permit, you ought to be able to challenge that decision in court. If the tribe builds a casino next door to your home, you ought to be able to challenge that decision in court. If the tribes builds a casino and doesn't make provisions for the traffic problems it causes, you ought to be able to take them to court.

Whenever the county is considering a land use decision on the Yakama Indian Reservation, the tribe is given notice. They participate fully in all hearings whether its before the planning department, the planning commission, the hearing examiner or the Board of County Commissioners. They are consulted as are other units of government within the county. If they don't agree with the decisions that are made, they challenge those decisions in Court which is their right to do. Yakima County has been sued more than one by the Yakama Indian Nation because of its land use decisions. On the other hand, the tribe gives no one notice of it's land use intentions.

I find it inconceivable that the Congress of the United States stands by its inaction authorizes the tribal governments to blatantly destroy the civil and property rights of United States citizens. The "king can do no wrong" has no place in the 21<sup>st</sup> century. The Congress should pass The American Indian Equal Justice Act, S. 1691 and recognize the value and rights of all its citizens.

**TESTIMONY OF JILL JENSEN  
CITIZENS FOR SAFETY AND ENVIRONMENT**

**BEFORE THE COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE**

**TRIBAL SOVEREIGN IMMUNITY  
PRESENTED TUESDAY, APRIL 7, 1998**

Honorable Committee Members,

My name is Jill Jensen. Thank you very much for the opportunity to convey to you our considerable concerns as they relate to the White River Amphitheater project being developed by the Muckleshoot Indian Tribe in partnership with a California promoter, Bill Graham Presents.

The White River amphitheater, a project that would allow up to 23,000 people and up to 10,000 vehicles to trample upon the Enumclaw Plateau *every weekend* from April to October, is under construction upon *fee-simple* land in a rural, primarily agricultural area half way between the cities of Enumclaw and Auburn in King County. Despite many violations of land use, zoning, and regulatory laws, construction proceeds without adequate lawful jurisdictional oversight by King County, the State of Washington, or the government of the United States of America.

Citizens for Safety and Environment is a grass-roots community action group with over 8,500 constituents. We have been fighting this amphitheater project for nearly a year, without the benefit of adequate support and interdiction by any governmental entity. We are demanding the proper and rightful enforcement of legal and environmental laws by all governmental entities responsible for protecting the rights of all citizens of the community, both on an off the Muckleshoot Indian Reservation.

The American Indian Equal Justice Act, S. 1691, is precisely the type of legislation needed to begin to properly address complex issues relating to business and commerce involving American Indian tribes. **This Act is a fundamental building block for future legislation that will be necessary to define tribal legal and sovereignty issues and subsequently clarify relationships, such that both tribal governments and other political subdivisions of the United States may conduct our affairs with the proper dignity, integrity, and respect.**

This proposed legislation begins to define a set of rules and guidelines that is necessary for more comprehensive business and governmental relationships. This will make all parties



more comfortable in an area that has heretofore been too complex for most people to navigate. **The ultimate result will be an elevation of tribal governments and enterprise to their proper standing within our economic and societal systems.**

This project is a very large scale commercial operation involving a large facility upon which construction has already begun. The issue of immunity from lawsuit as relates to this project is choking almost all efforts to resolve many problems, if indeed solvable at all, before the project is allowed to continue construction. **Nobody at any level of government has had the fortitude to take on this issue, primarily because of their fear of the sovereign immunity threat. This is totally unacceptable!**

We all know that despite the best intentions of architects, design engineers, and construction companies, perfect results are never guaranteed. Additionally, despite the best intentions of the operators and/or managers of such a large scale endeavor, security may be lax or overzealous, medical treatment may be insufficient or untimely, traffic mitigation attempts may not be sufficient therefore increasing potential for injury accidents, and many other potential impacts may endanger the public safety and/or property.

Consequently, the legal system properly has within it the "tort" system. A tort is, according to the Random House Dictionary of the English Language, a wrongful act, not involving a breach of contract or trust, which results in injury to another's person, property, reputation, or the like, and for which the injured party is entitled to compensation.

As a result of the Indian Reorganization Act of 1934, Indian tribes *have claimed* they have a degree of sovereign immunity not unlike that of states, counties, and cities. Among the protections immunity offers, a very significant one is immunity from lawsuits that result from torts.

Immunity has practical purpose at times when self government, and other matters within any jurisdiction need protection from constant and/or frivolous interference with the governmental process. However, "blanket immunities" have been removed by all governmental entities except those which Indian tribes purport to have. Non-Indian governmental entities have waived immunity from lawsuit on all but the most absolutely necessary issues because of the lawful need for accountability of those who have power over others, whether from the business community or government.

**The assumed immunity by Indian tribes may have validity for many internal issues but becomes a significant problem as tribes become more active in business activities that are patronized by non-Indians and Indians alike. This is of especial import when the business is one such as the amphitheater. The large outdoor concert industry is known to be at high risk as to injuries and all too often, deaths of patrons.**

Indian tribes often waive immunity when entering into significant contracts with non-Indians. This allows both parties to the contract to have reasonable access to the same non-tribal court system wherein they may seek relief from damages which may have been caused by the other party to the contract. It is highly likely that Bill Graham Presents, the general contractor, financial lenders, as well as others who have contracts for the proposed amphitheater have sought and been granted a waiver of immunity by the Muckleshoot Indian Tribe.

If the business people that believe so strongly in the success of the amphitheater have waivers of immunity, it only seems to make sense that at a minimum, families of patrons, patrons, and neighbors of the project have the same access to the courts to seek relief should "injury" occur.

It is inexcusable that a facility that may contain up to 23,000 citizens of the region, both Indian and non-Indian alike may be built with out proper and sufficient oversight and without proper access to non-tribal courts for relief should injury to persons and/or property occur.

**Citizens of the surrounding area have no recourse within the legal system to compel the Muckleshoot Indian Tribe to be in compliance with land use, zoning, and regulatory requirements normally associated with a project of this scale and impact. The issue of assumed tribal immunity from law suits is ever present, inhibiting the due process that is demanded of this business endeavor.**

The issue is further complicated by the typical tactic of tribes to join suits against non-Indian partners and contractors on the basis that the tribe is a "necessary and indispensable" party since their economic well being is being attacked. The result is that the courts then dismiss the suits on the basis that tribes are assumed to be immune from law suit. CSE's current federal legal action against the Bureau of Indian Affairs, the Muckleshoot Indian Tribe, and the contractors has had volumes of material generated by the defendants in an attempt to have the case dismissed since the Tribe is "necessary and indispensable" but immune to lawsuit. The issue of immunity has become a panacea for the tribes whenever they seek to escape accountability. Senate Bill 1691 would eliminate this legal shell game, and give citizens their Constitutionally guaranteed access to due process.

Ever since the Indian Reorganization Act of 1934, non-Indians and non-members of the reservation tribes, even though they comprise nearly 50% of residents of reservations nationwide, are not granted the right to vote in tribal elections, or the right to participate in the making of tribal law and regulations, including, but not limited to, land use and zoning.



Consequently, they must depend on the underlying jurisdiction as *their representative agency of government*, in which they put their full faith and trust that they will have the right to *due process of law* protected. All too often, cities, counties, and states can't protect non-tribal citizens' interests because of the ever-looming immunity problem.

The basic civil rights of these non-Indian and non-member Indian residents of the Muckleshoot Indian Reservation living within unincorporated King County, must be guaranteed by the government of the United States of America.

In 1971, the State of Washington published a booklet entitled "Are You Listening Neighbor?" which was a report of the state's Indian Affairs Task Force. Many of the Indian tribes of Washington contributed. One of the outcomes was that many tribes of Washington State strongly requested that they be recognized as a "public agency" such as cities and counties for the purpose of inter-local agreements and other government-to-government issues. An amendment to Title 39.34.020 of the Revised Code of Washington codified this recognition. This recognition gave the tribes many rights and privileges to enable more self-sufficient and empowered government, but the state and King County have failed to recognize the associated obligations of this status, such as compliance with the state's Growth Management Act and compliance with the State Environmental Policy Act.

Indian reservations have an interesting governmental form, perhaps best described as a "city-state". A *city* because of their relationship to the state, counties, and other cities. A *state* because of their unique relationship to the federal government, not unlike that of states. There is little question that this status needs clearer definition such that all of us may have better jurisdictional relationships.

As recognized governmental entities, dependent upon the United States, and subject to the Constitution and statutes of the United States, as acknowledged in treaties and the Muckleshoot Constitution, it is confounding that Indian tribal governments, which resemble both state and local governments, should think themselves uniquely exempt from the Environmental Laws of the United States and the State of Washington. Especially considering the *treaty promises* by the Indian tribes and bands to be *friendly with citizens* or in other words, their neighbors, yet relentlessly demanding full compliance by their neighbors.

Over the last thirty or so years the United States and the States have come to understand the sensitive and important relationship of their peoples to the land, nature, and one another. As a result of this critical understanding, our country has created the National Environmental Policy Act, (NEPA), and the State of Washington has adopted the State Environmental Policy Act, (SEPA), which in many instances is more restrictive than NEPA. These very significant laws have become our *good neighbor* laws. They define

the importance of understanding and implementing statutes that *always* consider the actions of one entity as to its impacts on all other neighboring entities.

These environmental laws span jurisdictions, and become the tools for conflict resolution, a "voice of reason" if you will, in that virtually no one is exempt.

As relates to Indian Reservations, the Bureau of Indian Affairs demands that NEPA regulations be complied with when considering federal actions wherein a "fee to trust" land conveyance is applied for by a tribe. The BIA also recognizes the jurisdiction of states, counties, and cities over fee simple land regardless of ownership by an individual Indian or by a Tribe. BIA regulations specify that these jurisdictions be allowed to comment as to lost taxes, lost land use controls, and lost assessments, whenever considering fee to trust conveyances.

It is our hope that the Committee on Indian Affairs consider adding to S. 1691 the requirement that should no other jurisdiction assert compliance with NEPA or state level environmental laws, that the requirements of NEPA be the minimum mandates for projects being developed by Indian tribes. This should be the case whether on fee-simple lands or those defined as "Indian Country" (as specifically defined in the February 25, 1998 unanimous U.S. Supreme Court opinion 'Alaska vs. Native Village of Venetie Tribal Government et. al.'). The U.S. Environmental Protection Agency could be the lead NEPA agency for all such projects.

As one last footnote, many people are concerned that Indian tribes would be unduly impacted by the burden of potentially large compensatory legal claims. Many tribes are still economically disadvantaged and would be at significant financial risk. It is our firm belief that this should not hinder the application of due process. **All too many victims of negligence, abuse, and illegal activity are often ruined financially when no one can be held accountable. It would be appropriate for the federal government to subsidize or underwrite liability insurance for tribes with financial need.**

Again, thank you for your consideration of our issue. We know that many other communities have similar problems and are as frustrated as the citizens of our community. Please do all in your power to pass this critical piece of legislation.

TESTIMONY OF  
 BILL TAYLOR,  
 PRESIDENT, TAYLOR SHELLFISH  
 and  
 PRESIDENT, PUGET SOUND SHELLFISH GROWERS

BEFORE THE COMMITTEE ON INDIAN AFFAIRS  
 UNITED STATES SENATE

CONCERNING S.1691 THE AMERICAN INDIAN EQUAL JUSTICE ACT

PRESENTED ON  
 APRIL 7, 1998  
 TUKWILA, WASHINGTON

At 45 minutes after midnight in the wet chill darkness of January 19, 1995, my family's beach in Chapman's Cove in southern Puget Sound was invaded illegally by about a dozen members of the Squaxin Indian Tribe. As part of a larger tribal workforce of 60 to 80 who were digging clams on an adjacent state beach, they were accompanied by two armed tribal enforcement officers. My foreman, who happens to belong to that Tribe, told a tribal officer they had no right to be on our property, but the officer refused to stop them. In fact, our boundary was clearly marked every ten to twenty feet, and the Tribe's diggers ignored and even destroyed our markers. They went up to 70 feet onto our property, proceeded to dig 2,000 pounds of clams worth \$4,000, and caused other damage to our property. If my family had not cultivated and seeded that beach, there would have been few or no clams there. Instead, the clams were much more dense than on the state beach. And if we had harvested them later, as we had planned, they would have been worth even more.

Obviously the Tribe sanctioned the event that led to this injury, and obviously the Tribe allowed it to stand. We asked the Tribe for reimbursement. To this day, my family has never been compensated.

The reason we were denied justice is my family and I are merely American citizens, and therefore we have no legal recourse in state or federal court against the Tribe. Congress continues to allow Tribes to hide behind an archaic concept reserved elsewhere to dictators and monarchs, but that no other government in America accepts. That legal barrier is absolute sovereign immunity. And it is unjust.



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To U.S. Senate Committee on Indian Affairs  
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Mr. Chairman, I also want to stress that my family has always enjoyed good relations with our Indian neighbors. We buy and market shellfish for some, and others are valued employees. We share more than a community with the Tribe, we hold common values, especially a love of our environment. We bear no ill will toward our neighbors.

My name is Bill Taylor. I am a farmer of shellfish. My family has grown shellfish on the shores of Puget Sound and Hood Canal for four generations. Today, my company grows clams, oysters and mussels and sells them all over the world.

I am also President of the Puget Sound Shellfish Growers, a group representing over 130 independent businesses, mostly small and family-run.

Some tidelands my family farms today, and many tidelands belonging to our fellow growers, have been in our families for generations. Washington state sold some tidelands to our ancestors in the 1890s specifically to try to save the then-declining shellfish populations of Puget Sound. Earlier, the federal government had granted use of the territorial tidelands to shellfish growers.

In fact, when local Indian tribes signed the treaties with Governor Stevens in the 1850s, they agreed to protect the growing shellfish industry, with a commitment that stated *"provided however, that the tribes shall not take shellfish from beds staked or cultivated by citizens."*

The reason, Mr. Chairman, that I go into this history is to explain that the private, commercial farming of our tidelands has been going on for nearly 150 years. And until very recently, there has never been a question that we owned the tideland and its resources, fully and without the slightest shadow of doubt.

As a rancher yourself, I know you appreciate the risks and failures that underlie every farmer's existence. Like you, we suffer from adverse whims of nature. We risk the rise and fall of prices, the changing tastes of consumers, the press of ever-greater regulation. We invest in research and new technologies to enhance our success, and sometimes we fail. And in our case, we often suffer from the pollution of others, and we find ourselves in the front line of battle to clean and protect our waters.

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In 1989 however, some 130 years after the tribes signed the treaties, and without any complaint to us over that time, several Puget Sound Indian tribes sued, claiming one-half of our shellfish under the Treaties.

In the nearly ten years since, a great black cloud has hung over me, my family, and all the other families that farm shellfish here. Today, we do not know whether we may keep the shellfish we grow, or just some portion. For nearly all the families who grow shellfish, their entire savings, their entire life's work is tied up in their beaches, their businesses, and this lawsuit. Some face total ruin.

And a principal reason that this immense unfairness was visited upon us after seven generations, is because the Tribes enjoy a legal haven that every other government in America has rejected as unjust: absolute sovereign immunity.

Actually, it is more unfair than just the one-sided ability of the Tribes to sue us that creates this injustice. We also are not allowed the normal defenses that would otherwise protect us in this situation. There is no statute of limitations that restricts the Tribes from bringing a claim, ever. The principle of laches, that is, a legal principle against delay in asserting a right or claim, does not apply to the Tribes, at least not yet. And of course, sovereign immunity also means there is no proactive way that I, as an American citizen, can sue the Tribes to settle this or any other issue that may come between us. I have to wait, because the scales of justice are completely one-sided: only the tribes can sue me, not the reverse.

And what is the result of this gross imbalance of justice? The final chapter remains unwritten, because we have yet to take our case to the U.S. Supreme Court. But if the case remains as it stands today, a tribe could demand half the natural background production from my lands. That will force me to try to prove what the natural production was before cultivation ever began. Mr. Chairman, please ask yourself: in all the years of your ranching, did you ever keep records on the native grasses you plowed under? The deer or antelope your cattle displaced? Could you go back forty years, let alone 140, and prove to a judge what existed decades before you came? Would it be fair that you pay the cost of finding out and fighting over it?

That is not only an absurd burden, it is an impossible burden. My great-grandfather is dead and so is everyone else who might know these answers. To require it today is to disgrace our concepts of justice. And this burden exists because the Tribes have a

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legal protection that the United States of America and every State within it has long since dropped. Americans can sue their states or the federal government for many things, including the taking of private property without compensation.

As you can see by now, our case is not idle speculation. Absolute immunity from law suit has already hurt me. Beyond these very real and present injustices, however, lie the future jeopardies that should be equally offensive to any American: if in the future the tribes legally sponsor a taking of shellfish on our land but they allow their members to take too much, or to damage our property again, we cannot sue the Tribe for compensation. Our lawyers have raised the frightful possibility that the tribes could arrest us on our own beaches for allegedly violating their rights; if they did, we would have no recourse against the tribe for false arrest or damages. Further, only tribes can sue us, and not we them, to determine whether any other act of ours to conduct our business is acceptable. They can wait another seven generations, and they can sue again. And its not just us: if they win this shellfish case, they can sue to undo the developments of tens of thousands of acres of developed tidelands, affecting hundreds of thousands of citizens, anytime and for any reason. The American citizens of this area have no certainty, no settled relationships, and no justice. We respectfully suggest to you that absolute sovereign immunity is not only unwise, it is unfair and un-American.

Americans do not bow to kings. So why do we allow certain groups of citizens the rights of kings? Give us all equal access to justice. Let tribes have the same immunity that states and the federal government retain. That is all Senator Gorton's bill would do. On behalf of all the families whose livelihoods depend on the Puget Sound shellfish industry, I urge the committee to support Senator Gorton's bill.

Mr. Chairman and members of the Committee, my fellow growers have a question for the Congress. We have always believed that our justice system was supposed to protect individuals and settle disputes peacefully and fairly. But if Congress refuses to give all Americans equal access to judicial processes to settle disputes, what alternative would Congress intend?

Thank you.





June 10, 1998

The Honorable Senator Ben Nighthorse Campbell  
Chairman, Committee on Indian Affairs  
Washington, D.C. 20510-6450

Dear Senator Nighthorse Campbell:

This letter responds to your May 5, 1998 letter with supplemental questions to my testimony at the April 7<sup>th</sup> hearing on tribal sovereign immunity in Seattle, Washington.

1. Since the Chapman's Cove incident in 1995, have there been other instances involving shellfish collection on our property or other private property?

There have been a number of incidents, some reported and some alleged. The incidents, some which involved our property and others that didn't, were individual tribal members harvesting clams, claiming to be exercising their treaty rights. Most of these incidents to my knowledge were not tribally sanctioned activities. Some specific case numbers from Skagit County involving tribal harvest in Northern Puget Sound are 98-3961, 98-3406, 982519 and 98-4713. This is not a full list.

To my knowledge there have been few if any other incidents of sanctioned tribal harvest on grower cultivated beds since Judge Rafeedie's December 1994 Ruling. I believe the tribes realize that it is not in their best interest to have any more incidents such as that which occurred in Chapman's Cove as long as the case is on appeal.

2. What is the status of the shellfish litigation now pending in Federal court?

The Ninth Circuit Court of Appeals issued their ruling on various petitions in January of this year. All parties filed petitions for rehearing on specific points or for En Banc review with the Ninth Circuit Court of Appeals in March. The Court requested responses to the grower's and tribe's petitions. These petitions and responses are currently being considered by the Court and we are awaiting their decision.

Each of the parties in the case has indicated an interest in appealing some aspect of the lower court's decisions to the United States Supreme Court. The petitions to the United States Supreme Court will likely be filed later this summer assuming the Ninth Circuit opinion is forthcoming.

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The Federal District Court Order currently provides the tribes the opportunity to access shellfish on grower's privately owned tidelands. Under the Judge Rafeedie's August 28, 1995 Implementation Order the tribes can file notice on the growers of their desire to develop a harvest plan for shellfish on the grower's tidelands outside their artificial beds. Judge Rafeedie ruled that growers could exclude tribes from harvesting on beds that had been artificial prior to August 28, 1998. He felt it was within the equitable powers of his court to exclude the tribes from harvesting in grower's artificial beds and thus benefiting from the fruits of their labor. All of the tribes filed notice on virtually all of the commercial growers. The growers then had 60 days to respond as to where their artificial beds were and to provide documentation regarding the cultivation activities that proved the beds were artificial. It took the better part of two months and two of my employees to do that documentation for my company. The tribes never responded.

The Ninth Circuit Court of Appeals overturned the District Court and said that if a grower has cultivated a natural bed, that the grower now has to provide the tribes access to those privately owned, cultivated beds for half of the shellfish that would exist there prior to cultivation efforts. A significant problem is that there is no recognizable difference between a cultivated clam and a natural clam. Both the tribes and the growers are challenged by how to implement this. Unfortunately for the growers, the Court has put the burden on us to determine the sustainable natural yield of a particular bed prior to historic cultivation efforts. Many of these beds have been cultivated since the late 1800's or early 1900's and no records exist for what was there prior to cultivation.

Regardless of the outcome from the Ninth Circuit, the growers feel the District Court missed the mark in their interpretation of the shellfish proviso in the treaty and we intend to appeal that to the United States Supreme Court. The treaties say that "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory... **Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.**" It is our intention to petition the United States Supreme Court to reconsider the simple meaning of this treaty language and to consider the doctrine of laches as it pertains to our case. The doctrine of laches basically says that it was unfair of the tribes to sit silently for 135 years while the growers successfully built their businesses with the understanding that the shellfish on their property was theirs, then assert their treaty rights claim. After allowing this much time to pass, the growers generally do not have the necessary records to document natural populations prior to cultivation efforts.

3. Would state trespass laws prevent tribal members from crossing private property in the event the Court rules for the tribe on appeal?

The answer is yes and no. It is yes if an individual tribal member is on private property unlawfully. Then state trespass laws apply. The individual tribal member would be prosecuted in county or tribal court depending on the arrangement between the tribe and county.

The tribes can legally access across private uplands if they can demonstrate to a Special Master the absence of access by boat, public road, or public right of way. In this situation state trespass laws would not apply since they would be their lawfully. The Federal District Court ruled that the tribes could not access across private uplands to get to privately owned tidelands to harvest their share of the shellfish resource. Judge Rafeedie told the tribes they would have to come by water as they had traditionally to avoid conflicts with the upland owners. The tribes appealed to Judge Rafeedie to

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reconsider this and he once again said "no" unless the tribes could demonstrate to a Special Master the absence of access by boat, public road, or public right of way. The tribes appealed this to the Ninth Circuit and the Ninth upheld the District Court's decision. We would anticipate the tribes will appeal this once again to the United States Supreme Court.

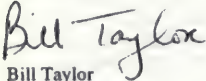
State trespass laws will not preempt a Special Masters decision to grant the tribes access over private uplands now. Nor will state trespass laws prevent further access over private uplands if that is granted by the Supreme Court.

The issue of crossing private uplands to access the beaches has been a real source of conflict in the case. Upland owners are very concerned about this particularly in the winter when the low tides come during the middle of the night.

It is important to point out that the beaches the tribes are accessing are also privately owned. It wasn't clear from your question as to whether you understood that the beaches were public and it was just an issue of accessing across private uplands. The tidelands are private property as well. Washington State is unique in this respect. All states had the option at statehood of keeping the tidelands in public trust or selling them to private ownership. Most states opted to keep tidelands in the public trust. Washington opted to sell a portion of their tidelands. Much of the tidelands were sold specifically for the purpose of culturing shellfish under the Bush and Callow Acts passed by the Washington State Legislature in 1895.

Thank you Senator for the opportunity to testify before your committee in Seattle and for your interest in this very important issue. I hope these responses to your supplemental questions are helpful. Please feel free to contact me if you have any additional questions. I would be willing to provide you or your staff with periodic updates on the tribal shellfish rights litigation if that is of interest to you.

Sincerely,



Bill Taylor  
Vice President  
Taylor Resources, Inc.



**Testimony**  
**of**  
**Alan Montgomery, Chairman of**  
**United Property Owners of Washington,**  
**Before the Senate Committee on Indian Affairs on**  
**Tribal Sovereign Immunity**  
**Presented Tuesday, April 7, 1998**

I am Alan Montgomery, Chairman of United Property Owners of Washington ("UPOW"), a non-profit organization with over one hundred seventy-five primarily residential waterfront home-owner associations as members. I am also the individual owner of waterfront residential property on Hood Canal, in western Washington.

UPOW and its member organizations have a combined membership of over sixty thousand individuals. There are an estimated total of two hundred thousand private property owners who own waterfront property on salt water beaches in western Washington, and to whom tribal sovereign immunity has recently become as issue of urgent importance even though they may reside many miles from a reservation. We strongly urge the Senate to pass Senate Bill #1691 simply because it will promote the interests of justice.

Washington is unique among the states because its 2000 miles of protected inland waterways and beaches are well-suited to growing shellfish, primarily clams and oysters. These sheltered inland waterways of Puget Sound and Hood Canal also became the locations for the first businesses and homes for the settlers of the Washington territory, after the making of the Stevens treaties in the 1850s between the local Indian tribes and the federal government. In reliance upon the promises of the territorial and federal governments that the treaties insured their clear title to these properties, the early settlers invested in and improved the properties and tidelands, and helped to create the modern economy and tax base that supports our local and federal governments to this day.

The present owners of these properties acquired them in good faith by purchase, and in some cases have invested their life savings in them. Shellfish beds flourish on these tidelands because the owners nurture and protect them from predators, both human and animal. This may be as part of a commercial enterprise or for personal use and pleasure, much like other home owners raise vegetables, flowers or fruit in their gardens and orchards.

UPOW was organized to provide a legal defense for these private property owners against claims made by local area Indian tribes under the Stevens Treaties. The tribes seek the right to come onto these privately-owned shellfish beds, including those that serve as the "front yards" of private residences, to take shellfish in which the owner has a significant financial and personal investment.

The tribes also seek the right to cross privately-owned upland residential properties for access to the shellfish beds. The tribes continue, via judicial appeals, to seek the right to use private roads and driveways, on a twenty-four hour per day basis, to

gain entrance to the beaches, even if it means crossing through the side-yards of private residences. We private home owners consider this to be an outrageous assault on our reasonable expectation of privacy and security in our homes that all other Americans enjoy.

Much to the dismay of private owners, under the recent Ninth Circuit ruling, shellfish beds that may be less than fifty feet from the front doors of our homes, are now subject to a tribal treaty right to take up to half of the shellfish, depending upon how much the private owner has improved the shellfish bed. Until the appeals are over, the extent to which tribal access down our driveways and across our side yards, and the extent to which large equipment and tools that could damage our properties may be used by tribes, is unclear.

However, it is clear that as a result of this ruling, the tribes will be able to come onto private properties without the consent of the owners, and engage in activities that may lead to significant damages. For example, the tribes may take a greater percentage of the shellfish than the ruling allows, or may damage or destroy shellfish beds in which the tribes have invested nothing and for which they pay no property taxes. If tribes attempt to cross upland properties to get to the beaches, damage to shrubs, gates, fences, landscaping, docks and bulkheads will inevitably result. Under some circumstances, these activities may result in personal injuries, or violations of the owner's right to privacy or other civil rights.

There is a growing frustration among property owners resulting from these claims because we know we have done nothing wrong. To the contrary, Judge Rafeedie specifically ruled that we private owners are completely innocent, which indicates that Congress should act aggressively to help avoid injustice against us:

The Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes. Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed.

All U.S. citizens (including the tribal members) benefited from the treaties. It is unjust to place the entire burden of this new treaty obligation upon innocent private property owners who are only a small percentage of the benefited citizens. In fairness, the federal government should accept full responsibility for satisfying these federal obligations by exempting private lands from treaty rights, which only it has the power to do. Regrettably, the federal government has, so far, declined to do so.

To make things worse, private owners know that if the tribes begin to exercise this newly created treaty right on their properties, there is little incentive for the tribes to respect the rights of the owners. Under the doctrine of tribal sovereign immunity, regardless of how careless or negligent the tribes may be, and no matter how large the amount of damages they may cause, the tribes know there is nothing the owner can do about it.

The tribes may argue that eliminating tribal sovereign immunity is unnecessary since, if damages occur as a result of their activities on private property, the private owners can make their damages claims against the individual tribal members involved.

However, that is not a realistic remedy, as the evidence presented by the tribes at trial indicates that, despite the substantial funds provided to the tribes by the federal government, a large percentage of their members are unemployed or otherwise below the poverty line. That is because those funds are owned and controlled exclusively by the tribal governments, as entities. Although the individual tribal members may have access to these resources, they do not individually own them, and therefore are less likely to have sufficient resources of their own to be financially responsible for any damages they may cause.

Our attorney presented evidence in the subproceeding that the annual income the tribal governments receive from the federal government and from casino gambling is very substantial (see attached charts). Thus, the Washington tribal governments are not poor, and being made to account for the damages they may cause to others will not cripple their ability to perform essential functions for their members. To the contrary, they have substantial financial resources, and should be expected to pay any damages they cause to others so that there is sufficient incentive to avoid damaging others, and as a matter of simple justice. Individual tribal members exercise treaty rights only under the jurisdiction and control of the tribal governments. Therefore, the tribal governments, as entities, should be held responsible for the damages their members cause on private property since they organize and supervise the tribal digs.

The treaties do not exonerate tribal governments from liability for damages they cause on private property. To the contrary, the Stevens treaties specifically require the tribes "to commit no depredations on the property of citizens," or "compensation may be made by the Government out of their annuities." The modern version of tribal sovereign immunity is therefore a violation of the spirit of the very treaties the tribes seek to enforce against us.

We private property owners do not seek to voluntarily enter into any transactions with the tribes, nor to obtain any benefits or advantages from them that might justify the imposition of tribal sovereign immunity upon us. The tribes may be sovereign governments with respect to their own members, but none of their members are compelled by law to join them. We private owners, on the other hand, are being compelled by the courts to interact with the tribes against our will. Private property owners who are not of Indian descent are excluded from tribal membership, and therefore have no ability to hold tribal governments accountable through participation in democratic elections.

It should be obvious that this ruling, if implemented, will be the start of unending conflict between the tribal governments and their off-reservation neighbors. It is unbelievable to private property owners that the federal government may force the tribes and property owners to be unwilling partners in privately owned shellfish beds that will only serve to undermine the systems of free enterprise and exclusive private property ownership that the Stevens treaties were intended to encourage.

If the Congress will not act to exempt private property from the exercise of treaty rights, then the least it can do is provide a strong incentive for the tribes not to damage private property by eliminating the doctrine of tribal sovereign immunity. Respect for, and confidence in, the American judicial system depends on having a realistic remedy available to persons damaged by others. If sovereign immunity for damages caused by unwanted tribal incursions onto private properties is not eliminated, the risk of angry conflict and confrontation on those private properties, rather than calm and deliberate dispute resolution in the courts, will be unnecessarily and unwisely increased.



Some of UPOW's member organizations are comprised of "fee land" owners of property located within the boundary of reservations. Their plight is even more severe than that of off-reservation waterfront property owners because the unfettered interference of the tribal governments with the reasonable use of their properties is much greater. Tribal governments have threatened to shut off the water supply to fee lands, block access roads, tax and regulate fee lands with no legal authority to do so, and to arrest and incarcerate fee land owners for using their property in a manner permitted by local, state and federal law. Due to tribal sovereign immunity, these private fee land owners have no ability to prove through the judicial process that the tribes are acting illegally, nor do they have recourse against them for the resulting damages or for violations of their civil rights. In short, they are denied the simple justice that all other Americans enjoy.

Again, we urge the passage of Senate Bill # 1691 because it will better promote justice than the current system of tribal sovereign immunity, under which the tribes have too much freedom to damage the properties and violate the civil rights of U.S. citizens with impunity.

**TABLE 1: TRIBAL MODERATE LIVING CONTRIBUTION BY U.S. GOVERNMENT**

<b>Tribes</b>	<b>Federal Government Payment or Award to Tribes</b>	<b>Number of Tribal Households</b>	<b>Federal Government Payment or Award Per Tribal Household</b>
Jamestown Klallam Tribe	3,140,474	62	50,653
Lower Elwha S'Klallam Tribe	2,285,261	157	14,556
Lummi Tribe	11,194,698	531	21,082
Makah Tribe	4,852,741	434	11,181
Muckleshoot Tribe	14,579,485	134	108,802
Nisqually Tribe	9,212,017	71	129,747
Nooksack Tribe	1,933,256	207	9,339
Port Gamble Tribe	1,200,792	111	10,818
Puyallup Tribe	11,455,976	363	31,559
Skokomish Tribe	1,510,678	196	7,708
Squaxin Island Tribe	2,319,762	116	19,998
Suquamish Tribe	3,349,600	198	16,917
Swinomish Tribe	3,664,086	111	33,010
Tulalip Tribe	8,679,622	502	17,290

1 From latest A-128 Audits produced at trial (fiscal year 1991 or 1992). Ex. UPOW-004, ER 1178. A-128 Audits not produced for Upper Skagit or Yakama Tribes.

2 Household numbers as shown in Thomas Report, Table D1, ER 1039, 1040.

**TABLE 2: TRIBAL CASINO NET WIN (CALCULATED FROM PUBLIC RECORD OF COMMUNITY CONTRIBUTION, ADDENDUM 3-4)**

<b>Tribes</b>	<b>Year</b>	<b>Highest of Allocated or Distributed</b>	<b>Net Win</b>	<b>No. of Tribal Households</b>	<b>Net Win per Household</b>
Jamestown Klallam Tribe	1995	159,813	7,990,650	62	128,881
Muckleshoot Tribe	1995	527,595	26,379,750	134	196,864
Nooksack Tribe	1995	124,733	6,236,650	207	30,129
Squaxin Island Tribe	1996 <sup>2</sup>	156,420	7,821,000	116	67,422
Suquamish Tribe	1996 <sup>2</sup>	300,000	15,000,000	198	75,758
Swinomish Tribe	1995	279,192	13,959,600	111	125,762
Tulalip Tribe	1995	495,903	24,795,150	502	49,392
Upper Skagit Tribe	1996 <sup>2</sup>	347,548	17,377,400	113	153,782

**NOTICE: THESE FIGURES ARE CALCULATED FROM STATE PUBLIC RECORD OF 2% COMMUNITY CONTRIBUTION; REQUEST FOR JUDICIAL NOTICE OF PUBLIC RECORD INFRA, P. 43.**

- 1 All Appellate Tribes but the Makah have casino compacts. See UPOW Opening Br., p. 60, n.22. A public records request for latest figures from all Tribes is pending, and the numbers will be furnished when produced by the State and/or Tribes.
- 2 When only 1st quarter figures were available, the amount was multiplied by four to calculate an annual figure.
- 3 Household numbers as shown in Thomas Report, Table D1. ER 1039, 1040.



**BEFORE THE UNITED STATES SENATE  
COMMITTEE ON INDIAN AFFAIRS  
APRIL 7, 1998--SEATTLE, WASHINGTON**

**STATEMENT OF CLEMENT J. FROST, CHAIRMAN  
SOUTHERN UTE INDIAN TRIBE**

Mr. Chairman and members of the Committee:

I am Clement J. Frost, Chairman of the Tribal Council of the Southern Ute Indian Tribe. We appreciate your invitation to participate in these proceedings, and we hope that our views will assist the Committee. You have requested that I address civil rights and property rights in Indian Country. In doing so, I must call upon my own experience and that of my tribe.

Our reservation is a checkerboarded reservation consisting of approximately 700,000 acres in southwestern Colorado. Almost one-half of the reservation is owned by the United States in trust for the Tribe. Additionally, we own severed mineral estates reserved in patents issued by the United States to homesteaders between 1909 and 1934. Because of the land ownership patterns, non-Indians are often close neighbors of members of my Tribe. The small Town of Ignacio, which is a tri-ethnic community of Hispanics, Anglos and Utes, is located within the reservation not far from our tribal headquarters. For many years, members of our tribe and other members of the community lived in harmony, attended public school together, helped one another, and respected each other. For a number of reasons, our relationships have become strained. Respect has been replaced by resentment. Mutual concern for one another has often turned to distrust and suspicion. As a person and as a tribal leader I am saddened by the increasing tensions that continue to grow. While many Indians and non-Indians seek to save the cooperative spirit of the past, racism and ethnic division is spreading on all sides. Racism is evil and destructive. It is born in ignorance and nurtured by fear and greed.

One factor leading to the decline in our relations has been the tribe's success. With the

frequent encouragement of Congress, we have actively pursued economic improvement. Where 25 years ago we were poor, we have taken advantage of the energy resources underlying our lands. Today the tribe's payroll exceeds that of any other employer in La Plata and Archuleta Counties. We employ almost 1000 residents of the Four Corners. Our tribally owned natural gas company is the fourth largest producer in the State of Colorado. In partnership with KN Energy, we are the majority owner of a gas gathering and treating system that collects and transports natural gas from hundreds of wells located within our reservation. While energy related revenues account for more than 90% of our annual general fund, we also receive revenues from a small casino, which we own and manage in accordance with our compact with the State of Colorado. We are proud of our accomplishments, and we have a right to be. This Committee should also take pride in our accomplishments.

Our success, however, has also fostered jealousy and envy by area residents who do not understand the barriers we faced in reaching our goals and objectives. They liked us better when we were poor. In 1972, Congress passed legislation authorizing our Tribe to sell lands and to purchase lands within our reservation. Under that law, purchased lands are to be titled in the name of the United States in trust for the tribe. Increased tribal revenues have permitted us to make occasional purchases of reservation land. While initially purchased by the Tribe in its own name, we have followed procedures set forth under federal regulations to have the lands taken into trust. Acquired lands have been used for a variety of purposes, including expansion of educational programs and other facilities that serve not just our tribal members, but other residents, as well. Fueled by concern that these few purchases signal reacquisition of the entire reservation, local officials feared that we would destroy the local property tax base. In response to those fears and in settlement of litigation regarding taxation, in 1996 we negotiated a Taxation Compact with the State of Colorado and the

County Government. Under the Compact our tribe agreed to make annual voluntary contributions to the County Government to help offset negative tax consequences associated with our purchases. The lost tax revenue associated with our acquired tracts is less than \$5000 per year in a county with an annual operating budget of more than \$30 million. More significant, but seldom mentioned, is the fact that energy related tax revenue derived from tribal lands supplies La Plata County with approximately one fourth of its annual tax revenue. The fears that the Tribe will reacquire all lands within the reservation are grossly exaggerated. As the Chairman of the Committee will attest, many non-Ute residents within the reservation have no interest in selling their lands, and we certainly cannot force them to do so. Yet acquisition of five small tracts of land within the Town of Ignacio and their placement into trust has spurred a panic among town officials, who have appealed to the Interior Board of Indian Appeals.

As elected leaders of our tribe, we hear from and listen to our tribal member constituents. Over the last two years, we have heard repeated allegations of use of excessive force against our tribal members by Town Police Officers. Those reports included assertions that officers beat tribal members and, in some cases, held loaded revolvers against the heads of members already restrained by handcuffs. The allegations were frequent and appeared to be verified by witnesses. We met with town officials and proposed creation of a citizen review panel to investigate complaints of police abuse brought against both town police and tribal police. Our suggestions were rejected, yet the allegations persisted. We support law and order, but there is nothing more damaging to community relations than repeated police brutality. In order to end those abuses, we authorized our attorneys to file a lawsuit against officials and officers of the town for civil rights violations. The filing of that lawsuit has further widened the gulf between Indian and non-Indian citizens in our area. We make



no apology for supporting the lawsuit; however, we remain hopeful that the lawsuit will be settled in a manner that will provide all citizens, Indian and non-Indian alike, with assurances that the town police are not above the law and are there to serve and protect all members of the public.

Because of the checkerboarded nature of our reservation, jurisdiction is complex. In an effort to help remove some of that confusion, we worked with state and local officials to resolve issues that have led to lengthy litigation on other checkerboarded reservations. The compromises we reached were approved by Congress in 1984, with enactment of Public Law No. 98-290. That Act confirmed the boundaries of our reservation, disclaimed tribal jurisdiction over non-Indians on non-Indian lands, and confirmed the Town of Ignacio's criminal jurisdiction over tribal members. New town officials who have moved to Ignacio from other states do not understand the long and complex history that led to this legislative compromise. Unfortunately, they have shown no interest to become informed, rather they simply demand that the Indian Country status of our reservation be revoked. In public statements, town officials appear to blame the lawsuit on Indian Country jurisdiction rather than on allegations of police abuse. Since enactment of Public Law No. 98-290 in 1984, however, our tribe has not contested the authority of the Town of Ignacio to enforce state and local laws against tribal members within the town.

We hope that our presence here will mark a new day in our relations with the town, in which constructive discussion can replace litigation. Discussion and cooperative governmental agreements could strengthen police protection for all concerned. Toward that end, we have urged the victims of civil rights abuses to mediate with the Town. A mediation session is scheduled later this month. We support and look forward to those discussions. Our history reveals repeated examples of negotiation and settlement of difficult issues, including: Indian Country status, reserved water rights

claims, taxation, and gaming matters. We have always supported discussion over litigation, whenever possible.

In conclusion, our governmental status as an Indian tribe is very important to us. We intend to maintain our traditions and our differences. We have been promised those rights and we have earned them. For our sake and for the sake of our children, our differences should be respected and not serve as the basis for hatred or jealousy. I hope that the Committee will not turn its back on the promises it has made to Indian people. Our sovereignty should not be diminished. At the same time, however, we remain willing to discuss ways in which the rights and expectations of non-Indians can be accommodated without sacrifice of our governmental status. Attachment No. 1 to my written statement is a schedule showing a number of examples of tribal actions which have contributed to the well being of the entire community as a whole. In the interest of providing you a more detailed legal analysis of several issues, Attachment No. 2 is a memorandum prepared by our lawyers for your review. Again, we thank you for the opportunity to appear before you today.

**ATTACHMENT NO. 1  
TO STATEMENT OF CLEMENT J. FROST**

**TRIBAL ECONOMIC CONTRIBUTIONS  
TO REGIONAL ECONOMY AND HUMAN SERVICE PROGRAMS  
IN THE IGNACIO AREA  
(Exclusive of federal and State Grants)**

<b><u>PROGRAM</u></b>	<b><u>TARGET POPULATION/# SERVED</u></b>	<b><u>TRIBAL SUPPORT</u></b>
-Tribal Payroll	Tribal Employees/ approx. 800	\$8 million annually, plus benefits
-Waste water treatment	Entire Indian and non-Indian community in Ignacio area	Approx. \$11 million investment no other entity could make
-charitable contributions	Beneficiaries of United Way, Schools, Human Service Programs/ see detail below	Approx. \$1 million annually
-energy development taxable non-Indian investment and production on tribal lands	La Plata and Archuleta Counties/ 45,000 residents	Approx. \$10 million annually
-fire protection	Los Pinos Fire Protection District	\$70,000 cash contribution plus dispatching service
-Head Start 1997-98	106 children and families: 36 Southern Ute 19 other Native American 19 Hispanic 30 Anglo 2 Black	\$260,765 gaming funds to support staff training, material purchase and implementation of Montessori curriculum, \$10,000 general operating support, \$100,008 in-kind support in facilities and service
-Families Learning Growing, Even Start	75 families at four sites in La Plata County, tribal support pending for Ignacio site--28 families, 28% Southern Ute	Tribal gaming request pending at \$23,000, Tribal in-kind support in facilities and services \$12,395



<b><u>PROGRAM</u></b>	<b><u>TARGET POPULATION/# SERVED</u></b>	<b><u>TRIBAL SUPPORT</u></b>
-Peaceful Spirit Alcohol Recovery Center	Intensive Residential Trtmt--96 clients 92% Native American Outpatient--52% Southern Ute 22% other Indian 8% Hispanic 18% Anglo	Request pending \$33,000 outreach counselor
-Ignacio Drop In Center	Approx. 100 youth per month--60% Southern Ute, average daily attendance 25	\$9,400
-Senior Citizens' Program	Meals, transportation, home visits, adult day care--approx. 200 clients--60% Indian	\$29,800
-Ignacio Volunteer Emergency Squad (Ambulance)	1997 Responses--Anglo 151 Southern Ute 107 Other Indian 91 Hispanic 90	\$14,900
-Job Training	11 county Training Advantage Southern Ute Reservation-Native American programs	\$47,819
-Butch McClanahan Library, Town of Ignacio		\$6,000 gaming funds
-Town of Ignacio DARE		\$10,000 per year for 5 years 1996-2000
-Multi-ethnic local youth sports teams		\$6,682
-George's Independent Boxing		\$7,500
-College of Sante Fe	High Risk Youth	\$94,705
-Ignacio Elementary School and Head Start Spaulding Reading Program Training		\$14,014

**BEFORE THE UNITED STATES SENATE  
COMMITTEE ON INDIAN AFFAIRS  
APRIL 7, 1998—SEATTLE, WASHINGTON**

**ATTACHMENT NO. 2  
TO STATEMENT OF CLEMENT J. FROST  
PREPARED BY MAYNES, BRADFORD, SHIPPS & SHEFTEL**

The Committee has requested testimony on two broad issues affecting Indian Country, civil rights and property rights. Because of their legal nature, Tribal Chairman Clement J. Frost has requested that our firm, which serves as general legal counsel for the Southern Ute Indian Tribe, prepare a brief legal analysis of those subjects. We hope that this analysis assists the Committee in its evaluation of these matters.

**I. Introduction**

The civil rights and property rights of persons in Indian Country turn heavily upon the legal relationship of those persons to the respective tribe or tribes for which Indian Country status has been established. In the area of civil rights, most substantive and procedural rights of Indians in Indian Country are defined by federal and tribal law, rather than by state law. As citizens of the states in which they reside, however, Indians are generally eligible to receive services provided to other state citizens. For non-Indians in Indian Country, depending upon the circumstances, civil rights may be defined by state law, federal law or tribal law. Determining applicable law is not always easy, particularly when different governments can articulate reasonable, competing interests over the persons or subject matter at issue.

Like civil rights, property rights in Indian Country may also be affected by one's relationship to the tribe at issue. Those rights include a vast range of potential interests that may vary significantly based upon the history of the tribe or the reservation. Clearly, reservation history, including consideration of the treaties or federal statutes that addressed the lands, may affect fundamental title

to real property. How underlying title is obtained or held also affects rights associated with those lands. For example, lands held by the United States in trust for the benefit of a tribe are presumed to be exempt from state or local property taxation. Federal statutes and regulations, coupled with tribal law, further define how subordinate interests in land, such as mineral leases or rights-of-way, may be acquired from tribes and their members. Just as the use of property outside of Indian Country may be affected by governmental action or regulation, so too may property rights in Indian Country be impacted by governmental regulation. Thus, the jurisdiction of a government to take action, whether that entity is a federal agency, a county planning commission, or a tribal council, is generally a key starting point in evaluating how property rights may be affected by governmental action in Indian Country.

First, this analysis seeks to provide legal support for and more detailed explanation of the foregoing propositions. Second, this analysis also addresses several matters of controversy or misunderstanding regarding civil rights and property rights in Indian Country. In that regard, we have identified the following issues:

1. To what extent may tribal governments regulate the conduct of non-Indians in Indian Country? How does that jurisdiction differ on tribal lands versus non-Indian lands?
2. What procedural rights, if any, do non-Indians have to participate in the making of tribal governmental decisions that may affect their personal or property rights? What minimal requirements, if any, might be imposed upon tribal governments to consider the views of such affected non-Indians?
3. Do tribal courts provide an adequate forum for adjudication of the rights of Indians or non-Indians in Indian Country? What role should federal courts or state courts play



with respect to such adjudication? How does tribal sovereign immunity from suit affect such adjudication?

Recognizing that the Committee's work includes not only an understanding of the status quo, but also consideration of ways in which to improve the current system, we believe that the experiences of the Southern Ute Indian Tribe may provide useful examples of alternative ways in which to approach issues in Indian Country.

## II. Civil Rights in Indian Country

### a. "Indian country"

"Indian country" is defined at 18 U.S.C. §1151 to include "all land within the limits of any Indian reservation," "dependent Indian communities," and "all Indian allotments." "Although this definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction." Alaska v. Native Village of Venetie Tribal Government, 66 U.S.L.W. 4145, 4147 (1998). By its express terms, 18 U.S.C. §1151(a) includes lands patented to non-Indians within the exterior boundaries of reservations, unless reservation boundaries themselves have been modified by Congress to exclude such lands. Particularly on reservations in which allotment and homestead patenting occurred, establishment of reservation boundaries, and thus Indian Country status, is a threshold matter that affects the jurisdictional powers of Indian tribes and of the federal government, as well of the civil rights of individuals. See, e.g., South Dakota v. Yankton Sioux Tribe, 66 U.S.L.W. 4092 (1998) (determining that landfill site located on non-Indian land opened for homesteading under 1894 statute was excluded from reservation and not subject to tribal environmental regulation).

### b. Jurisdiction in Indian Country

Assuming that Indian Country status exists, special jurisdictional principles apply. Several

factors must be considered in applying the principles, including: the Indian or non-Indian status of persons; the ownership status of the lands on which activities are conducted; and the nature of the activity at issue. For example, federal courts have jurisdiction over non-Indians who commit offenses against Indians within Indian Country under the general laws of the United States or under the Assimilative Crimes Act, 18 U.S.C. §13. State Courts have exclusive jurisdiction over non-Indians committing offenses against other non-Indians in Indian Country. United States v. McBratney, 104 U.S. 621 (1882). Tribes may not prosecute non-Indians for criminal violations of tribal law in tribal court. Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). Tribes possess authority to prosecute Indians for violations of tribal law, provided that criminal penalties do not exceed the limitations imposed by the Indian Civil Rights Act of 1968, as amended.

With respect to civil matters, tribes have the power to control their internal workings, subject to Congress' plenary authority to regulate Indian affairs. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (in the absence of express waiver, tribe immune from suit regarding denial of membership). Unless authorized by Congress, states are generally preempted from interfering in tribal affairs in Indian Country. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973). By the same token, states, rather than tribes, may regulate the conduct of non-Indians in Indian Country unless the application of state law "would interfere with reservation self government or impair a right granted or reserved by federal law." Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989) (upholding state tax of non-Indian oil and gas lessees on tribal lands where no direct injury to tribe demonstrated); Montana v. United States, 450 U.S. 544 (1981) (invalidating tribal prohibition of non-Indians fishing on their private lands within Crow Reservation). Because such issues generally approach the limits of governmental powers, determinations of whether tribal regulation of non-Indians is needed to preserve the integrity or welfare of the tribe or of whether state regulation affecting Indian Country

unduly interferes with tribal powers are particularly divisive and complex.

**c. Public Law No. 98-290**

Because the Southern Ute Indian Reservation was subject to allotment and homestead patenting, Indian Country status and jurisdiction was a matter addressed in several cases. See, e.g., People v. Luna, 683 P.2d 362 (Colo. App. 1984) (confirming Indian Country status of Town of Ignacio and dismissing state criminal prosecution of tribal member). Concerned that repeated litigation of this issue could result in inconsistent decisions and jurisdictional confusion, tribal leaders worked with non-Indians and local governmental officials to simplify Indian Country status and its effect on the Southern Ute Indian Reservation. The compromise reached by those parties was approved by Congress in Public Law No. 98-290. The provisions of that statute merit review by the Committee.

First, the legislation confirmed the exterior boundaries of the reservation and the Indian Country status of all land within those boundaries, including tribal land, allotments, private land, and national forest land. In so doing, the legislation confirmed the territorial jurisdiction of the Southern Ute Indian Tribe and the Indian Country jurisdiction of the federal government over Indians anywhere within those boundaries. Second, the legislation disclaimed tribal territorial jurisdiction and federal Indian Country jurisdiction over non-Indians conducting activities on non-Indian lands within the reservation. This concession by the tribe removed substantial concerns of non-Indians that the tribal government would directly regulate or tax non-Indian lands. Third, the legislation treated incorporated towns, such as the Town of Ignacio, as islands in which state criminal jurisdiction over Indians was deemed to exist under the provisions of Public Law 280. While this provision assured the town that it could enforce state criminal laws against all persons in the town, it did not negate Indian Country status.

In many respects, passage of Public Law 98-290 settled issues that otherwise promised



lengthy, expensive litigation. The law did not answer all questions, however, and important issues remain unresolved. For example, with subsequent passage of amendments to environmental legislation, such as the Clean Water Act and the Clean Air Act, which authorized certain delegations of environmental protection programs from EPA to tribes, the effect of Public Law 98-290 upon the eligibility of the Southern Ute Indian Tribe or the State of Colorado to assume primacy over reservation lands remains uncertain. Whether those amendments also amended the parceling of territorial jurisdiction reflected in Public Law 98-290 continues to be debated and unresolved. The practical consequence of that debate is that EPA refuses to extend primacy over those environmental programs involving the entire reservation to the state or to the tribe. Additionally, EPA appears to be reluctant to endorse any joint agreement that the state and the tribe might be willing to reach about water or air quality standards or their enforcement in part because of concerns about the precedential effect that such endorsement might have on other checkerboarded reservations. We anticipate that this issue will become one of increasing importance as the Four Corners continues to experience growth and development by both the tribe and non-Indians. Because the tribe believes it is best suited to institute an effective, comprehensive program in both of these areas, the tribe seeks "treatment as a state" on all reservation lands. Based upon EPA's current position, the tribe desires congressional confirmation of its eligibility to obtain primacy over the development of standards and environmental enforcement over all lands and persons within the reservation. Because of the checkerboarded nature of the reservation, we would anticipate that Colorado and local governments would also seek assurances of some rights to participate in these programs.

#### **d. Non-Indian Participation in Tribal Decisions**

Although Public Law 98-290 may raise its own special problems with respect to obtaining primacy over environmental programs on the Southern Ute Indian Reservation, non-Indian opposition

to tribal regulatory jurisdiction and enforcement over activities conducted on non-Indian land appears quite pervasive. In large part, we attribute such fears to a lack of knowledge about tribal governments and unjustified conclusions about the fairness of tribal governments to non-Indians. While it is true that non-Indians do not have the power to elect representatives of tribal governments, that limitation should not be viewed as preventing tribal governments from affording due process in tribal decision-making. On this point, we believe that the experience of the Southern Ute Indian Tribe is of particular relevance.

Following the Supreme Court's decision in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), the Southern Ute Indian Tribe enacted a severance tax ordinance, which was approved by the Department of the Interior on April 26, 1982. In January of 1988, following major changes in the natural gas industry, the Southern Ute Indian Tribal Council authorized a comprehensive review of its severance tax ordinance. In doing so, the tribe invited tax and regulatory specialists from Amoco Production Company, Atlantic Richfield, Northwest Pipeline Corporation, El Paso Natural Gas, and the Council of Petroleum Accountants Societies to participate in a working panel to assist in addressing industry concerns. After approximately one year of drafting sessions and meetings, the Tribe published and circulated for comment to all taxpayers of record a proposed revised ordinance. Because of the active participation of industry officials, the severance tax ordinance contained specific provisions addressing complex issues, such as gas balancing arrangements and take-entitlement questions. Significantly, no adverse industry comment was submitted, and the revised severance tax ordinance became law.

To be sure, the severance tax ordinance affected only interests in mineral lands owned by the Tribe and not private fee minerals. Nonetheless, the extensive solicitation of non-Indian participation went well beyond minimal due process protections. In fact, the collaborative nature of decision-

making, which is not an exception to the rule, ensured much greater public participation than that afforded by most state and local legislative bodies. With respect to any legislative enactment likely to have a direct effect upon non-Indian interests, the Southern Ute Indian Tribal Council regularly publishes its proposed laws in newspapers of general circulation and actively solicits public input.

#### **e. Efficacy of Tribal Courts**

The Southern Ute Tribal Court system, like many tribal courts, provides an effective forum for the adjudication of rights of both non-Indians and Indians. Not only has the tribe's court system become a reliable forum for securing judgments and collections against tribal members, it has also adjudicated complex civil rights and commercial issues. For example, in 1990, a group of tribal members calling themselves the "Committee For Better Tribal Government" ("CFBTG") sought and obtained a recall election involving all members of the Tribal Council. As a result of the Tribal Election Commission's disallowing certain ballots, including ballots submitted by "proxy," the recall effort failed. The CFBTG secured the legal representation of the American Civil Liberties Union, and, asserting that election irregularities had deprived them of civil rights, sued the tribe, the election commission, and individual tribal council members in tribal court. Committee For Better Tribal Government v. Southern Ute Election Board, 90-CV-35 (S. Ute Tribal Court 1990). In declining to dismiss the action, the tribal court ruled that it was a proper forum for adjudication of due process claims under the Indian Civil Rights Act, and, although the tribe was immune from suit, the tribe's officials could be sued for violations of those rights. *Id.*, Order, August 13, 1990. Following a trial on the merits, the tribal court concluded that the election officials had acted properly, and its conclusions were upheld by an appellate decision issued by the Southwest Intertribal Court of Appeals. Southern Ute Election Board v. Committee For Better Tribal Government, 90-013-SUTRA (Aug. 19, 1991).



The Southern Ute Tribal Court has also adjudicated complex commercial issues in which the principal litigants were non-Indian corporations. Hallwood Petroleum, Inc. v. Bowen/Edwards Associates, Inc., 96 CV 68 (S. Ute Tribal Court, 1997) (recognizing validity of foreign judgments and marshaling foreclosure on working interests in tribal oil and gas leases). See also Lyon v. Amoco Prod. Co., 923 P.2d 350 (Colo. App. 1996) (state court lacks subject matter over dispute between non-Indians where conduct directly affects political integrity, economic security, or health and welfare of tribe). In view of the successful development of the Southern Ute Tribal Court and other tribal courts throughout the country, we urge the Committee not to diminish their legitimacy, but rather to continue to assist in the improvement of these important institutions.

One possible approach to improving tribal courts, which may not necessarily be supported by other tribes, would be to expand the review powers of federal courts over categories of cases adjudicated in tribal courts. Under Iowa Mutual Insurance Co. v. La Plante, 480 U.S. 9 (1987) and National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985), there is currently no guarantee that a litigant in a controversy for which federal court jurisdiction may exist will necessarily be able to obtain federal court review of a tribal court decision. Appellate oversight of certain categories of tribal court cases, such as those involving allegations of civil rights violations under the Indian Civil Rights Act, might further establish the credibility of tribal courts in the non-Indian world as courts in which equal justice is regularly obtained. While the Southern Ute Indian Tribe does not necessarily advocate such an approach, further study of this and other methods of obtaining federal institutional support of tribal courts and its litigants should be explored.

#### **f. Importance of Tribal Sovereign Immunity**

One matter that has been raised in the context of protection of individual civil rights has been that of tribal sovereign immunity from suit. As reflected in testimony previously provided to the

Committee on March 11, 1998, by Reid Peyton Chambers, sovereign immunity remains an important protection that has been retained by the federal government and by state governments. In fact, reliance upon principles of state sovereign immunity has impeded the ability of some tribes to secure good faith participation of states in negotiation of gaming compacts. Seminole Tribe of Florida v. Florida, 134 L.Ed 2d 252 (1996). Sovereign immunity in Indian Country is important to the preservation of tribal governments. Wholesale abrogation of tribal sovereign immunity is not only incompatible with American jurisprudence, it would constitute a stinging rejection of tribal sovereignty long-recognized by Congress. The effect of sovereign immunity in any jurisdiction often yields a harsh result to those who have been harmed by negligent or improper conduct by governments. Should the Committee proceed with consideration of abrogating tribal sovereign immunity from tort actions, we respectfully request that its analysis be the result of careful study and that modifications, if any, be imposed sparingly and only where clear necessity has been demonstrated. Even in such instances in which some limited waiver of tort immunity is justified, we would suggest that Congress has many opportunities to provide incentives to tribes electing to limit aspects of sovereign immunity. While incentives for such tribal decisions should not be unduly coercive, a consensual approach rather than unilateral imposition by Congress would certainly be more palatable and consistent with notions of tribal self-determination.

With respect to contracts, the Southern Ute Indian Tribe has recognized for many years that economic development often requires unequivocal assurances to industry and to commercial institutions that interpretation and enforcement of contractual obligations can be obtained despite the sovereign status of tribes. Hundreds of contracts with the tribe contain limited waivers of immunity that provide for judicial review and enforcement of such contracts. Although individual tribes may well refuse to grant such waivers, our experience would suggest that failure to do so will result in lost

opportunities or the declination of services of highly qualified persons or companies to tribes. The decision to pay that high price for lack of compromise remains the decision of the members and leaders of individual tribes, and the power to make such measured decisions should remain that of contracting parties, including tribal governments. We incorporate by reference and support the testimony of Reid Peyton Chambers on this matter.

### III. Property Rights in Indian Country

#### a. Underlying Federal Statutes

The relationship of property in Indian Country to an Indian tribe substantially affects the manner in which such property may be used. In the first instance, one must examine federal statutes establishing Indian Country, the federal statutory history of those lands, and the ownership interests affected thereby. In addition to rights expressly reserved to tribes, the implied reservation doctrine may also affect rights to interests in lands needed to effectuate the purposes of original reservation. See, e.g., Winters v. United States, 207 U.S. 564 (1908) (implied reservation of water needed to fulfill purposes of treaty). Federal statutes disposing of reservation land may well establish a patchwork of land ownerships within Indian Country, including: tribal trust lands, restricted Indian allotments, private fee lands owned by non-Indians or Indians, federal lands, and lands owned by state and local governments. Moreover, the estates in such lands may be severed in a manner that creates a three dimensional checkerboard of land ownership. See, e.g., Southern Ute Indian Tribe v. Amoco Production Co., 119 F.3d 816 (10th Cir. 1997), rehearing pending (recognizing tribal beneficial ownership of coal bed methane contained in coal deposits reserved under 1909 and 1910 Coal Land Entry Acts and restored to tribe). One matter of paramount importance associated with property in Indian Country is the maintenance of accurate and complete land records. As discussed in more detail below, not only are such records vital from an informational sense, the existence of proper land



records defines substantive rights.

The issue of ownership of land claimed by Indian tribes and by others is a matter of federal law. Oneida Indian Nation v. Oneida County, 414 U.S. 661 (1974). For example, rights of non-Indians to real property in Indian Country are frequently established by federal statutes that opened reservation land to homesteading. See Yankton Sioux Tribe, 66 U.S.L.W. 4092; Brendale v. Confederated Yakima Indian Nation, 492 U.S. 408 (1989) (dividing land use planning jurisdiction over certain lands within the reservation between tribe and county). Based upon judicially established legal presumptions, in the absence of federal statutes to the contrary, tribes appear to have limited authority to regulate non-Indian use of non-Indian fee interests in Indian Country. See, e.g., Montana, 450 U.S. 544, but see Brendale (local state governments must ensure that private land use does not frustrate federally authorized use of neighboring tribal lands). Particularly on lands with severed estates in which tribes own valuable mineral rights, however, there is the potential for disputes regarding the dominant or controlling use of land for either surface or subsurface uses.

Rights associated with tribal and allotted lands are generally governed by federal and tribal law. In this regard, federal law expressly renders void any grant, lease or conveyance of tribal land not authorized by federal law or treaty. 25 U.S.C. §177. While applicability of this statute to land acquired by tribes outside of Indian Country for investment purposes is questionable, the literal language of the statute would appear to apply to lands acquired by tribes in their own names within Indian Country. In accordance with the expansive effect of 25 U.S.C. §177, numerous federal statutes define the manner in which Indian lands may be sold, leased, or burdened by easements. See, e.g., The Indian Mineral Development Act of 1982 (25 U.S.C. §§2101, et seq.); The Indian Mineral Leasing Act of 1938 (25 U.S.C. §396a); 25 U.S.C. §323 (authorizing issuance of rights-of-way across tribal land with tribal consent). These federal statutes, as supplemented by tribal law, limit the manner in

which tribal lands may be leased and used by persons obtaining rights associated with tribal land.

#### **b. Acquisition of Lands by Tribes**

The rights of tribes to participate in gaming activities has engendered new debates surrounding tribal acquisitions of land. See Indian Gaming Regulatory Act (25 U.S.C. §2703 and §2719) (authorizing gaming within Indian reservations and limiting gaming on certain acquired trust lands). The right of tribes to purchase lands has long been recognized.

Tribes may acquire land in their own names as a consequence of their general contractual capacity. Many tribes have purchased lands in the exercise of this capacity and the validity of such purchases has been recognized legislatively and judicially.

FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 482 (1982 ed.). Part 151 of Title 25, Code of Federal Regulations, sets forth the procedure by which lands acquired by tribes may be taken into trust status by the United States. Although acquisition of fee land within Indian Country by a tribe in its own name may well exempt such land from state and local property taxation, trust status clearly removes acquired lands from tax rolls. 25 C.F.R. §151.109 (e) (1997). The perceived adverse tax impact of securing trust status for on-reservation tribal acquisitions has fueled recent tensions between the Southern Ute Indian Tribe and local governments.

#### **c. Land Acquisitions by the Southern Ute Indian Tribe**

In 1972 Congress passed specific legislation authorizing the Southern Ute Indian Tribe to sell and buy land within the boundaries of the Southern Ute Indian Reservation. 25 U.S.C. §§668-670. Lands purchased by the tribe under this enactment "shall be taken in the name of the United States in trust for the Southern Ute Indian Tribe." 25 U.S.C. §669. The clear underlying purpose of the statute was to promote tribal land consolidation within the reservation.

In most instances, opportunities to purchase lands within the reservation are subject to normal market forces. A landowner desiring to sell his land secures the services of a real estate agent, the land

is advertised for sale, and the first willing buyer with sufficient funds will generally acquire the listed property. As the Committee may imagine, given the limited manpower and budgets of the Bureau of Indian Affairs, it is difficult for the tribe to require that immediate agency attention be given to land acquisitions for the benefit of the tribe. In order not to lose an elusive opportunity to purchase key lands tracts, the tribe, on several occasions, has purchased lands in its own name and then applied under the regulatory process contained in 25 C.F.R. §151.10 to have the property placed into trust status. Despite recent opposition by the Town of Ignacio and the Board of County Commissioners to such practices, the tribe maintains that it is fully within the rights conferred by Congress to proceed in this fashion.

On a somewhat more complex level, the tribe has also undertaken to expand and diversify its energy resource development. Pursuant to a plan approved by the Secretary of the Interior, the tribe obtained access to a portion of funds appropriated by Congress under the Colorado Ute Indian Water Rights Settlement Act of 1988. With those funds, the tribe established an energy operating department of the tribe, which has engaged in acquisition of working interests generally established in tribal oil and gas leases previously issued by the tribe. Those working interests, while owned by non-Indian companies, had been the source of state and local tax revenue under the principles established in Cotton Petroleum v. New Mexico, 490 U.S. at 163. Because of the complicated nature of working interest titles, such as overriding royalties and merger issues, the tribe has not requested that these acquired interests be placed into trust; however, in most instances underlying mineral ownership is already in trust status. The state and county asserted that such acquired interests remained subject to taxation.

In order to resolve this dispute, the tribe filed an action against the state and county in federal court. Southern Ute Indian Tribe, d/b/a/ Red Willow Prod. Co. v. Board of County Commissioners,



855 F.Supp. 1194 (D.Colo. 1994). The federal district court upheld the tribe's exemption from tax. On appeal, however, the federal appeals court ruled that the matter was not ripe because assessments had not been included in the record, and the original ruling was vacated. Southern Ute Indian Tribe v. Amoco Prod. Co., No. 94-1310 (10th Cir. 1995). Following issuance of new assessments, but immediately prior to reinstituting litigation, the tribe, the state and the county engaged in negotiations that ultimately resulted in a Taxation Compact approved by the Colorado General Assembly in 1996. C.R.S. §§24-61-101, et seq. (West Supp. 1996). Under the provisions of the Taxation Compact, the tribe agreed to make voluntary contributions to the county in an amount equal to approximately 30% of the tax assessments that otherwise would have been issued for lands and working interests acquired by the tribe in its own name, but not yet placed in trust status. The state and the county recognized that lands acquired by the tribe in its own name or in trust status within the reservation would not be subject to tax under the provisions of the Taxation Compact.

Here again, while the tribe may not have been legally required to do so, it engaged in compromise rather than litigation. All parties to the Taxation Compact recognized that future trust status for many acquired interests would be pursued by the tribe. While this resolution, like most negotiated compromises, may not be perfect, it reflects another example of the tribe's willingness to take into consideration the competing interests of those who might be affected by the exercise of the tribe's powers.

#### **d. Land Records in Indian Country**

The federal government has a fundamental obligation to maintain accurate records of interests carved from tribal lands, generally only with approval of the Department of the Interior. For that purpose, the Bureau of Indian Affairs has established "Land Titles and Records Offices" which are "charged with the federal responsibility to record, provide custody and maintain records that affect

title to Indian lands." 25 C.F.R. §150.2 (j) (1997). Particularly as tribes engage in increasingly sophisticated and frequent commercial transactions affecting tribal lands, the importance of this record-keeping function cannot be overstated.

Official record-keeping of interests affecting land titles generally has important substantive consequences, including the perfection and priority of lien interests. The existence of state record-keeping systems and the general inapplicability of state law to tribal land interests creates a general state of confusion among those seeking to establish valid security interests associated with tribal lands. For example, a lending institution willing to loan funds to a tribal lessee must be concerned with the quality of the lessee's security interest. In some cases, after obtaining tribal and BIA approval of assignments of security interests in tribal lands, lending institutions have required filing of documents in state systems, the BIA Land Title and Records Offices, as well as filing in a separately created tribal land filing system established under tribal law. Confusion in this area is extremely expensive for tribes and those who do business with them. That confusion creates another impediment to economic development in Indian Country, one which derives from the uncertainty surrounding the creation and perfection of security interests. See Thomas H. Shipps, "Commercial Transactions, Security Interests and Perfection in Indian Country, ABA 7th Annual Conference on Natural Resources Development and Environmental Protection on Indian Lands (Seattle, Wash. Oct. 19, 1995). As the work of this Committee proceeds, we hope that it will call upon those who have had to swim in these rough waters to help establish an optional model system of recording and perfection of interests associated with tribal lands.


### **Conclusion**

The Southern Ute Indian Tribe has been on the cutting edge of many issues affecting Indian Country. The broad subjects being reviewed by the Committee cannot be adequately addressed in this

short analysis. Nonetheless, we hope that some value can be derived from these comments, and we offer our assistance to improving relations and understanding issues in Indian Country.

Respectfully submitted,

MAYNES, BRADFORD, SHIPPS & SHEFTEL, L.P.  
Attorneys for the Southern Ute Indian Tribe

By:   
Thomas H. Shipps

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## LUMMI INDIAN BUSINESS COUNCIL

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DEPARTMENT \_\_\_\_\_

EXT. \_\_\_\_\_

### TESTIMONY OF THE LUMMI NATION

Henry M. Cagey, Chairman

United States Senate Committee on Indian Affairs

April 7, 1998

Seattle, Washington

Field Hearing on Senate Bill 1691 - Sovereign Immunity

*"We just want to live in Peace... the Government and the People "*

*"America was founded on Freedom of Choice... "*

*"Non-Indians live on the Lummi Reservation by choice... no force "*

*Statement of the Lummi Nation Tribal Government*

My name is Henry Cagey. I am Chairman of the Lummi Nation and I am here to address the subject of Senate Bill 1691, which is mockingly entitled, *"the American Indian Equal Justice Act."*

This legislation would strip Indian tribes of their sovereign immunity so they could be sued like any non-governmental entity. This legislation would also extend state court jurisdiction over tribes without tribal consent. If enacted, this legislation will undermine and potentially destroy tribes' abilities to function as tribal governments, financially and politically. This is a direct attack on our people, children, elders and our total way of life. The Lummi Nation is a responsible and accountable government. We have come a long way in a short period of time in the development of our governmental structures.

### INTRODUCTION

The last one hundred and fifty years are full of examples of hastily drawn and narrowly conceived legislation that ultimately created negative consequences for Indian people and for non-Indians alike. While these negative consequences are not necessarily intended, it was often the hasty drafting of legislation that produced negative results. The present legislation is both carelessly drawn in the heat of political passions and narrowly designed to serve the interests of

just a few individuals while adversely affecting the lives and property of hundreds of thousands of Indian people.

Immunity from suit for governments is acknowledged as a time-honored and proper method for protecting the interests of a political community from narrow and sometimes dishonorable attempts by individuals to take for themselves at the expense of the many. This is an attack on the poorest of the poor of the United States. Indian governments have the same responsibility as the United States of America and each of its fifty states to protect the public interest. We need to develop alternative solutions to address these issues based upon mutual consent and mutual respect.

Indian Nations are well aware of the issues cited in S. 1691 and have been addressing them in numerous constructive ways. We must seek the cooperation of state and federal officials to help us to continue solving these problems through constructive measures. These new mechanisms will rely on the principles of dignity, authority and respect of each of the sovereign governments.

#### **A MATTER OF HONOR - The Treaty**

I would like to quote from the Treaty of Point Elliot, to which we are signatories; the reservations were "set apart... for the exclusive use" of the Indians; "nor shall any white man be permitted to reside upon the same without permission of the said tribes the Superintendent or his agent." We have never accepted payment for any of our lands. Our reservation was set aside for our tribal use - our land was never allotted - it was assigned and therefore should have never left Indian ownership.

The original reservation was established when the Lummi Nation entered into the 1855 Treaty of Point Elliot with the United States of America. In that treaty, Lummi ceded millions of acres of what is now western Washington. Our treaty is based upon the mutual consent and respect between the Lummi Nation and the United States government.

The Lhaq'atemish the Xwlemi, or Lummi people have worked, played, and celebrated life on the shores and waters of Puget Sound for uncounted generations. Lummis were always a fishing people and fished the waters of the Puget Sound for centuries. We reserved our fishing rights in the Point Elliot Treaty of 1855, signed by Washington State territorial Governor Isaac I. Stevens and ratified by Congress April 11, 1859, thirty years prior to Washington gaining statehood.

This Treaty has not been honored. This is a contract between two sovereign governments that should be honored. It is various acts of Congress that have created these problems; such as the Allotment Act and the Dawes Act, **NOT THE ACTS OF TRIBAL GOVERNMENTS.**

#### **THE LUMMI RESERVATION**

The projected enrollment for the Lummi Nation in 1996 was 4,373 tribal members. The projected enrollment for 2010 is 6,500. Of the total resident Indian population, the unemployment rate is at 50%. According to the 1995 Overall Economic Development Report, approximately 30% of the Tribal members still rely upon the decimated fishing industry as their

sole source of income and approximately 35% of the tribal population have incomes below the poverty level. The main employers on the reservation consists of the Tribal Government and the Northwest Indian College.

A healthy balance of vocation, education, and recreation keeps the Lummi community strong. Generations of hard workers have forged a strong work ethic among the Lummi people. Education is encouraged at every level. Canoe racing teaches us that we go farther when we pull together. We cherish our children and we honor and respect our elders. From generation to generation, in work and in play, we are proud to be *Xylemi*.

Our language. Our customs. Our approach to life. Each is unique to Lummi. Each has survived the ages to be passed down from elder to child. Respect for our heritage and one another is the cornerstone of our community. The present generation of the *Xwlemi* is proud to continue building upon this foundation laid by our fathers so that our children might always prosper on our land.

### THE GOVERNMENT

The Lummi Indian Nation is a sovereign nation within the United States. The nation defines its sovereignty as; *"our inherent right to govern ourselves without external interference."* The Lummi Nation retains and exercises its sovereign powers to regulate and control its people, territory and resources.

The General Council is composed of the registered voting membership of the Lummi Nation. Each elected official is voted upon by the General Council to serve staggered 3 year terms. Each year the Business Council votes from within its membership the officers: (1) Chairman; (2) Vice-Chair; (3) Secretary; (4) Treasurer. The Lummi Indian Business Council through powers granted to them in the Tribal Constitution exercises its jurisdictional control over those activities within the boundaries of the reservation.

The Tribal Government offers a wide ranges of services. This includes Education from preschool through a two year college, a full service Health Care facility, a comprehensive social services department, full tribal administration services, a Natural Resources Department, a Public Works Department with Housing and Construction divisions, as well as a Water and Sewer Department and law and Order department to secure and protect the well being and safety of all who reside within our Reservation..

As non-Indian populations increase in the various states, demands on Indian reservation lands and resources have increased and the number of conflicts over water, land, natural resources, environmental quality, law enforcement, etc., have also increased.

- Non-Indians on the Lummi Reservation occupy 4% of our land and use 50% of our water resources.



#### JUDICIAL STRUCTURE and DUE PROCESS

Since the inception of the Lummi Nation Tribal Court in 1974, we have evolved under Self-Governance, into a court system that in 1997 had 1173 cases filed. The Lummi Tribal Court can best be compared to a court of general jurisdiction. The court has jurisdiction over criminal cases involving Indians, civil cases and civil infractions for traffic, hunting and fishing violations.

The court currently has one chief judge, two clerks and five pro-tem judges. The chief judge and four of the pro-tem judges are attorneys licensed in the State of Washington. The fifth pro-tem judge is an experienced tribal court judge currently serving as Chief Judge of another tribe in Tacoma, Washington. The Lummi Tribe also employs a prosecutor and public defender. The Lummi Tribal Court encourages attorneys and qualified spokesperson to join the Lummi Tribal Court Bar and practice before the court.

In the Lummi Nation Tribal court, due process is accorded to all parties that use the system. The Lummi Tribal Code and Constitution provide for basic protections and ensure due process. Judges are appointed to six(6) year terms and can only be removed for cause, *LTC 1.3.06* Judges can be disqualified from a case, by a party submitting an affidavit of prejudice as provided for by *LTC 1.4.04*. There is an appeal process where parties may appeal a decision of the tribal court to a panel of three judges. Those appellate judges are composed of attorneys in private practice. Although jury trials are rare, parties have a right to a jury composed of "residents of the Lummi Reservation," which means any qualified person regardless of race or tribal affiliation may serve on a jury, *LTC 4.3.020 (b)*.

- The Lummi Nation has a tribal Court a Law and order systems that ensure equal access to due process and the equal protection of the law is provided to all persons.
- In 1997, there were 1173 cases filed in *Lummi Tribal court*. 592 civil cases and 581 criminal cases. Of these cases there were 20 cases that involved non-Indians and non tribal members. Non Indian/non tribal individuals prevailed in 60% of these cases.
- In 1997, the *Lummi Law and order* responded to 3,929 calls. Of these 962 or 24.4% involved non-Indians.

The Lummi Nation is not insensitive to, nor unaware of, the needs of non-tribal members on the reservation. The Nation has put in place mechanisms which ensure due process in tribal forums for tribal and non-tribal members on the Lummi reservation for their *personal safety, protection of the resources and private properties*.

Tribal sovereign immunity does not put anyone at risk who lives within the reservation boundaries. At Lummi, many non-Indians, in fact, use the Tribal Court to resolve their disputes. The non-Indians living on the reservation probably obtain access to justice for less money and in less time than is available in nearby state courts. Even if a tribal government is immune from

unconsented suit in federal court, tribal governmental officials are not and may be sued to restrain unconstitutional action.

#### **TORT CLAIMS**

Sections 4 and 5 of S. 1691 create a special Tort Claims Procedure for Indian tribes, allowing tribes to be sued in federal court for money damages for loss of property, personal injury, or death caused by the negligent or wrongful act or omission of an Indian tribe, to the same extent that a private individual or corporation is liable in the state where the act or omission occurred.

This new Tort Claims Procedure ignores the fact that Congress has already effectively dealt with the problem of tribal government liability for tort damages. In the Indian Self Determination and Education Assistance Act, Congress requires the Secretaries of Interior and Health and Human Services to obtain liability insurance or equivalent coverage of Indian tribes carrying out self determination contracts; and any policy of insurance so obtained must contain a provision that the insurance carrier will not "raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall only extend only to claims ... within the coverage and policy limits." In some instances Congress has provided that the Federal Tort Claims Act applies to programs and services that Indian tribes now carry out instead of the federal government. The Indian Self-Determination Act statutory insurance requirement described above, is incorporated in the Lummi Nation Self Governance Compact with the federal government. Virtually all services and programs at Lummi are delivered pursuant to this Compact; hence, there is insurance coverage or Federal Tort Claims Act coverage for whatever claims might arise. In addition, Lummi purchases general liability insurance and waives its immunity to the extent of such coverage and policy limits.

S. 1691 creates a sledge hammer that could weaken or destroy tribal governments, totally ignoring the fact that Congress has already created a careful scheme to provide redress to deserving claimants while protecting the limited resources of tribes.

#### **RESPONSIBLE AND COOPERATIVE GOVERNMENT**

As a responsible government, we have always prided ourselves on our ability to maintain a high level of integrity in our governmental operations. We have several examples of these types of governmental functions.

- A Water/Sewer Board with two slots for non-Indian property owners on the reservation
- A water/sewer agreement
- A water agreement in principle. Recently signed an historic agreement in principle with the state and property owners that will guarantee water for all reservation property owners. Like the sewer agreements non-Indian Property values are greatly increased by this agreement.
- A Memorandum of Understanding with Whatcom County on Zoning issues

- The Lummi Nation maintains many long-standing cooperative agreements with governmental entities, including Whatcom County, the State of Washington, and Federal agencies. Lummi Nation has been working cooperatively for 6 years with Whatcom County, Washington State Department of Transportation, US Army Corps of Engineers and the Bureau of Indian Affairs on a multi-million dollar Lummi Shore Road reconstruction project.

#### **WE ARE NOT TAX EVADERS - TAXATION**

It has been asserted that Indian Nations are tax evaders in that Tribes do not pay various taxes. This is simply not true. It is estimated that in 1997 the Lummi Nation paid the following taxes to Washington State and the Federal Government.

<b>Employer portion of payroll taxes</b>		
1.	Tribal government	\$1,100,279
2.	Enterprises	\$458,000
3.	Water & Sewer District	\$41,540
<b>Other Taxes</b>		
4.	Fuel Taxes	\$308,400
5.	Cigarette Taxes	\$180,000
	<b>Total Taxes paid in 1997</b>	<b>\$2,088,219</b>

#### **CONTRACTURAL RELATIONSHIPS**

- In 1997, there were more than 133 contracts between the Lummi Nation and various, state/federal entities as well as individual contractors. These contracts were negotiated between consenting parties. No one is forced to contract with the Lummi Nation or to accept contract terms with which they do not agree. That is why these contracts may include various remedies for resolving any disputes that might arise; they may include limited waivers of sovereign immunity; or they may provide that the terms of the contract be interpreted according to federal, state or tribal law. Each of these contract terms is carefully tailored to fit the needs and concerns of the contracting parties; and they are appropriate to the specific circumstances of each contract. The Lummi Nation prides itself on honoring its contracts. There is simply no evidence that the Lummi Nation has avoided its contractual responsibilities, hidden behind tribal sovereign immunity, and left its contractors high and dry without a remedy. If the Nation behaved in that fashion, governmental entities and private parties would cease to do business with us. That this has not happened is perhaps the



most compelling evidence why S. 1691's provision for contract suits addresses a problem that simply does not exist.

- In 1997, the Lummi Nation *Tribal Employment Rights Office* (TERO) negotiated 19 compliance plans that agreed to Indian Preference Hiring and payment agreement for TERO tax payments. Of these contractors 14 were non-Indian and 5 were Indian owned. As of this date there have not been any disputes.
- In 1997 the Lummi Nation *Natural Resources Department* maintained 19 different service contracts, 15 were with non-Indian contractors and 4 were with Indian contractors. There have not been any disputes. This Department also successfully maintained 17 inter-jurisdictional cooperative agreements that involved local, state, tribal, national and international entities.
- Through the Lummi Nation *Planning Department* the Nation has maintained many long-standing cooperative agreements with various governmental entities. There are presently 5 such cooperative agreements. This includes a recent discussion that will lead to a Memorandum of Understanding being drafted to guide a cooperative effort to develop permanent zoning for reservation fee lands.
- For the Nation's many road and housing construction projects over 31 successful contractual agreements have been maintained with many local and regional contractors and vendors.

All agreements are negotiated based upon mutual respect and consent. The Lummi Nation has earned this respect over the years.

#### **FUTURE PERSPECTIVES**

As one of the first Self-Governance Tribes in the United States, we have worked aggressively to ensure community input, involvement, and participation in government and budgeting. Tribal governments have worked diligently over the past thirty years under Self-determination and Self-Governance policies. These policies are working for Indian people. Indians are raising their standards of living, living longer with longer life expectancies, restoring the heritage of their cultures and improving their ability to govern both themselves and others on the reservations.

*Sovereignty is not an anachronism. It is a proven way of life that is no different for Indian Nations than any other sovereign Nation.*

#### **RECOMMENDATION**

While S. 1691 is clearly inappropriate, and the methods proposed for solving a long standing problem are potentially destructive of Indian rights and the rights of non-Indian citizens, the Bill does demonstrate the need for diligent and accelerated cooperation between Indian and non-Indian governments to solve the problems of jurisdictional confusion and the imbalance between

Indian peoples' fights and the rights of non-Indians on and near Indian reservations. Indian leaders in Indian Country believe we have a workable solution that will preserve the dignity and integrity of Indian, state and federal governments while providing an expeditious method of addressing intergovernmental disputes and problems of citizen rights.

#### CONCLUSION

The introduction of S. 1691 serves an important function. It reminds tribal, state and federal government leaders of the great importance we must attach to defining a solution to growing problems of inequity between Indian people and non-Indian citizens. I urge a moratorium on consideration of any legislation until tribal, state and federal officials have had a chance to consider and act on the development of a new intergovernmental mechanism that will address the problems of jurisdiction, citizen rights and the exercise of governmental authority in Indian Country.

US government and State government efforts to reduce the sovereignty of Indian Tribes by forcing Indian governments to waive sovereign immunity against law suits in exchange for receiving continuing tribal government aid threatens the basic future of Indian Country. Unilateral US government legislation pending before the US Congress threatens to overturn more than two centuries of developing government to government relations between the United States, Indian nations and with state governments.

This would mean financial devastation and the end of tribal governments. If, S. 1691 is enacted it is the future of our children that you will be jeopardizing.

I thank the Committee for giving me the opportunity to present the Lummi Nation's position on Senate Bill 1691.

#### Attachments:

1. Treaty of 1855
2. Map of the Lummi Nation
3. Centennial Accord Proclamations
4. Water Agreement in Principle
5. Hallauer Summary Judgment
6. Sandy Point Shores Flyer
7. Lummi land Synopsis



# LUMMI INDIAN NATION

*Northwest Coastal Aboriginal People*



Treaty between the United States and the Dwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory.

JAMES BUCHANAN,  
PRESIDENT OF THE UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Whereas a treaty was made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and hereinafter-named chiefs, headmen and delegates of the Dwamish, Suquamish, Sk tahl-mish, Sam-ahmish, Smalh kahmish, Skop-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quend ma-mish, Skrah-le jum, Stoluck-wha-mish, Sno-ho-mish, Skagit, Kik-I-allus, Swinamish, Squin ah-mish, Sah kumehu, Noowha ha, Nook wa-chah mish, Meesee-qua-guilch, Cho bah-ah-bish and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by law; which treaty is in the following words and figures to wit:

Articles of agreement and convention made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headman and delegates of the Dwamish, Suquamish, Sk tahl-mish, Sam-ahmish, Smalh kahmish, Skop-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quend ma-mish, Skrah-le jum, Stoluck-wha-mish, Sno-ho-mish, Skagit, Kik-I-allus, Swinamish, Squin ah-mish, Sah kumehu, Noowha ha, Nook wa-chah mish, Meesee-qua-guilch, Cho bah-ah-bish and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by them.

Article I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty inlet, known as Point Pully, about midway between Commencement and Elliott bays' thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the gulf of Georgia' thence through the middle of said gulf and the main channel through the Canal de Arro to the straits of Fuca, and crossing the same through the middle of Admiralty inlet to Suquamish Head; thence south-westerly, through the peninsula, and following the divide between Hood's canal and thence round the foot of Vashon's island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within





## LUMMI INDIAN NATION

*"Protect all spiritual, cultural and physical values..."*



said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

Article II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwomish bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's island called Chah-choo-sen, situated in the Summi river at the point of separation of the mouths emptying respectively into Bellingham bay and the gulf of Georgia: all which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use: nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage there-by done them.

Article III. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of the of Snohomish river, including Tulalip bay and the before mentioned Kwilt-seh-da creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade mountains in said territory, provided, however, that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

Article IV. The said tribes and bands agree to remove and settle upon the said first above mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Article V. The right of taking fish at usual and accustomed fishing grounds and stations is further secured in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: provided, however that they shall not take shell fish from any beds staked or cultivated by citizens.

Article VI. In consideration of the above cession, the United States agree to pay the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand dollars for the next two years, twelve thousand dollars each year, for the next three years, ten thousand dollars each year for the next four years, seven thousand five hundred dollars each year, for the next five years, six thousand dollars each year, and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the discretion of the



## LUMMI INDIAN NATION

*"Building upon this foundation..."*



President of the United States, who may from time to time determine at his discretion upon which beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Article VII. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians to be promoted, remove them from either or all of the special reservations, herein before made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same as a permanent home, on the same terms and subject to the same regulations as are provided in the 6th article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

Article VIII. The annuities of aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Article IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven to the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self defense, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that described in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Article X. The above tribes and bands are desirous to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty liquor into said reservations, or who drinks liquor, may have his or her proportions of the annuities withheld from him or her for time as the President may determine.

Article XI. The said tribes and bands agree to free all slaves now held them and not to purchase or acquire others hereafter.

Article XII. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservation without the consent of the superintendent or agent.

Article XIII. To enable the said Indians remove and settle upon their aforesaid reservations,



## LUMMI INDIAN NATION

*"To meet the economic, social, educational  
values of our people..."*



and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree pay sum of fifteen thousand dollars, to be laid out and expended under the direction of the President and in such manner as he shall approve.

Article XIV. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, and agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor of instructors, and also to provide a smithy and a carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

Article XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

*In testimony whereof, the said Isaac I. Stevens, governor and superintendents of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.*

Isaac I. Stevens,

Governor and Superintendent.

Seattle	his x mark	Chief of the Dwamish and Suquamish tribes.
Pet-ka-nam	his x mark	Chief of the Snoqualmoo, Snohomish and other tribes.
Chow-its-hoot	his x mark	Chief of the Lummi and other tribes.
Gonah	his x mark	Chief of the Skagits and other allied tribes.
Kwallatrun	his x mark	Sub-chief of the Skagit tribe.
S'Hoolst-hoot	his x mark	Sub-chief of Snohomish.
Snah-tale	his x mark	Sub-chief of Snohomish.
Squash-um	his x mark	Sub-chief of the Snoqualmoo.
Chul-whil-tan	his x mark	Sub-chief of Suquamish tribe.
Ske-eh-tum	his x mark	Skagit tribe.
Parch-kanam	his x mark	Skagit tribe.
Sate-kanam	his x mark	Squin-ah-mush tribe.
Sd-zo-mantl	his x mark	Kik-ial-lus band
Dahd-de-min	his x mark	Sub-chief of Sah-ku-meh-he.
Sd'zek-du-num	his x mark	Me-sek-wi-quilse sub chief





# LUMMI INDIAN NATION

*Northwest Coastal Aboriginal People*



Whai-lau-he	his x mark	Sub-chief of Lummi tribe.
Kwult-seh	his x mark	Sub-chief of Lummi tribe.
Kwull-et-he	his x mark	Lummi tribe.
Kleh-kent-soot	his x mark	Skagit tribe.
Sohn-heh-ovs	his x mark	Skagit tribe.
S'den-ap-kan	his x mark	Skagit tribe.

## Executed in the presence of us...

M.T. Simmons, Indian Agent.	C.H. Mason, Secretary of Washington Territory.
Benj. F. Shaw, Interpreter.	Chas. M. Hitchcock.
H.A. Goldsborough.	George Gibbs.
John H. Scranton.	Henry D. Cock.
S.S. Ford Jr.	Orrington Cushman.
Ellis Barnes.	R.S. Bailey.
S.M. Collins.	Lafayette Balch.
E.S. Fowler.	J.H. Hall.
Rob't Davis.	

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eight day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

### "In Executive Session,

"Senate of the United States, March, 8, 1859.

"Resolved, (two-thirds of the senators present concurring.) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen and delegates of the Dwamish, Suquamish, and other allied and subordinate tribes of Indians occupying certain lands situated in Washington territory, signed the 22nd day of January, 1855.

### "Attest:

"Asbury Dickins, Secretary."

Now, therefore, be it known that I, James Buchanan, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to the Hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in the year of our lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

James Buchanan



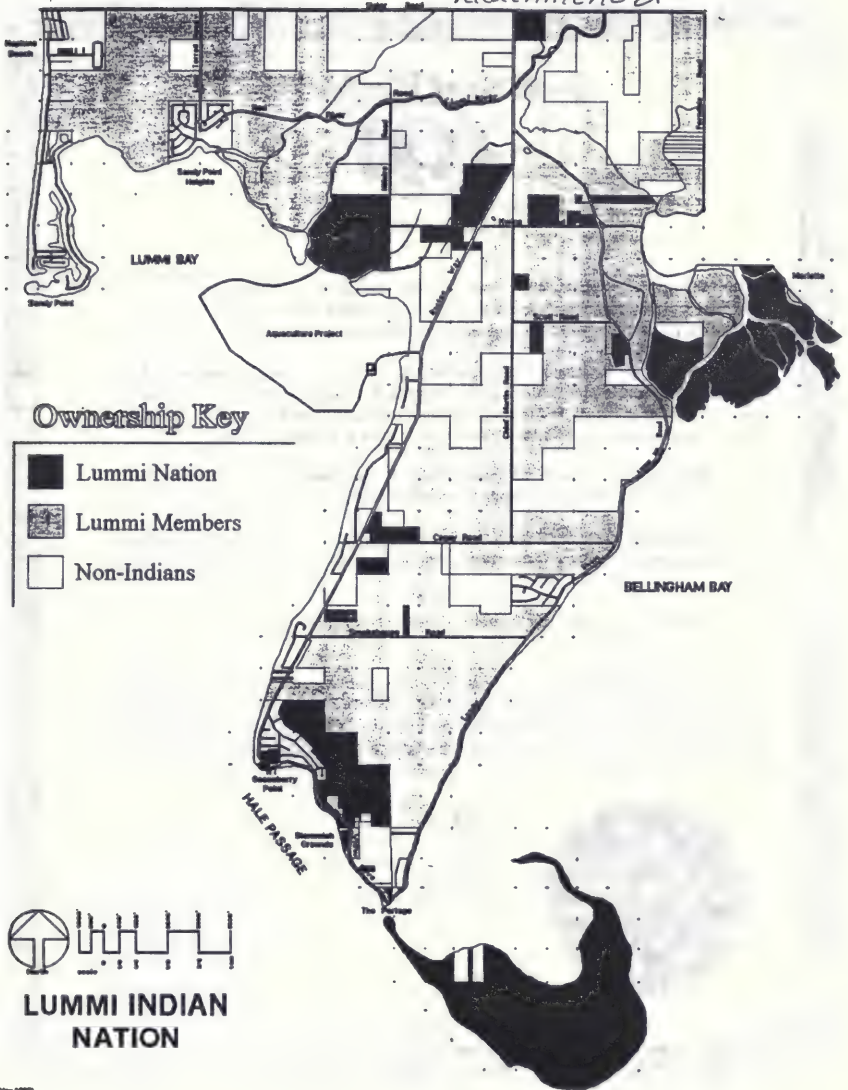
## LUMMI INDIAN NATION

Signed this day: January 22, 1855



Now-a-chais	his x mark	Sub-chief of Dwamish
Mis-lo-tehe	his x mark	Sub-chief of Suquamish
Sloo-noksh-tan	his x mark	Suquamish tribe
Moo-whah-lad-he	his x mark	Suquamish tribe.
Too-leh plan	his x mark	Suquamish tribe.
Sla-seh-doo-an	his x mark	Dqmish tribe.
Slovilt-meh-time	his x mark	Sub-chief of Suquamish
We-ai-pah	his x mark	Skaishwamish tribe
Sah-au-he	his x mark	Snohomish.
She-hope	his x mark	Skagit tribe.
Hwu-lah-lakq	his x mark	Lummi tribe.
Che-simpe	his x mark	Lummi tribe.
Tse-sum-ten	his x mark	Lummi tribe.
Klt-hahl-ten	his x mark	Lummi tribe.
Kut-ta-kanam	his x mark	Lummi tribe.
Ch-lah-ben	his x mark	Noo-qua-cha-mish band.
Noo-heh-oos	his x mark	Snoqualmoo tribe.
Hweh-uk	his x mark	Squalmoo tribe
Peh-nus	his x mark	Skaishwamish tribe.
See-alla-pa-han	his x mark	Sub-chief of Sk-tah-le-jum.
He-uch-ka-nam	his x mark	Sub-chief of Snohomish.
Tse-nah-tale	his x mark	Sub-chief of Snohomish.
Ns'Ski-oos	his x mark	Sub-chief of Snohomish.
Wats-ka-lah-techie	his x mark	Sub-chief of Snohomish
Smeh-mai-be	his x mark	Sub-chief of Skaishwamish
Slat-eah-ka-nam	his x mark	Sub-chief of Snoqualmoo
Se'Hau-ai	his x mark	Sub-chief of Snoqualmoo
Lugs-ken	his x mark	Sub-chief of Skaishwamish.
S'Sleht-soolt	his x mark	Sub-chief of Snohomish.
Do-queh-oo-satl	his x mark	Snoqualmoo tribe.
John Kanam	his x mark	Snoqualmoo tribe.
Klemsh-ka-nam	his x mark	Snoqualmoo.
Ts'Huahnd	his x mark	Dwa-mish sub-chief.
Kwuss-ka-nam	his x mark	Skagit tribe.
Illel-mit	his x mark	Skagit sub-chief.
S'kwai-kwi	his x mark	Skagit tribe, sub-chief.
Seh-lek-qu	his x mark	Sub-chief of Lummi tribe.
S'h—chen-oes	his x mark	Sub-chief of Lummi tribe.

*Attachment 2*





*Historical*

**The State of Washington**



**Proclamation**

**WHEREAS**, it is the intent of the Governor to reaffirm the government-to-government relationship established in the Centennial Accord of August 4, 1989 with the federally recognized Indian tribes within the boundaries of Washington state; and

**WHEREAS**, the state of Washington recognizes that there are 27 separate and distinct federally recognized sovereign tribal governments in Washington state and acknowledges that the tribes have an historical relationship with reserved rights defined by treaties with the United States government, federal statutes, and executive orders of the President; and

**WHEREAS**, the state of Washington seeks to strengthen the relationship with the federally recognized tribal governments to promote and enhance tribal self-sufficiency; and

**WHEREAS**, the state of Washington reaffirms the spirit and intent of the Centennial Accord and directs its agencies to develop policy consistent with the stated principles therein; and

**WHEREAS**, the state and federally recognized tribal governments respect the sovereignty of one another;

**NOW, THEREFORE**, I, Gary Locke, Governor of the state of Washington, do hereby proclaim that the state of Washington accepts the fundamental principles and integrity of the government-to-government relationship between the state and the federally recognized Indian tribes within Washington state, and that the principles of the Centennial Accord shall guide Washington state's policy in relations with the federally recognized tribal governments.

Signed this 21<sup>st</sup> day of July, 1997,

*Gary Locke*  
Governor Gary Locke



# The State of Washington



## Proclamation

**WHEREAS**, it is the intent of the Governor to continue the government-to-government relationship set out in the Centennial Accord of August 4, 1989 with the 26 federally recognized Indian tribes within the boundaries of Washington state; and

**WHEREAS**, the State of Washington and the federally recognized Indian tribes seek to better achieve mutual goals through an improved relationship between their sovereign governments and provide a framework for government-to-government interaction; and

**WHEREAS**, the State and tribal governments acknowledge there are 39 counties and numerous other local governments and independent State elected officials with independent and often overlapping interests and legal authority in Washington state; and

**WHEREAS**, the State and federally recognized tribal governments will direct their staffs to communicate within the spirit of the Centennial Accord; and

**WHEREAS**, the State and federally recognized tribal governments reaffirm that it is their shared policy to maintain government-to-government relations and to promote understanding of this relationship within their governmental organizations and with the public; and

**WHEREAS**, the State and federally recognized tribal governments respect the sovereignty of each other;

**NOW, THEREFORE**, I, Mike Lowry, Governor of the State of Washington, do hereby proclaim that the State of Washington continues to accept the fundamental principle and integrity of the government-to-government relationship between the State and the federally recognized Indian tribes within Washington state, and that the principles in the Centennial Accord shall guide Washington state's policy in relations with federally-recognized tribal government.

Signed, this 3rd day of March, 1993,



*Mike Lowry*  
Governor Mike Lowry

*Attachment 7***AGREEMENT IN PRINCIPLE****As agreed 12/3/97****I. GENERAL INTENT AND PURPOSE**

A. The United States, the Lummi Nation and the State of Washington entered into negotiations for the following stated purpose:

The purpose of the negotiations is first to reach agreement on future water needs of the Lummi Nation and non-tribal landowners within the reservation and to determine if these needs can be met from on-reservation groundwater supplies. To the extent there are unmet needs, subsequent negotiation discussions will focus on identifying alternative ways of meeting the on-reservation water supply needs and evaluating their feasibility, recognizing that some of these alternatives may require the involvement of other parties in the negotiation process.

B. This Agreement in Principle does not reach agreement on the total future water needs of the Lummi Nation within the Reservation.

C. Upon execution by the parties of this Agreement in Principle, the parties agree to immediately commence, in an expedited process, good faith negotiations for the purpose of obtaining an off-reservation source of water to satisfy future growth within the reservation and to enhance instream flows as set forth in II.A. below.

**II. ALLOCATION**

The purpose of this Agreement is to outline the steps that must first be taken as conditions precedent to enter into a Final Agreement and identify the issues to be resolved in the Final Agreement.

**A. AGREEMENT ON ALLOCATION**

1. The parties intend to find water from an off-reservation source or combination of sources totaling 5 million gallons per day (mgpd) for the purposes of: 1) importing for use on reservation 2.5 mgpd, to be divided .5 mgpd for non-tribal use, and 2 mgpd for tribal use, and 2) enhancing instream fishery resources within the Nooksack Basin equivalent to 2.5 mgpd. The water source(s) must provide an assured, uninterrupted supply of water that is legally, politically, environmentally



and economically available. Until the entire 5 mgpd is secured, no portion of the 5 mgpd may be delivered or used for either tribal or non-tribal purposes.

2. When the associations obtain delivery of the off-reservation water, the associations will substitute the off-reservation supply for the existing groundwater use subject to conditions agreed upon in the Final Agreement, including those issues listed in part C of this Agreement.

## B. STEPS TO TAKE PRIOR TO ENTERING INTO FINAL AGREEMENT

1. The parties will search for:

- a) Water for non-tribal use totaling 500,000 gpd from off-reservation sources, including transferring rights that withdraw water in continuity with the Nooksack River if the water is obtained from currently exercised rights that are transferred in whole or in part from future or recently (e.g., over the last 2 years) conserved water;
- b) Water for tribal use totaling an additional 2,000,000 gpd from off-reservation source(s); and
- c) Conserved water to enhance instream flows by 2,500,000 gpd or to provide other mitigation as agreed to by the United States and the Lummi Nation.

2. The parties will evaluate costs of delivering water from off-reservation and the availability of funding sources from local, state, federal, tribal, and private parties.

## C. ISSUES TO BE RESOLVED IN FINAL AGREEMENT

The Final Agreement will resolve issues, including but not limited to the following:

1. The necessary state and federal legislation for authorizing agreements and appropriations.
2. Funding, i.e., assessments, grants, loans, etc. to implement agreement.
3. The necessary state authorizations/permits to deliver water for on-reservation use, including resolving any legal impediments to existing tribal use of water now delivered from Bellingham.
4. The necessary pipelines, pump stations, etc., consistent with applicable drinking water laws and standards.

- 5 The timing for delivery of off-reservation water based upon phased-in non-tribal growth.
- 6 Ground water use for non-tribal emergency supplies and other uses.
- 7 How will off-reservation waters be purveyed to on-reservation users.
- 8 Jurisdiction
9. Dispute Resolution
10. Mechanism for making the Final Agreement binding.
11. Technical data to implement the Final Agreement.
12. Other issues that may be raised. More issues may be raised that need to be resolved for the Final Agreement.

This list of issues is not prioritized.

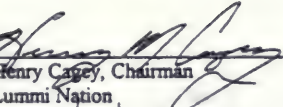
#### D. TIMING

The parties agree to commence expeditiously with effectuation and implementation of this agreement, including, as a matter of first priority, immediately to meet and agree on a schedule and checklist of the necessary actions, including certain time deadlines, to accomplish the goals of this agreement. The parties anticipate finding the off-reservation source and evaluating the cost effectiveness of the source within the next nine months of execution of this Agreement. To the extent feasible, the parties will also pursue, within the next nine months, resolution of the issues in Part C above.

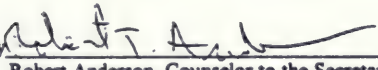
#### E. DISCLAIMER

Nothing in this or the Final Agreement limits or waives the United States' or Tribes' right to claim additional water from any source in satisfaction of the Nation's reserved water right.


## LUMMI NATION

By   
 Henry Cagley, Chairman  
 Lummi Nation  
 Date: 1/27/98

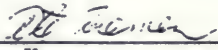
## UNITED STATES

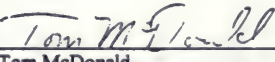
By   
 Robert Anderson, Counselor to the Secretary  
 United States Dept. of the Interior and  
 Chairman, Federal Negotiation Team  
 Date: 1/27/98

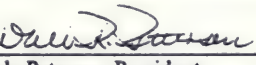
STATE OF WASHINGTON, including  
 certain water associations, Whatcom  
 County and the State Attorney General's  
 Office.

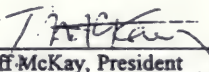
By   
 Mike Rundlett, Regional Director  
 Department of Ecology and  
 Chairman, State Negotiation Team  
 Date: 1-27-98


Concurred By:

By   
 Pete Kremen  
 Whatcom County Executive  
 Date: 1-27-98

By   
 Tom McDonald  
 Assistant Attorney General  
 Approved as to Form  
 Date: 1/27/98

By   
 Dale Petersen, President  
 For Sandy Point Improvement Co.  
 Date: 1/27/98

By   
 Jeff McKay, President  
 For Neptune Beach Water Association  
 Date: 1/27/98

By   
 Gary Smith, President  
 For Harden Island View Water Assn.  
 Date: 1-27-98



By Richard T. Bremer  
 Richard T. Bremer, Board Member  
 For Georgia Manor  
 Date: Jan 27, 1998

By Mike Heintz  
 Mike Heintz, President  
 For Sunset Water Association  
 Date: 1/27/98

By Richard T. Bremer  
 Richard T. Bremer, President  
 For Fee Land Owners Association  
 Date: Jan 27, 1998

cases\ptm\tribal agreement2.doc

*Attachment 5*

## ARTICLE XIV.

## JUDICIAL REVIEW

SECTION 14.01. INITIAL RESOLUTION OF DISPUTES. Any disputes regarding the right to use the sewer or water system, refusal or failure to provide service, operational problems affecting service, and other service related issues shall be resolved according to this Article. Any person aggrieved by an order or decision of the Sewer and Water Board relating to any of these areas shall first petition the Sewer and Water Board for a hearing. This petition shall be in writing, although this requirement may be waived by the Sewer and Water Board. The hearing shall be on the record and the Sewer and Water Board shall cause a verbatim record of the hearing to be kept and transcribed. The Sewer and Water Board shall issue a written decision which shall become a part of the written record and shall be open for inspection at the offices of the Sewer and Water Board during regular working hours.

SECTION 14.02. LUMMI INDIAN BUSINESS COUNCIL REVIEW. The decision of the Sewer and Water Board shall be reviewable by the Lummi Indian Business Council. Any person who desires any review of the Sewer and Water Board Decision shall petition the Lummi Indian Business Council for such review within ten (10) working days of the date of the Sewer and Water Board Decision. The review power of the Lummi Indian Business Council shall be limited to ascertaining whether a fair hearing upon the dispute was held. The Lummi Indian Business Council shall take up the review within thirty (30) calendar days of the date of the receipt of the petition for review. Failure of the Lummi Indian Business Council to act within this period shall be deemed to be an affirmation of the Sewer and Water Board Decision.

SECTION 14.03. JUDICIAL REVIEW. Any party dissatisfied with the decision of the Lummi Indian Business Council may petition the Lummi Reservation Court for judicial review of the decision. For the purposes of this review the Lummi Indian Business Council agrees not to raise as a defense to the appeal any immunity from this type of action which it or the Lummi Indian Tribe may possess in the Lummi Reservation Court. This petition for review shall be filed within ten (10) working days of the date of the decision of the Lummi Indian Business Council, or within forty (40) calendar days of the date of the petition for review to the Lummi Indian Business Council. The Reservation Court shall conduct a review upon the written record, and shall permit time for each party to present oral argument in support of this position. The standard used in this review shall be whether there was substantial evidence in the record to support the decision of the Sewer and Water Board. The Reservation Court shall issue a written decision.

SECTION 14.04. ARBITRATION. Any party to a dispute dissatisfied with the decision of the Lummi Reservation Court may invoke arbitration under the rules and auspices of the American Arbitra-

tion Association. The arbitrator shall conduct a de novo review upon the written record before the Reservation Court and shall issue a written decision. For the purpose of this arbitration, the Lummi Indian Business Council agrees to not assert any immunity from arbitration or suit which it may have as a defense to participating in the arbitration, provided that this agreement shall be strictly construed and shall not be considered or construed as an agreement not to assert any such immunity in any action brought or maintained in the courts of the State of Washington.

**SECTION 14.05. COSTS.** As a condition of appealing or petitioning in any of the above steps, the party wishing to file the appeal or petition shall first pay all costs of the previous step from which the appeal or petition is sought. Costs shall include, but not be limited to, the preparation of the written transcript of each hearing or meeting, reasonable filing fees, and other costs, provided that these costs shall not include attorney's or spokesman's fees for any of the above stages of proceeding.

**SECTION 14.06. MINOR DISPUTES.** Operational problems or complaints of a minor nature may, at the option of the complaining party, be resolved informally through contact with the manager or staff of the Sewer and Water Board. The use or nonuse of these informal proceedings shall not affect a complaining party's right to pursue the appeal right set out in this Article.

**SECTION 14.07. OTHER APPEALS.** Any other decisions of the Sewer and Water Board, including rate setting and class of service decisions, may be reviewed by the Lummi Indian Business Council pursuant to the Constitution and Bylaws of the Lummi Indian Tribe, Article VI, Section 1 (p). Any such decision of the Sewer and Water Board or of the Lummi Indian Business Council may be reviewed in the Lummi Reservation Court by filing an appeal therein within ten (10) working days of the date at which the decision of the Sewer and Water Board or of the Lummi Indian Business Council was taken. The procedures and rules of the Reservation Court governing civil actions shall be applicable to such an appeal, and the decision of the Reservation Court shall be final.



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FILED IN THE  
 UNITED STATES DISTRICT COURT  
 Western District of Washington

Attorney  
 LUMMI INDIAN TRIBE

FEB 5 - 1982

BRUCE RIFKIN, Clerk  
 By \_\_\_\_\_ Deputy

UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 AT SEATTLE

LUMMI INDIAN TRIBE, et al., )  
 Plaintiffs, )  
 and )  
 UNITED STATES OF AMERICA, )  
 Plaintiff-Intervenor, )  
 v. )  
 WILBUR HALLAUER, et al., )  
 Defendants. )

NO. C79-682R

ORDER GRANTING SUMMARY JUDGMENT  
 MOTION OF PLAINTIFF AND DENYING  
 SUMMARY JUDGMENT MOTION OF  
 DEFENDANT RE: JURISDICTION

THIS MATTER comes before the court on a motion for summary judgment by the Lummi plaintiffs, in which the United States and the Environmental Protection Agency (EPA) (plaintiffs-intervenor) join. The defendant State of Washington has filed a brief supporting the Lummi Indian Tribe's motion. The defendants have filed a cross-motion for summary judgment. Having considered the memoranda and supporting materials submitted by counsel, the court finds as follows:

I. THE ISSUE

The central issue before the court is whether an Indian tribe has civil jurisdiction to plan, construct, operate and maintain a sewer system to service non-Indian owned land within a reservation. The Lummi Tribe has formed a sewer district to serve the entire Reservation, including the land owned in fee simple by non-Indians.

1 The Lummi sewer district would require that all land on the Reser-  
 2 vation hook up to the Lummi sewer system. The non-Indians have  
 3 formed their own sewer and water districts and claim that they alone  
 4 have the authority to provide sewer services within the boundaries  
 5 of these districts.

6 On November 6, 1980, this court entered a partial judgment on  
 7 a consent agreement between the Tribe, the United States and the  
 8 State of Washington. The order allowed completion of the Lummi  
 9 sewer system, including the portion within the defendant districts,  
 10 while expressly reserving the issue of which entity would operate  
 11 and maintain the portion lying within the districts. The parties  
 12 to the agreement assumed the risk of later being required to pay  
 13 the cost differential of installing certain meters and valves nec-  
 14 essary to allow the defendant districts to operate the portion of  
 15 the sewer system within their boundaries if the court later deter-  
 16 mined that the Tribe did not have jurisdiction to operate that por-  
 17 tion of the system.

18 Plaintiffs argue that the Tribe has the civil authority to  
 19 regulate the sewer system on the Reservation and to require non-  
 20 Indian fee simple property owners to hook up to the system and to  
 21 pay assessment fees for the services received. They look to the  
 22 Tribe's inherent sovereignty, the treaties between the Tribe and  
 23 the federal government, federal preemption, and federal delegation  
 24 under the Clean Water Act. Defendant State of Washington has sub-  
 25 mitted a memorandum in support of the Tribe's regulatory authority,  
 26 but relies solely on the theory that the Lummi Tribe is the proper  
 27 grantee and delegate of federal and state grants to construct and  
 28 operate the sewer system. The individual and district defendants  
 29 attempt to refute all of plaintiffs' and state defendants' theories.  
 30 The defendants argue that they cannot be made to hook up to and pay  
 31 for services from a sewer system in which they have no voting  
 32 rights. In addition, despite the position taken by the State of

Washington, they claim to be asserting superior jurisdictional claims under state law.

## II. BACKGROUND

In 1972, the State of Washington declared as a goal of the State the protection of the State's resources, environment, and the health and safety of its people through the provision of adequate waste treatment facilities. RCW 43.83A.010. The Washington State Department of Ecology (DOE) was authorized to issue loans or grants to public bodies for improvements to fulfill this goal. Public bodies include Indian tribes. RCW 43.83A.050. One such loan or grant was issued to the Lummi Tribe.

It is undisputed that Washington State (DOE) listed the Lummi Sewer Project as its number one priority problem. There is no question that inadequate septic tank systems had resulted in unsanitary and unhealthy conditions on the Lummi Indian Reservation. Serious diseases were posing imminent health problems due to sewage seepage and open sewage in ditches.<sup>1/</sup> Badly needed additional housing could not be built without the sewer system, thus resulting in substandard and overcrowded living conditions that intensified health hazards.<sup>2/</sup> In addition to the pressing health problems, pollution of the waters surrounding the Reservation was threatening the Lummi aquaculture and oyster-raising ventures which are vital to the Tribe's economic well-being.<sup>3/</sup>

The Lummi sewer project began in the early 1970's. See State Defendants' Exhibit A-1. The Lummi Indian Business Council began receiving federal and state grants for the project under the super-

1/ Deposition of Robert Sylvester, 18-19; Affidavits of Phillip Jones, M.D. and Stephen P. Weiner with exhibits attached to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment dated Nov. 7, 1980.

2/ Affidavit of Lloyd L. Kinley, C2-3 in Support of Lummi Plaintiffs' Motion for Summary Judgment re: Jurisdiction; Affidavit of Celeste Alaniz, p. 2 in Support of Lummi Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment on Civil Rights Claims.

3/ Affidavit of Lloyd L. Kinley, supra at 3.



vision of EPA and DOE in 1974.<sup>4/</sup> The Tribe's comprehensive sewer ordinance (Ordinance No. O-U3(O-45) was passed by the Council in 1976.<sup>5/</sup> The ordinance passed by the Lummi sewer district requires that all dwellings within 200 feet of its sewer connect with the sewer. This provision is essentially in conformity with the Bellingham-Whatcom County Health District and the State codes. WAC 248-59-100(6).

### III. INHERENT TRIBAL POWER TO EXERCISE CIVIL AUTHORITY

The proper decision in this case is made clear by the recent Ninth Circuit decision in Confederated Salish & Kootenai Tribes v. Namen, No. 80-3189 (9th Cir. filed Jan. 11, 1982) (hereinafter Namen). In that opinion the Court carefully analyzed the legal tests to be considered by a trial court in determining when a tribe's regulatory powers could extend to non-members.

#### A. The Colville Rule

The first test by the court in Namen was the one enunciated by the Supreme Court in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 135, 153 (1980) (hereinafter Colville). Under this test, the traditional quasi-sovereign powers of tribes would be divested only when they were inconsistent with overriding federal interests.

Applying the Colville test to the case before this court, the court finds there is no inconsistency with federal interests. Quite the contrary, the United States itself is urging the court that not only would no federal interest be injured by the proposed sewer project, but that this project is vital for the advancement of federal interests in promoting and improving water and sewage conditions on Indian reservations.

The government points to various federal enactments which deal

4/ Attachments 5A-D to EPA Motion to Dismiss; Attachments 9-12 to United States' Motion for Summary Judgment re: Jurisdiction.

5/ Attachment No. 13 to United States' Motion for Summary Judgment re: Jurisdiction.

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THE LAW FIRM FOR STOP

specifically with Indians and which demonstrate pervasive federal regulation aimed at improving water and sewage systems on Indian reservations. The Indian Health Care Act of 1976, 25 U.S.C. § 1601 et seq., has as its goal the highest possible health status for Indians. The Indian Health Care Act specifically notes the need for improved sanitation on Indian reservations and the interrelationship of sewage disposal systems, pure water, sanitary housing and health:

(e) All other Federal services and programs in fulfillment of the Federal responsibility to Indians are jeopardized by the low health status of the American Indian people.

(f) Further improvement in Indian health is imperiled by....

(6) lack of safe water and sanitary waste disposal services. For example, over thirty-seven thousand four hundred existing and forty-eight thousand nine hundred and sixty planned replacement and renovated Indian housing units need new or upgraded water and sanitation facilities.

25 U.S.C. § 1601(e), (f)(6). In the same Act Congress declared that it was federal policy to provide existing Indian health services with all resources necessary to affect the Act's policy. 25 U.S.C. § 1602.

The Indian Hospitals and Health Facilities Act, 42 U.S.C. § 2004(a), authorizes construction, improvement and maintenance of sewage- and waste-disposal facilities for Indian communities. State defendants' Exhibit A shows that the Regional Indian Health Service probably received funds authorized under 42 U.S.C. § 2004(a) for the purpose of assisting the Lummi sewer project.

The Housing Act of 1974 provides for federal assistance to create "decent, safe, and sanitary dwellings for families of low income." 42 U.S.C. § 1437. Indian tribes are included within the definition of "states" to whom such assistance is provided. 42 U.S.C. § 1437a(2)(7). See 24 C.F.R. § 805. See also this court's Partial Judgment and Consent Decree of November 6, 1980, concerning both the poor health conditions and substandard housing on the Lummi

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ORDER  
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Reservation which determined the listing by the Washington Department of Ecology of the Reservation as number one on its priority list of areas with sewage treatment problems needing federal and state assistance.

These Federal statutes and regulations dealing with problems of substandard housing and health conditions show a strong interest in promoting programs which will improve those conditions. Certain of those programs have been implemented to improve the specific conditions which existed on the Lummi Indian Reservation.

### B. The Montana Rule

The second test applied in Namen is whether this attempt at regulation by the tribe falls within the exception set forth by the Supreme Court in Montana v. United States, 450 U.S. 544, 566 (1980) (hereinafter Montana), that is, whether "the conduct of the non-Indians on fee lands within its reservation threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."

In Namen the Tribes sought to regulate non-Indians' exercise of their riparian rights to build wharves, breakwaters, and other structures out onto the bed and banks of the Flathead Lake. Even more so than in Namen, the conduct the Lummi Tribe seeks to regulate in this case has the potential for significantly affecting the economy, welfare, and health of the Tribe.

Non-Indian landowners within the Reservation contribute to the Reservation-wide pollution and health problems which have been described above. The pattern of Indian and non-Indian land ownership is very irregular and not static.<sup>6/</sup> The Tribe has a strong interest in including the lands and houses of non-Indians in its sewer system because of the engineering requirements for the efficient operation

<sup>6/</sup> Affidavit of David W. C. Oreiro, Exh. F-1 in Support of Lummi Plaintiffs' Motion for Summary Judgment re: Jurisdiction.

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of any comprehensive and economically feasible system.<sup>7/</sup> Assertion of authority by another entity whose boundaries "gerrymander" around and through the Reservation sewer district could lead to a lack of consistency or uniformity in the administration and operation of the Tribe's system.<sup>8/</sup>

In Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) the Ninth Circuit considered the claim to water rights of a non-Indian, fee owner on the Colville Indian Reservation based on state water permits. The Court of Appeals held that the state's regulatory power was preempted. The Court found that the actions of one water user have an immediate and direct effect on other users. Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. 647 F.2d at 52. The same is true regarding the importance of a sewer system to the Lummi Reservation.

#### IV. DEFENDANTS' OTHER ARGUMENTS

Defendants have offered two other theories in support of their position that were not dealt with by the Court in the Namen case.

##### A. Assertion of Authority Under State Law

District defendants argue that they have jurisdiction to operate a sewer district created by state law and that they represent a state interest that must prevail. This argument is severely undermined by the fact that the State of Washington has filed a brief in support of the Lummi Indian Tribe's authority to provide the sewer services to all residents, Indian and non-Indian fee owners, of the Lummi Indian Reservation. The State's strongly stated position destroys any argument that the district defendants

7/ Depositions of Robert Sylvester, 51-56 & John Spencer, Vol I, 163-164, 181, 233; Affidavit of Craig Peck, Attachment 17 to United States' Motion for Summary Judgment re: Jurisdiction.

8/ Defendants' map, Dkt. No. 377; Affidavit of Craig Peck, supra.

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contrary position represents a "state interest."<sup>9/</sup> Sen Reynolds v. Sims, 377 U.S. 533, 575 (1974); Moses Lake School District No. 161 v. Big Bend Community College, 81 Wn.2d 551, 554, 503 P.2d 86 (1973).

Furthermore, Washington state case law, while recognizing that competing municipal corporations may exercise concurrent jurisdiction, makes clear that it is against public policy for two corporations in the same territory to exercise the same functions.

Alderwood Water District v. Pope & Talbot, 62 Wn.2d 319, 321, 382 P.2d 639 (1963). RCW 57.04.070 provides:

Whenever two or more petitions for the formation of a water district shall be filed as herein provided, the petition describing the greater area shall supersede all others and an election shall first be held thereunder, and no lesser water district shall ever be created within the limits in whole or in part of any water district.

This statutory prohibition against the geographical overlapping of water districts directs the finding that the state's interest is better served by not having the Lummi Sewer System carved up into an irregular patchwork of districts.

The State of Washington has made it clear that a solution to the Lummi Indians' health and pollution problems by means of a unified and comprehensive sewer system operated by the Tribe is an important state priority. Any contention that there is a state interest to the contrary must be regarded by the court as totally without foundation.

#### B. Assertion of Constitutional Right to Vote

It is the position of the individual defendants that the tribal sewer district cannot exercise authority over them because they have

<sup>9/</sup> There is some question whether the district defendants are properly formed under state law. Defendant District 12 does not have an approved comprehensive plan. Defendant water district No. 11 does not have a certificate of necessity to operate a sewer system. Depositions of Robert Sylvester, 54-58, 201-204 & Virginia Smith, Vol. I, 74-83, 89-101, 104-111. Both the certificate and approved plan are necessary under state law in order to operate. RCW 56.08.020; 57.08.065.

no voting rights in the Lummi Indian Business Council which is the governing board of the Tribe and has veto power over the Lummi Sewer Board on which non-Indians do sit. According to defendants this is a violation of the due process and equal protection guarantees of the Fifth Amendment as well as of the right to hold office and to vote guaranteed by the First Amendment. Essentially the same argument was offered by appellees in Naman. The Court of Appeals dismissed this argument with the general rule that the Bill of Rights cannot be invoked against tribal actions unless Congress has explicitly so provided. Slip op. at 208 n. 31, citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and Talton v. Mayes, 163 U.S. 376 (1896).

The Tribe's position is much stronger in the present case, because one's right to vote for members of the governing body of a sewer district does not rise to the same level as the right to vote for representatives of a government with broader powers. Defendants discuss at length various United States Supreme Court cases affirming the right of all qualified citizens to vote in state and local elections. Reynolds v. Sims, 377 U.S. 533 (1964); Avery v. Midland County, 390 U.S. 474 (1968). Whether or not the denial of the right to vote for members of a sewer board constitutes the violation of fundamental rights of due process and equal protection as asserted by defendants is not answered by these cases, however.

The court finds more persuasive authority in the case of Holt Civil Club v. Tuscaloosa, 439 U.S. 60 (1978) in which the Supreme Court held that the exercise of police powers by Tuscaloosa outside its corporate limits to the residents of the community of Holt without the concomitant extension of franchise equal to those residing within Tuscaloosa was not a denial of the rights secured by the due process and equal protection clauses of the Constitution. 439 U.S. at 69-70. It is interesting to note that defendants have not protested their inability to vote or hold office in other utilities



from which they have received services and been assessed costs.<sup>10/</sup>

The Supreme Court has recognized that in certain situations Indian tribes may exercise civil regulatory authority over non-Indians. The fact that non-Indians could not participate in tribal government did not change the conclusion. United States v. Mazurie, 419 U.S. 544, 557 (1975). The right to vote and participate in governmental decisions is an important one. Nevertheless, the lack of franchise in a municipal corporation whose sole function is the construction, operation and maintenance of a sewer does not rise to the level of being a deprivation of fundamental rights as claimed by defendants. Ball v. James, 451 U.S. 355, 101 S. Ct. 1811 (1981); Molt Civic Club v. Tuscaloosa, *supra*; Salver Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973).

Individual defendants' arguments have even less weight in light of the fact that, without being compelled to do so, the Lummi Indian Tribe has offered an opportunity to non-Indians to participate and voice their opinions. Four members of the board are elected at large by all voting residents of the reservation and, at present, are non-Indian.<sup>11/</sup> Four are elected from among the membership of the Tribe, by voting members of the Tribe, and one is a member of the Lummi Indian Business Council, also elected by voting members of the Tribe. The Lummi Indian Business Council, which is the governing board of the Tribe, has veto power over the Lummi Sewer Board.

Finally, there is nothing in the record to indicate that the individual defendants have received or will receive unfair treatment or inferior service from the Lummi Indian sewer service. All aspects of the sewer system conform to state law and regulations,

<sup>10/</sup> E.g. Deposition of Virginia Smith, pp. 28-34, 130-32, 198-200.

<sup>11/</sup> Affidavit of Terry Hage, Attachment 16 to United States Motion For Summary Judgment re: Jurisdiction.

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as well as to the federal standards set by the EPA. The Lummi Tribal Court is available to non-Indians for adjudication of any dispute which might arise regarding the sewer system.

#### V. CONCLUSION

The court finds that the Lummi Indian Tribe is a proper grantee for federal and state funds to plan, design and construct a sewer system in accordance with the Clean Water Act, as amended; that the Lummi Indian Tribe has the power and the authority to provide sewer services to all residents of the Lummi Indian Reservation; that the exercise of sewer powers by the Lummi Indian Tribe within the boundaries of the Lummi Indian Reservation preempts the exercise of sewer powers by either Whatcom County Sewer District No. 2 or Whatcom County Water District No. 11; that the exercise of state sewer powers by either Whatcom County Sewer District No. 2 or Whatcom County Water District No. 11 impermissibly infringes upon the self-government of the Lummi Indian Tribe and is therefore prohibited; that the administration of the Lummi Reservation Sewer System by the Lummi Sewer Board and Lummi Indian Business Council is a proper exercise of tribal governmental powers, and that the regulation of a sewer system serving the entire Reservation is necessary to protect the economic security and health and welfare of the Tribe and affords to all users of the sewer system, on an equal basis, the rights to which they are entitled. The Lummi Sewer Board has the authority to require residents of the Lummi Indian Reservation to hook up to the Reservation sewer system and to assess and collect connection and service fees from all users of the system.

IT IS ORDERED that plaintiffs' motions for summary judgment are

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ORDER

Page -11-

FILED 1990-04-04 10:00 AM 1990

1 GRANTED and district and individual defendants' cross motion is  
2 DENIED.

3 The clerk of the court is directed to send uncertified copies  
4 of this order to all counsel of record.

DATED at Seattle, Washington this 5<sup>th</sup> day of February, 1982.

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8 BARBARA J. ROTHSTEIN  
9 UNITED STATES DISTRICT JUDGE  
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Attachment 6



**Sharon Allen**  
715-7100

E-Mail: SAllen99@aol.com



**Dick Jacobson**  
384-6109



Certified  
Residential  
Specialist



## THE MULJAT GROUP

SANDY POINT PROPERTIES



**Waterfront Jewel \$315,000**

3 BR, designer home with 50' no bank water frontage. Quality extras: Berber & Pergo flooring, 1st floor ceilings, double oven, and jetted tub in master suite.



**Lakefront Home \$134,950**

2+ BR year around home on 10 ft. lakefrontage. New gazebos & hot tub. New windows, roof, appliances, carpets, etc. etc. on Agate Lake.



**Just Completed \$278,950**

New 3 BR, canal home with 20' dock and 20 x 40 pole bldg. Many quality extras throughout. Incredible views. Ask about amenity pkg.



**Boat At Your Doorstep \$237,500**

Lake new year round home with dock for your boat. Enjoy sunsets, fishing, crabbing and the complete Sandy Point Amenity Package.



**Waterfront Condo \$129,900**

At Sandy Point's inner Harbor 2+ BR, great retreat. Condo with Sandy Point Amenity Package.



**Mt. Baker View \$97,500**

3 BR, 2 BA. 2 car garage & shop, RV parking. Like new condition over 1200 sq. ft. Just listed & won't last.

# Announcing

## Lummi Sign Water Pact

The Lummi Tribal Government and all "On Reservation" water associations have signed a water agreement. This agreement should make available water to all on reservation residents, natives and non-indian alike.

Call Dick Jacobson for details.  
733-3030 or 384-6109



(360) 733-3030

510 Lakeway Drive  
Bellingham, WA 98225

(360) 384-4081



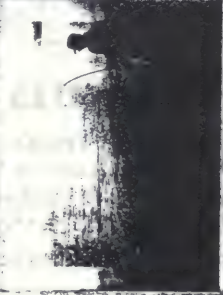
When buying or selling  
Sandy Point properties,  
Call your residential Realtors®

**Dick Jacobson**  
Sandy Point resident for 20 years  
**& Sharon Allen**

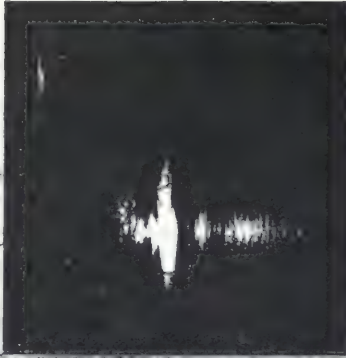


**D**ick Jacobson, a resident of Sandy Point for 20 years, is a real estate agent with the Washington State Real Estate Commission. He has been a member of the National Association of Realtors since 1960. Dick and Sharon Allen, who have lived in Sandy Point for 20 years, are also real estate agents with the Washington State Real Estate Commission. They are both members of the National Association of Realtors. Dick and Sharon Allen are the owners of the Sandy Point Real Estate Company, which is located in Sandy Point. They are both active in the community and are involved in many local organizations. Dick and Sharon Allen are both very proud of their home in Sandy Point and are committed to helping others find their perfect home in this beautiful area.

**S**almon fishing from shore has become a September ritual for many residents. It has also been stated that Sandy Point has the best dungeness crabbing on the west coast.



Fishing from shore is a popular activity in Sandy Point.



Way to the San Juans



# SANDY POINT

Located between Bellingham and Ferndale, on the Georgia Strait, is the exquisite Sandy Point Shores. Residents here

- magnificent sunrises and sunsets
- beach combing
- crabbing
- bird-watching
- tennis
- golf
- swimming
- use of the local lunch camp and marina



*the magnificent view from the beach*

Lunni Bay is the wintering grounds for thousands of migratory waterfowl, herons and shore birds. Two pelicans were even cited in the summer of '97. Breathtaking sunrises and sunsets are enjoyed by all residents, and almost every home has a superb view of Mount Baker.

S

*Sandy Point*



Whale watching has become a relaxing pastime for local residents. Numerous seals, sea lions, otters and dolphins also pass by Sandy Point Shores.



Sandy Point has protected moorage for over 200 boats. You may have a boat at your doorstep or arrange moorage with a neighbor or the harbor master. After you leave the harbor, you are only minutes to the San Juan or the fishing grounds at Allen Bank.



*Sandy Point sampler*



Choose Sandy Point as a weekend get-away or a year-round residence.



### Historic Land Use

Prior to the arrival of Euro-Americans the Lummi people inhabited a territory stretching from eastern Vancouver Island to Point Roberts and south to Samish Island, including the San Juan Islands and parts of northeast Olympic Peninsula. Some of the ways in which the Lummi people used the local environment included building permanent summer and winter villages near the shoreline at strategic locations, constructing temporary hunting and fishing camps inland along major rivers, and utilizing established sites for the gathering of important food plants and berries. The use of special sacred locations for spiritual purposes was also important.

With the immigration of Euro-Americans into the northwest after 1850, many of the traditional Lummi places were occupied by non-Indians. In 1855, with the Treaty of Point Elliott, the Lummi Nation reserved for its exclusive use that portion of the Lummi's aboriginal lands known as the Island of Chah-Choo-Sen located between the mouths of the Nooksack and Lummi Rivers. This area became the Lummi Indian Reservation. In 1873 the boundary of the Lummi Reservation was changed by a Presidential Executive Order to add the western peninsula now today as Sandy Point.

The Lummi people maintained several village sites on the Reservation, including Gooseberry Point, on the Lummi River, at Fish Point, and at Portage Point. A small community grew up around the Catholic Church near Marietta as well. Each village site was typically surrounded by about 5 acres of cleared land. At the time of the Treaty the population of the Lummi Reservation was about 450.

Federal Indian policies that were applied to the Lummi Nation included encouraging native people to become farmers. Consequently land began to be cleared at Lummi for small scale agricultural use. In addition, American immigrants settled and cleared land for farming on northern portions of the Reservation. By 1896 it was reported that 1,222 acres of land were cleared and under cultivation at Lummi. According to BIA figures, the population at the turn of the century on the Lummi Reservation had dropped to about 325.

In addition to clearing land for agriculture, logging of the old growth forests for lumber by the BIA and non-Indians was occurring. Most of the timber on Portage Island was cut for use as fuel on the steamboats plying the Nooksack River. Forest fires also raged across the Reservation forests at the turn of the century, destroying the remaining old growth forests. By 1916 records indicate that nearly all of the forests were either harvested or burned, leaving only about 500 acres of standing forest. About 500 Lummi people were recorded living on the Reservation at this time.

The diking of the Nooksack River and Lummi River delta in 1929 created a major land use change on the Reservation. This engineering project made it profitable to clear more land for agricultural purposes along the floodplain of the Nooksack. Eventually over 3,000 acres of land was cleared and brought into production after these flood control projects were built. The diking and draining that occurred at this time resulted in the alteration and loss of thousands of acres of freshwater and estuarine wetland systems. The diking and draining of the Lummi River delta significantly reduced the habitat for local wildlife species and salmon. Other significant changes in land use between 1940 and 1960 included the construction of several new public roads providing access to Ferndale and Bellingham as well as a toll ferry to Lummi Island.

### Land Ownership

The Treaty of Point Elliott between the Lummi Nation and the United States described the land area that was ceded to the United States Government by the Puget Sound Indians as well as the land that was reserved by the Lummi Nation. The purpose of the treaty was to define those lands available for homesteading by American emigrants and set-aside that land reserved by the Native

*Lummi Indian Nation*

American inhabitants of Puget Sound. The boundary of the Lummi Reservation, as described in Article 2 of the Treaty of Point Elliott, 1855, was as follows:

*...the peninsula at the southern end of Perry's island called Shais-quihl, and the island called Chah-choo-sen situated in the Summi river at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia; all tracts shall be set apart, and so far as necessary surveyed and marked out for their (the Lummi's) exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damages done them.*

During the late 1800s Federal Indian policy attempted to assimilate Native Americans into the larger American society in response to the closing of the American frontier and to secure reservation lands for non-Indian development. In order to accomplish this assimilation, the Federal Government tried to break down Native American traditions of communal land ownership. Indian reservation lands throughout the West were subdivided into small regular parcels and allotted to individual Indians. The intent of the Federal Government was to break up the large tribal holdings of the reservations and allow the smaller parcels of land to be sold to non-Indians. This action was authorized by the 1887 Allotment Act, also known as the Dawes Act.

Because of language in the 1855 Point Elliott Treaty prohibiting the sale of land at Lummi without the permission of the tribe (along with references to Article 6 of the Treaty with the Omahas defining the method and terms of assigning land parcels to tribal members) the Dawes Act could not be applied to the land on the Lummi Reservation. Three years before the Dawes Act was approved reservation land at Lummi had been assigned to various Lummi tribal members as a means to thwart non-Indian trespass and occupation of reservation lands. The "assignment" of land to Lummi tribal members was different than the "allotment" of tribal lands on other reservations, and carried with it different restrictions and requirements. Tribal land at Lummi was assigned to individual Lummi tribal members as restricted fee lands, and could not be sold to others, including non-Indians, without the consent of the Lummi Tribe. Land allotted to Indians on other reservations was transferred with a fee patent that prohibited the sale of the allotted land for 25 years. After 25 years, a fee patent was issued to the Indian title holder, whereupon they could do what ever they liked with their allotment.

Beginning in 1884, reservation land at Lummi was assigned to individual Lummi tribal members with a "restricted fee patent" based on provisions contained in the Stevens Treaty containing the restrictions outlined in Article 6 of the Treaty with the Omahas. These restrictions included provisions restricting leases to two years and exempting these lands from levy, sale, or forfeiture.

At Lummi, individual or family use rights to specific areas were acknowledged by tribal members for various activities such as fishing, shellfish beds, or root gathering. The assignment system instituted in 1884 significantly changed the nature of the land ownership. Previously only the heads of important families had property or rights to properties. With the coming of the assignment system every nuclear family received land of its own, regardless of family or kinship ties.

Despite the provisions of the 1855 Treaty restricting the sale of Indian land, white settlers and land speculators thought they could gain title to Indian lands at Lummi. With the approval of the Commissioner of Indian Affairs, individual Lummi title holders began to sell their land to non-Indians, in violation of the 1855 Treaty. The Dawes Act was repealed in 1934 with the passage of the Indian Reorganization Act on the recommendation of Meriman Report which recognized that loss of traditional lands was destroying Native Americans cultures. However at Lummi, the original

*Lummi Indian Nation*

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provisions of the Treaty of 1855 continued to apply yet individual assignments of land on the reservation were sold to non-Indians, often in time of individual financial hardship.

With the increase in non-Indian settlement in Whatcom County the traditional means of gaining a livelihood for the Lummi people became threatened. Fishing, hunting, and gathering became more and more difficult. Some Lummi fishermen were prosecuted for taking salmon at their usual and accustomed places of fishing. Lummi people were forced to find employment in the local economy and began shifting from a traditional hunting/gathering economy to a wage and cash economy. However the instability of the local and national economy in the late 1920 and 1930s forced many Lummi people to seek assistance from the government. Paradoxically, individuals were not eligible for government assistance if they owned property. Consequently, those Lummis who became dependent on the cash economy were left with no choice but to sell their property if they were to become eligible for government assistance. The sale of Lummi Reservation land was further encouraged by active assimilation policies of the Federal Government. Beginning in the 1930s, many valuable shoreline parcels were sold to non-Indians. During the 1950's the Bureau of Indian Affairs exerted pressure on Lummi landowners to sell reservation land to non-Indians as part of the termination policy of the Federal Government. This policy was eventually changed, but individual Indian landowners, with the approval of the Commissioner of the BIA can still sell their property to anyone they choose.

Land ownership today on the Lummi Reservation can be divided into two basic groups: trust land held in a restricted fee status for the Lummi Nation or individual Indians, and fee simple land, which can be owned outright by any one, including Indians and non-natives. The fee lands are those lands that were alienated from the original Lummi Reservation by the sale of original land assignments. Of the total 12,987 upland acres within the exterior bounds of the Lummi Reservation, about 9,350 (72%) acres are held in restricted fee status with 3,636 acres (28%) in fee simple ownership. In addition to these upland areas, there are about 8,000 acres of tribal owned tidelands within the exterior bounds of the reservation. Map 17 displays the distribution of restricted fee and fee simple ownership categories for the Lummi Reservation.



In addition to the development and regulatory problems posed by the mixture of land ownership on the Lummi Reservation, the undivided ownership of many restricted fee parcels by numerous heirs has made efficient development of these lands very difficult. Undivided ownership of land means that several individuals can be owners of a single parcel of land, each with an assigned percentage interest in the parcel. The parcel however remains a single, undivided parcel, and cannot be developed or leased unless a majority of the owners agree.

Most of the Lummi people who were originally assigned restricted fee land did not transfer their ownership of the land to another individual at the time of death. Consequently, the ownership of a restricted fee parcel was divided evenly among the surviving heirs by the Federal Government. Over the course of several generations the number of undivided interests in many trust parcels increased as owners passed on without adequate wills that would have transferred their assigned land to a specific individual. Today there are some restricted fee parcels of land that have over 300 separate owners, each with a percentage of undivided interest in a small parcel of land. As part of Lummi self-governance responsibilities the Lummi Nation is encouraging tribal members to provide for adequate legal transfer of properties. In addition the tribe is working on ways to consolidate undivided ownership in order to create manageable parcels of land that can become available for development.

#### Current Land Use

The distribution of various land uses on the Lummi reservation was recently inventoried by field observation, air photo analysis, and interpretation of satellite imagery. In order to meet the needs of land use planning, the wide variety of uses of land on the Lummi Reservation were categorized into 16 distinct groups, and each parcel on the reservation was assigned to one of these categories. Residential land uses were classified as either single family residence, mobile home, multi-family, agricultural residence where a home was located on a larger agricultural parcel, business residence where there was a clearly defined home enterprise, and forestry residence where a home was situated on a large parcel of forest land. Land uses such as the Casino and Lummi Shellfish Company, are classified as Commercial. Forestry and Agricultural categories were assigned to those parcels where that particular uses was the predominate use of the land area. Road ways were categorized as Transportation. Community Use included such areas as the Tribal Center, the Lummi School system, the Lummi Sewer and Water system, and the Stomish grounds. Light Industry includes land uses such as auto wrecking. For those areas such as the Nooksack Delta or the Lummi River a specific classification of Wetland or Riparian area was assigned. All land remaining uncategorized was classified as vacant. Table 15 and Figure 7 below display the area of each of the 16 land uses.



## LUMMI INDIAN BUSINESS COUNCIL

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DEPARTMENT \_\_\_\_\_

EXT. \_\_\_\_\_

### ORAL STATEMENT

Henry M. Caggy, Chairman Lummi Nation

Senate Committee on Indian Affairs

April 7, 1998

*S. 1691 - Sovereign Immunity*

### PROPERTY RIGHTS

Lummi Nation members and their government fully support the protection of property rights for both Indians and non-Indians. The discussion about property rights on our reservation seem to indicate that only non-Indians are concerned about their property rights.

Lummi Nation members and other Indian tribes and their members, more than any other identifiable group within the United States, are conscious of the need to protect property rights. A report recently referenced by Ada Deer, Assistant Secretary for Indians Affairs, indicated that since the 1870's approximately 190 million acres of Indian land have been lost. These were not aboriginal losses; but losses of land set aside by treaty and statute to provide homelands for Indian people.

Is there any incident comparable to this level of loss among non-Indians? The Lummi people also suffered this loss. The Lummi Reservation was established by the Treaty of 1855. By 1970, a little over one half of the reservation was owned by non-Indians. Then, the Lummi Nation started to buy land back. Today, nearly 80% of the Reservation land base is owned by either the Tribal government, tribal members or other Indians. This is a major success story of a Tribe working to restore its land base through the private market system.

Yet, the property rights of non-Indians, rather than Indians, seems to be of paramount concern. What have they lost? What are their purposes? We are preserving our lands to preserve our way of life. Not our way of life in 1855; that is not possible or desirable. We are preserving our way of life as we live now. We do not wish to preserve our poverty, our poor health or the other problems which impair the quality of life for our members. We need a place, not a big place, but enough to stand on the earth, through which we maintain our livelihood.

Most of the non-Indians who have voluntarily decided to live within our boundaries and within our rules have similar goals. They want a place to live and the resources needed to sustain their lives. (*See Testimony of Tom Richardson, non-Indian land owner on the Lummi Reservation*). Those non-Indians who are most vocal about their property rights are those that do not have similar goals. This small minority sees our reservation as a way to make profits by increased access to our resources. These are not

new issues. This is the age old story of non-Indians wanting more and more of our land for their purposes. Today, these are the owners of magnificent houses who want the market value of their assets increased and see the continued existence of tribal government as something to be dismissed in favor of their profits. *(See attachment on recent brochure distributed on Sandy Point Shores)*

We ask the Committee, have profits ever been guaranteed by governments? The anger of these non-Indians is their perception that the actions of the Lummi Nation do not support their plans to **profit**. We have offered to guarantee water to existing reservation homes, even though reservation water supplies cannot meet this need and also the short term future needs. This is still not enough for this small group of property owners. This offer was not enough because this group wants to speculate using our resources and lands within our Reservation for their own profit without regard to our needs. The Reservation is our home Mr. Chairman: *not an investment held for speculation and profit.*

It is simply an unreasonable expectation on the part of some non-Indian property owners that the government of the Lummi Nation, or any other government, would operate in a way to guarantee the profits to small groups within their boundaries. The Lummi Nation will not operate in this manner. Instead the Nation intends to pursue a balance of both natural resource protections and sound economic development. The narrow profit goals of this **small group** are not consistent with the interests of members of the Lummi Nation or the majority of non-Indian property owners living on the reservation.

Whatever, the outcome of this hearing, the record is clear: ***The Property rights of Indians are in jeopardy***, not the property rights of non-Indians. Regardless of the spins that are placed on this topic, there is absolutely no evidence of any loss of property rights by non-Indians that is in any way shape or form comparable to the losses experienced by Indian people. Where is our due process - the due process for Indian people in these historical losses. This is a loss that has occurred and continues within our own lifetimes.

The asserted claim is that non-member property rights are violated by tribal governments and not protected in tribal courts. If the goal is to create a forum in which the non-member always prevails and tribal government always loses, we have no suggestions for the committee. But, if the goal is to create a system in which discriminatory or illegal actions are minimized, and aggrieved parties have a speedy, inexpensive and fair dispute resolution, the Committee should consider the experience of the installation of the Lummi Tribal Sewer System and the Court case that evolved, *(See attachment - Lummi Tribal Sewer System)*

In the 1970's, the Lummi Nation was increasingly concerned over the failure of individual septic systems on the reservation. It proposed to construct a comprehensive sanitary sewer system which would serve both Indians and non-Indians. The Tribe packaged tribal, state and federal funding in such a way that the entire \$14 million system



could be constructed without capital cost to any property owner, Indian or non-Indian. The system would be administered by an elected board consisting of both Indian and non-Indian residents. Rather than accepting these substantial benefits, local non-Indian property owners prevailed on the state to withhold funding from the Tribe. This resulted in a delay of the project of over eight years.

The Tribe sued to obtain release of the funds and the system was constructed. The discrimination claims of the property owners were dismissed by the federal court as factually groundless. Rather than simply imposing its will on the property owners at that point, the Tribe sat down with them and negotiated a dispute resolution system which addressed their concerns. The principal features of the system are: initial decision on water and sewer hook-ups, rates, etc. by the manager or Board; a formal hearing on the record before the Board with full opportunity for representation by counsel, cross-examination of witnesses and introduction of evidence under a relaxed evidentiary standard designed to allow property owners to represent themselves if they desire; formal findings of fact and conclusions of law and a written decision; appeal to the Lummi Indian Business Council on the limited issue of whether the Board provided a fair hearing; appeal to the tribal court on the record with the standard of review being whether the Board's decision is supported by substantial evidence; further appeal to an arbitrator under the rules of the American Arbitration Association; and a waiver of sovereign immunity to enforce any final decision. In addition, the five member Tribal Sewer Board has two seats which are open to non-Indian residents and non-Indians are eligible to vote for those positions which are staggered 2 year terms.

In the sixteen year history of the system only one sewer appeal has reached the tribal court, and in that case the appellant stipulated to the fairness of the hearing procedure. She lost her appeal on the merits, but elected not to appeal to the outside arbitrator. The appellant in that case was Marlene Dawson, (*Ms. Dawson is a member of the Whatcom County Council and the Vice-President of the Sandy Point Improvement Company located on the Lummi Reservation*) who has submitted to this Committee relentless attacks on tribal sovereignty and claims of violations of her rights. Yet when she had the chance to prove her claims to an arbitrator where she would be subjected to cross examination, she elected not to proceed. She was given due process, but chose not to disclose the rest of the story.

There are two lessons here. First, the Committee should not accept at face value unsubstantiated horror stories from persons with ulterior motives in the outcome. Ms. Dawson, for example, continues to speculate in real estate on the reservation in the hope that the land will greatly increase in value if tribal sovereignty is destroyed. (*Ms. Dawson and her husband, a realtor, own 4 homes at Sandy Point, 1 1/2 vacant lots in another reservation development, and an 8.98 acre undeveloped parcel at Sandy Point that she purchased in 1995. Her property is assessed on the tax rolls at a total value of over \$770,000, but has a market value higher.*)

Secondly, the most important lesson may be what would be lost if the proposed legislation passes? What incentive does a tribe have to incorporate non-member participation in tribal government or to create innovative, accessible dispute resolution systems if the court of "first resort" is a distant federal or state court system? The Bill would effectively destroy the Lummi appeal system. Tribal courts will never increase their expertise in handling civil litigation or reviewing tribal council actions if litigants can routinely bypass them in favor of a non-tribal forum.

In addition, the self-correcting aspects of a localized dispute resolution system will be lost. Day to day decisions affecting lives and property will still have to be made by tribal governments. But, if the correctness of those decisions is only reviewed in a distant federal court after protracted litigation, progress will be slow indeed.

Tribal courts have made huge strides as law-formulating and law-applying bodies in the thirty years since the passage of the Indian Civil Rights Act in 1968. This legislation will destroy that progress and have the opposite effect. Tribal courts will become irrelevant. Tribal officials will be afraid to act, fearing that even if their decisions are ultimately upheld, the huge costs of litigating in a distant forum will bankrupt their tribe in the process. This "chilling effect" on legitimate tribal action is precisely what the proponents of this legislation seek.

We ask the Committee to consider the attitude toward tribal property of these self-proclaimed property rights advocates. Their attitude toward Lummi tribal tidelands is typical. The Lummi Reservation is surrounded on three sides by the waters of Puget Sound (*See attached map*). The Lummi Nation owns all of the beaches on the reservation below the high tide water mark. Individual tribal members (not the tribe) have sold some of the more attractive uplands to non-Indians who have built expensive homes on them. Many of these property owners initially leased the adjoining tribal beaches, but now assert that they have a right to use this tribal property without compensation. They have argued that since the land is held by the United States in trust for the tribe, they should be able to use it because they are U.S. citizens. They complain that any tribal effort to keep them off tribal property violates their property rights. For the past ten years, the property owners at Sandy Point, where Ms. Dawson owns most of her property, have refused to enter into a lease for use of our tidelands, despite the fact that they use them and the channel dredged over our tidelands to enhance their waterfront property values. It is not their property rights which are being violated, *but ours*.

The same attitude has been demonstrated in disputes over groundwater on the Lummi Reservation. In 1995 property owners on the Lummi Reservation created a false "crisis" by claiming that a tribal well was drawing off their water from a nearby well. In fact, the non-tribal well was being pumped in concentrated bursts which caused temporary shortages and exceeded the conditions imposed by their state water permit. While it is true that these poor practices and permit violations did not result in a water

shortage until the tribe also began withdrawing water, it is equally true that the problem went away once the non-tribal well was properly managed. The property owners have not made use of available remedies. Instead, they have created political controversy in order to ask Congress to accomplish their real goal: to diminish tribal sovereignty itself. If all they sought was a remedy, they would use the remedies which exist. They seek more. They seek the destruction of tribal government and the relegation of tribes to nothing more than private, voluntary associations whose property and treaty rights can more easily be taken for private gain.

If, Congress is convinced that non-Indian rights are being violated by tribal actions, it should strengthen tribal courts and encourage tribes to provide redress and involve non-members more in the governance process. It should not destroy the very institutions which promise to deliver justice on the reservations on a day by day basis. They cannot show that tribal courts have failed to deliver justice, because they have not used the tribal courts. The prejudice against tribal courts should not be a reason for Congress to abandon them. No one has forced non-Indians to live on an Indian reservation. They have chosen to do so. They will not be treated unfairly, but they must recognize that on an Indian reservation Indians will have a say in what life will be like.

In order to improve the current circumstances of conflicts locally and with governmental entities other than the federal government, Congress could enact and fund a number of proactive policies, such as:

- Fully fund tribal court systems
- Fully fund establishment of tribal codes and ordinances which delineates the private property rights of member and non-member citizens alike, rights protected by the US Constitution and Bill of Rights for all citizens.
- Fully fund tribal education programs.
- Fund and establish an ombudsman and process for alternative conflict resolution.
- Assist tribes in the formation and development of inter-local agreements regarding civil and criminal jurisdictional issues involving members and non-members on-reservation, or living in Indian country under the jurisdiction of tribes.



**STATEMENT OF SUSAN M. WILLIAMS, ESQ.  
WILLIAMS & JANOV, P.C., ALBUQUERQUE, NEW MEXICO  
BEFORE THE COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE  
APRIL 7, 1998  
SEATTLE, WASHINGTON**

Mr. Chairman and members of the Committee, my name is Susan M. Williams. I am a shareholder in the law firm of Williams & Janov, Albuquerque, New Mexico. Our firm represents many Indian tribal governments throughout the country and has broad experience in dealing with issues of tribal sovereign immunity and legal matters affecting non-Indians and non-members within reservation boundaries.

At your invitation, I am pleased to appear before this distinguished body to discuss the issue of tribal sovereign immunity against the backdrop of S. 1691, Senator Gorton's bill to waive tribal sovereign immunity and subject tribes to state court jurisdiction. I believe that my views are representative of the positions taken by many tribal leaders on these issues, and I am grateful for the opportunity to testify before you on this matter of critical importance to Indian country.

In sum, the Congress should not legislate the type of sweeping, unprecedented abrogation of tribal sovereign immunity represented by S. 1691 for several reasons. Such legislation is not needed and is bad public policy for the country. Legally, of course, the Congress may have the power to waive tribal sovereign immunity, although some constitutional issues are presented. We should not, however, distract ourselves in the intellectual niceties of the law. Instead, we should judge this bill by its impact on ordinary citizens, Indians and non-Indians. Practically, non-Indians gain little by this bill, for it is based on the flawed premise that numerous individuals have been aggrieved by tribal actions and have been prevented from obtaining legal redress for their injuries. The truth is that the rights of non-members are being considered by most tribal governments, and those rights demonstrably are being vindicated in tribal courts and tribal administrative agencies. Conversely, S. 1691 represents an extreme response to those minor problems with non-member rights that remain to be dealt with in Indian country. By diminishing the rights of Indian tribes, the bill does great harm to the Indian citizens of this country. Morally, passage of this legislation would be a reprehensible act by the United States in breaking its solemn promises to protect tribal governments' authority in their territories and would set in motion the destruction of American Indian culture and Indian self-government. Such a loss would be profoundly sad for American culture. Unfortunately, the magnitude of that loss is not well understood by most members of Congress.

No one has presented sufficient evidence that S. 1691 is necessary. To be sure, the proponents of this bill can produce some shocking stories about harms that were not redressed, and I would be less than credible were I to insist that none of these stories were true. However, I can in perfect honesty insist that these stories are not truly representative of what's going on in Indian country today, and cannot justify the massive assault on tribal sovereignty launched by S. 1691. Some of these stories misrepresent the true facts, because the true grievance of some of these individuals is their disagreement with tribal action, not any harm they suffered because their rights were denied. The anecdotal information currently advanced to support the waiver of

tribal sovereign immunity involves isolated events, not patterns of injustice in Indian tribes' dealings with non-members and non-Indians. These anecdotes, unfortunately, feed common misunderstandings and negative stereotypes held by non-Indians about Indian tribes. The ill-conceived legislation now proposed to respond to these incidents is much like the ill-advised use of a bulldozer to remove a dandelion weed from the front lawn. No government could or does operate under the level of waiver envisioned by this bill. The problems that exist regarding the civil rights and property rights of tribal non-members have less drastic solutions, many of which have already been implemented by many tribes.

Extremism is an appropriate word to describe the provisions of S. 1691 because they jeopardize the welfare of American Indians and the continued existence of viable tribal governments. The legislation violates solemn obligations for protection and assistance to Indian tribes that the United States has sworn to uphold in treaties, laws, and administrative actions. The care of that trust responsibility is to protect tribes' sovereignty and to assist them to achieve self-governance and self-determination.

S. 1691 is unfair to tribes, and it is discriminatory. No member of this Congress would think of introducing similar legislation completely abrogating the sovereign immunity of states--yet the problems the legislation presumes to address have their analogies in the dealings of individuals with state, local, and federal governments. For these reasons, as amplified below, I urge the Congress to refrain from legislating a broad abrogation of tribal sovereign immunity and thus prevent the infliction of far greater harms than the alleged harms that S. 1691 purports to correct.

#### **I. Background of Tribal Sovereign Immunity.**

Indian nations possess "the common-law immunity from suit traditionally enjoyed by sovereign powers."<sup>1</sup> The basis of this immunity has been expressed as an inherent aspect of sovereign powers predating the United States Constitution, applicable to all governments, and as consistent with federal policy in preserving tribal autonomy.<sup>2</sup> Congress thus must act cautiously in this area because the important federal interest in tribal self-determination is at stake.<sup>3</sup> Indian tribes, however, are not cloaked with an absolute, unqualified immunity from suit, as the proponents of S. 1691 like to claim. Tribal immunity is subject to waiver by congressional action, and courts also have recognized exceptions to tribal immunity from suit. In fact, tribal sovereign

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<sup>1</sup>*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citing *United States v. United States Fidelity & Guaranty*, 309 U.S. 506, 512-13 (1940)).

<sup>2</sup>*Id.*; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Turner v. United States*, 248 U.S. 354, 357-58 (1919).

<sup>3</sup>See, e.g., *Santa Clara Pueblo*, 436 U.S. at 66-67 (Congress' provision in the Indian Civil Rights Act of 1968 "for *habeas corpus* relief, and nothing more, reflected a considerable accommodation of the competing goals of 'preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people'").

immunity is practically similar, but not identical, to that enjoyed by the federal government, state governments, or foreign sovereigns.

The doctrine of sovereign immunity rests on the theory that official actions of government must be protected from undue interference.<sup>4</sup> As a practical issue of sound public policy, the doctrine is necessary to protect public treasuries from depletion by unfettered litigation.<sup>5</sup> Thus, the common law doctrine of immunity from suit will remain viable into the 21st century. The need for immunity is especially strong for tribal governments, since Indian tribal governments are weaker financially and have poorer revenue-raising capacity than most non-Indian governments. Without protection of the land on which Indian culture depends and the other limited assets owned by most tribes, tribal governments would constantly be at risk--whether they acted or refrained from acting--of exposure to substantial losses through the judgments of federal or state courts. The tribes are particularly vulnerable to a barrage of meritless or marginal suits simply as a means to deplete tribal revenues and render tribal governments ineffectual, a tactic that has been used within the non-Indian legal system.

The Supreme Court since 1940 has viewed the common law sovereign immunity possessed by tribes as "a necessary corollary to Indian sovereignty and self-governance."<sup>6</sup> Courts have recognized that tribal immunity from suit is essential to preserve tribes' autonomous political existence and tribal assets, as well as to promote the federal policies of tribal self-determination, economic development, and cultural autonomy. From a policy standpoint, tribal immunity advances the federal policy of assuring that Indian nations remain viable cultural, economic, and political entities. We must remember that tribes are governments, and governments must operate and provide services to their citizens. Tribes are responsible for a broad range of governmental activities on their land, including education, law enforcement, justice systems, social welfare, environmental protection, and basic infrastructure such as roads, bridges, water systems, sewers, solid waste management, and public buildings.

Tribes and tribal agencies and officials are subject to suit under various exceptions to tribal sovereign immunity recognized in the courts. For example, courts have applied the age-old

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<sup>4</sup>See Note, *Tribal Sovereign Immunity: Searching For Sensible Limits*, 88 Columbia L. Rev. 173 (1988); see also The Federalist No. 81 at 548 (J. Cook E. 1961); Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 Geo. L.J. 81 (1968); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3654 (1985) (litigation must not be allowed to stop or slow down official activities that are essential to governing a nation); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949) (the government represents the community as a whole and cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right).

<sup>5</sup>See Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L.Rev. 1 (1975).

<sup>6</sup>*Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1986) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).



doctrine established by *Ex parte Young*<sup>7</sup> in the tribal context.<sup>8</sup> This doctrine works as an exception to the general rule of sovereign immunity from suit and is applied to federal and state governments. At its core, the *Ex parte Young* doctrine permits suits for prospective injunctive or declarative relief to require governmental officials to comply with the law. It is based on the notion that an action against individual government officials engaging in unauthorized or illegal conduct is not an action against the sovereign government itself. Thus, in the tribal context, a litigant may seek injunctive or declaratory relief against individual tribal officials who allegedly have acted outside the scope of their authority.<sup>9</sup> This exception to tribal sovereign immunity has been broadly construed, permitting, for example, developers or individuals to obtain adjudications of the validity of various tribal laws and actions.

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<sup>7</sup>209 U.S. 123, 159-60 (1908)(where a state official attempted to enforce an unconstitutional state law, he was "stripped of his official or representative character"; his immunity from suit in federal court under the Eleventh Amendment did not protect him from the consequences of his individual conduct). This doctrine remains vital as a mechanism to force compliance with the commands of the federal Constitution, although it is based, in part, on the legal fiction that "unauthorized" or "illegal" actions of government officers are not actions of the sovereign itself.

<sup>8</sup>*See Wisconsin v. Baker*, 698 F.2d 1323, 1332 (7th Cir.), *cert. denied* 463 U.S. 1207 (1983)("an official of an Indian tribe should be stripped of his authority, and corresponding immunity, to act on behalf of his tribe whenever he exercises a power that his tribe was powerless to convey to him"); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 171 (1977)(a suit to enjoin violations of state law by individual tribal members is permissible).

<sup>9</sup>As with suits against state or federal officials, an action against tribal officials can seek only injunctive or declaratory relief; suits for monetary relief are barred under the notion that suits affecting the treasury are suits against the sovereign itself. *See Edelman v. Jordan*, 415 U.S. 651 (1974)(action for retroactive relief barred); *but see Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975) and *Dry Creek Lodge v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied* 449 U.S. 1118 (1981)(no tribal remedy, thus non-Indians' claim for damages against tribe permitted).

In only a few instances has Congress waived tribal immunity from suit.<sup>10</sup> Various court decisions have established other exceptions to tribal immunity from suit. For instance, where particularly egregious allegations of personal restraint and deprivation of personal rights were raised, the Tenth Circuit distinguished the *Santa Clara Pueblo* case and permitted a claim against a tribe for damages for constitutional violations of personal and property rights.<sup>11</sup> In addition, an exception based upon the equitable recoupment doctrine has been recognized in the Tenth Circuit.<sup>12</sup> These latter two trends are disturbing to Indian country because the power of the United States to waive tribal sovereignty rests in Congress, not the courts, and that power must be exercised judiciously. Congress, appropriately, has exercised this power only sparingly.

In addition, tribes may waive sovereign immunity from suit voluntarily. Tribal waivers of sovereign immunity must be "unequivocally expressed."<sup>13</sup> Courts have found tribal waivers of immunity from suit in a variety of circumstances. For instance, courts have held that an Indian tribe's contract providing for resolution of disputes by arbitration and making the arbitration agreement enforceable in any court having jurisdiction creates a right to sue, and thus constitutes a waiver of the tribe's sovereign immunity.<sup>14</sup> Most courts also have held as a general rule that

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<sup>10</sup>See, e.g., *Santa Clara Pueblo*, *supra* (in the Indian Civil Rights Act, Congress waived sovereign immunity for habeas corpus proceedings to review decisions of tribal courts); *Metropolitan Water Dist. of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd*, 490 U.S. 920 (1989)(in the McCarran Amendment, 43 U.S.C. § 666, Congress waived the United States' sovereign immunity as a party defendant in suits to adjudicate all water rights in a stream system, which included Indian water rights); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989)(tribal sovereign immunity from suit is abrogated under the Resource Conservation and Recovery Act, thus permitting "citizen suits" against tribes); Indian Self Determination and Education Assistance Act, Pub.L. 93-638, 88 Stat. 2203 (Secretaries of Interior and Health and Human Services must require tribal contractors to obtain liability insurance or equivalent coverage in carrying out self-determination contracts and, further, that any policy of insurance must prohibit the insurance carrier from raising the sovereign immunity of the tribe as a defense to claims).

<sup>11</sup>*Dry Creek Lodge, Inc. v. United States*, *supra* at n.9 (wrongful denial of access to a non-Indian guest ranch located on the reservation).

<sup>12</sup>*Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982)(doctrine of equitable recoupment applies to tribes as it applies to federal and state governments). Under this doctrine, when a sovereign sues, it waives immunity to (1) claims of the defendant that assert matters in recoupment (matters arising out of the same transaction or occurrence), or (2) claims of equal or less monetary value that are of the same form or nature as those sought by the sovereign plaintiff. See *Frederick v. United States*, 386 F.2d 481, 487-88 (5th Cir. 1967).

<sup>13</sup>*Santa Clara Pueblo*, *supra*.

<sup>14</sup>*Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656 (7th Cir. 1996); *Rosebud Sioux Tribe v. Val-U Construction Co. of South Dakota, Inc.*, 50 F.3d 560 (8th Cir.), *cert. denied* 516 U.S. 819 (1995); see *Aubertin v. Colville Confederated Tribes*, 446 F.Supp. 430, 435 (E.D.

the presence of "sue and be sued" clauses in corporate charters established under the Indian Reorganization Act ("IRA")<sup>15</sup> constitute a waiver of sovereign immunity.<sup>16</sup>

In the commercial context, increased economic development involving non-tribal entities has resulted in tribal governments voluntarily waiving tribal immunity on a limited basis and providing protections to non-Indians' and non-members' interests as necessary. For example, in its gaming compact with the State of Arizona, the Yavapai-Apache Nation agreed to establish procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming establishment. Under the gaming compact, it was agreed that the procedures may be analogous to the remedial system available for similar claims arising against the State. Pursuant thereto, the Yavapai-Apache Nation adopted comprehensive tort remedies procedures, wherein the Nation waives the sovereign immunity of the gaming establishment and/or the Nation for the express purpose of allowing patrons to bring tort claims against the Nation and/or the gaming establishment in the Nation's tribal court. Our firm recently handled such a claim against the Yavapai-Apache Nation by non-Indians pursuant to these tort procedures. The case was settled before trial to the mutual satisfaction of the tribe and the plaintiffs.

These are but some examples of circumstances in which tribal immunity from suit has been limited. Given this discussion, it is clear that tribes are not cloaked by an impermeable shield of sovereign immunity from suit, as the backers of S. 1691 claim. The courts appear to be finding exceptions and waivers by tribes of tribal sovereign immunity with increasing frequency. Thus, a sweeping waiver of tribal sovereign immunity is unnecessary. As with any sovereign, tribal governments must retain their autonomy and ability to protect their treasuries from attack and to subject themselves to legitimate claims on a case-by-case basis.

The disruption S. 1691 poses to the sovereign immunity currently enjoyed by tribes has serious economic implications. The need for sustained economic growth and improvement is critical in Indian country. Despite the unfair hype about Indian gaming that is promoted by some in the media and some members of the Congress, Indian Reservations have a 31 percent poverty rate--the highest poverty rate in the United States. Indian unemployment is six times the national average. For better or worse, gaming represents one of the very few opportunities tribes have for economic development and job creation. Jobs created by gaming benefit not only tribal members but also the surrounding communities through employment, spending, and the generation of tax revenues. Federal law requires tribal governments to use gaming revenues to fund essential services such as education, law enforcement, tribal courts, economic development, and infrastructure. Indian gaming revenues thus are virtually indistinguishable from the revenues generated by state lotteries. Indian health, education, and income statistics are the worst in the country. Health conditions on reservations are generally poor, and recent statistics show that

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Wash. 1978); see also *In re Colegrove*, 9 B.R. 337 (Bankr. N.D. Cal. 1981)(where "sue and be sued" language is omitted from tribal corporate charter).

<sup>15</sup>12 U.S.C. §§ 461, 462, 464-479 (1983); 25 U.S.C. § 463 (Supp. 1986).

<sup>16</sup>See, e.g., *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd on other grounds*, 455 U.S. 130 (1982).



rates of diabetes, suicide, alcoholism, and smoking are far above those in the rest of the country. Tribal infrastructures for roads, community water and sewer services, and other amenities that most non-Indian communities take for granted are either absent or woefully inadequate. Whatever the source of tribal revenues--gaming or non-gaming--the needs of the overwhelming number of tribes far exceed available resources. S. 1691 will jeopardize all of the efforts tribes are able to initiate these days to address their economic problems. In addition, tribes have positive economic impacts on their surrounding non-Indian communities. S. 1691 could also have dire consequences for such local communities when it derails the reservation economic engine.

## **II. The Federal Government and the Tribes are Protecting Significant Interests of Non-Indians and Non-Members on Reservations Now.**

A broad abrogation of tribal sovereign immunity is unnecessary because the federal government and tribal governments already are providing protections to non-Indians and non-members within the boundaries of reservations. Existing federal oversight prevents abusive tribal practices and protects the interests of non-member, non-Indian reservation residents without destroying tribal autonomy.

Congress ensures the protection of non-Indians and non-members by requiring federal approval of certain tribal laws and ordinances governing a variety of civil regulatory areas, some of which are described below. While it is arguable that Congress oversteps the "guardian" role of the United States over tribes and effectively usurps tribal governments through this type of legislation, it is certainly less harmful than legislating broad waivers of tribal immunity from suit in these areas. Thus, where tribes exercise regulatory jurisdiction in these areas, the involvement and oversight of the federal government already protects the interests of non-Indians and non-members.

Congress has authorized federal agencies to assist tribes in developing tribal ordinances and regulations related to the particular agency's areas of concern. For example, the Indian Energy Resources Act authorized the Secretaries of the Interior and Energy to provide assistance to Indian tribes in the development, administration, implementation, and enforcement of tribal laws and regulations governing the development of energy resources on Indian reservations.<sup>17</sup> The Indian Gaming Regulatory Act authorizes the Chairman of the National Indian Gaming Commission, a federal agency, to approve tribal gaming ordinances and resolutions.<sup>18</sup> The interests of all reservation citizens are taken into account by the federal agencies that evaluate tribal undertakings in these areas.

In the area of environmental protection, Congress has acknowledged that tribal governments, like state governments, have the authority to regulate environmental matters. This authority, however, is subject to federal agency oversight. The Environmental Protection Agency ("EPA") is authorized to approve certain tribal environmental codes as part of federal government

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<sup>17</sup>25 U.S.C. § 3504 (Supp. 1998).

<sup>18</sup>25 U.S.C. § 2710(b)(1)B), (d)(1)(A)(iii), and (b)(2) (Supp. 1998).

programs. Specific EPA authority is found in the Clean Water Act<sup>19</sup> and the Safe Drinking Water Act.<sup>20</sup> Under the "primacy" provision of the Safe Drinking Water Act, tribes are provided the opportunity to assume principal responsibility for the enforcement of drinking water supply regulations within the jurisdictional boundaries of the tribe. To attain primacy status, a tribe must have drinking water regulations at least as strict as EPA's and establish an independent agency within the tribal government that has the power to enforce tribal regulations. Increasing numbers of tribes are undertaking principal responsibility, with the assistance of the EPA, for protecting sources used for drinking water under the federal enabling legislation.

Tribes also are undertaking environmental regulation under the Clean Water Act. Congress has permitted tribes to be "treated as states" for purposes of this legislation. As such, tribes can obtain funds necessary to pursue the planning required for protecting water resources vital to the tribes. Section 106 of the Clean Water Act allows for development of a surface water management program, and section 104 provides for water quality management. Once a tribe's water quality standards have been approved by the EPA, the tribe also is treated as a state for purposes of the certification process under section 401 of the CWA.<sup>21</sup> The section 401 certification process requires the technical review of pending permit applications to determine their impacts on water quality standards, and most tribal law-making bodies avoid becoming directly involved in carrying out this kind of technical review process. Another statutory requirement is that tribes adopting their own water quality standards, like states, must conduct a public review of their standards at least every three years. These burdensome administrative procedures ensure the input and protection of the interests of affected non-Indians and non-members.

Despite the strict statutory burdens of undertaking tribal environmental regulation, many tribes are establishing the necessary administrative and adjudicatory procedures and expertise in order to protect the resources that are vital to their welfare and future. For example, tribal governments have developed extensive solid and hazardous waste regulations, particularly in response to the Eighth Circuit's 1989 decision in *Blue Legs v. U.S. Bureau of Indian Affairs*,<sup>22</sup> which held that tribal governments are responsible for managing solid waste disposal on reservations and may be held liable for failing to meet this responsibility. The Campo Band of Mission Indians in California, for example, has established comprehensive tribal regulatory and enforcement mechanisms for regulating solid waste on the Reservation. In many of these tribal ordinances, tribes provide a waiver of their sovereign immunity from suit for purposes of appeal of administrative decisions by tribal agencies. The Lummi Water and Sewer Ordinance, discussed

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<sup>19</sup>33 U.S.C. § 1377(c) (Supp. 1998).

<sup>20</sup>42 U.S.C. § 300j-11(a) (Supp. 1998).

<sup>21</sup>We note for the record that any affected person may seek judicial review of the EPA's approval of tribal water quality standards. *City of Albuquerque v. Browner*, No. 93-82-M Civil (D.N.M., Oct. 22, 1993)(federal court jurisdiction is based on the Administrative Procedure Act and Declaratory Judgment Act).

<sup>22</sup>867 F.2d 1094, 1097 (8th Cir. 1989).

in Chairman Cagey's testimony, is another major example where the tribe has afforded non-members significant rights in tribal government.

In the commercial context, tribes have a built-in incentive to waive their immunity from suit or otherwise protect non-Indians. Interested parties usually will not conduct business on Indian reservations without an ability to seek redress for grievances. Tribes, thus, will choose to waive immunity or take other similar steps to consummate a business deal. Our firm has worked with many of our clients to insert arbitration clauses into commercial contracts that contain limited waivers of sovereign immunity for the purpose of enforcing an arbitration award, or limiting or specifically identifying which assets may be subject to judgment. Clearly, no further congressional intervention is necessary in this context.

### III. Regulatory Issues and Participation of Non-Indians and Non-Members in Tribal Government.

The authority of tribal governments to exercise jurisdiction over non-Indians has been one of the most disputed issues in Indian affairs during the modern era. In 1978, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe*<sup>23</sup> that tribes could not criminally prosecute and convict non-Indians, unless authorized to do so by Congress. In 1990, the Supreme Court extended the *Oliphant* ruling to non-member Indians,<sup>24</sup> but Congress later reinstated tribal authority over non-member Indians. Today, controversies relating to tribal authority to exercise civil jurisdiction and regulatory authority over non-Indians and non-members residing within reservation boundaries persist. In certain civil contexts, particularly taxation and land use, tribal authority over non-Indians and non-members has been upheld,<sup>25</sup> although the Supreme Court's current rationale for tribal sovereignty over non-members and non-Indians is confusing.

Federal judicially-created law imposes certain limitations on tribal authority to regulate non-Indians on non-tribal land within reservation boundaries. In *Montana v. United States*,<sup>26</sup> the Supreme Court articulated the rule for establishing tribal jurisdiction over non-Indians in this context. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities

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<sup>23</sup>435 U.S. 191 (1978).

<sup>24</sup>*Duro v. Reina*, 495 U.S. 676 (1990).

<sup>25</sup>*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)(upholding tribal cigarette tax for sales to non-Indians on tribal lands); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)(upholding tribal tax levied on mineral extraction from tribal lands, even though the tribe was receiving revenues from the mining companies under the mineral leases; the Court compared the tribe to states and cities, which may both receive contract payments as landowners and levy taxes in their governmental capacities as sovereigns); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985)(holding that non-IRA tribal governments may tax on-reservation business activities without first obtaining approval by the Secretary of the Interior where the tribal constitution does not require such advance approval).

<sup>26</sup>450 U.S. 544 (1981).



of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."<sup>27</sup> Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>28</sup> Under the "tribal welfare" test, lower courts have upheld broad tribal civil powers over non-Indians on non-Indian land in a tribal zoning ordinance, a tribal health and safety ordinance, and tribal regulation of non-Indian lands bordering tribal trust property. With regard to water use, the courts have upheld federal and tribal control to the exclusion of state control over water use by non-Indians on an Indian reservation.

Many tribes have responded to the civil regulatory concerns involving non-Indians as well as tribal members by adopting extensive legal codes, by administering their increased regulatory responsibilities, and by restructuring tribal government to enhance the capability to adjudicate Indian and non-Indian civil disputes in their own courts. These efforts make tribal governments more accessible and "user-friendly" to tribal members and non-tribal members alike. For example, the Zuni Pueblo has adopted extensive legal codes, including the Zuni Business Code which controls and regulates the activities of non-Zunis and non-residents in their commercial dealing with the Zuni tribal government and the people living on the Zuni Reservation. The Zuni Business Code establishes procedures and requirements consistent with federal laws and regulations governing the conduct of business on the Zuni Reservation.

In addition, because tribes have civil regulatory authority and jurisdiction over non-Indians and non-members, tribal governments are developing initiatives to increase the participation of non-tribal members in government. For example, the Navajo Nation has established a five-member Navajo Tax Commission, two of whom may be non-Indians and non-members. Particularly important to note here is that Navajo law permits a refund action in tribal court in specific instances for certain taxes. Thus, non-member reservation citizens have direct access to both regulatory and judicial relief. Similarly, the Zuni Pueblo has established the Zuni Tribal Enterprise Board of Directors, whose five-member Board may be comprised of "[a]ny person, Zuni or non-Zuni, resident or non-resident."

A particularly good example of tribal agency activities directly involving non-Indians is the Lummi Tribal Sewer and Water District Ordinance, discussed by Chairman Cagey in his testimony. Clearly, Lummi's regulation and administration of its water and sewer ordinance seeks to protect the interests of non-Indians and non-members within its reservation boundaries.

#### IV. The Need for S. 1691.

With this background in mind about current events on reservations, I would like to digress and examine the underlying purposes and findings that purport to support the need for the extensive dismantling of tribal sovereign immunity proposed in S. 1691. Comparing the

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<sup>27</sup>*Id.* at 565.

<sup>28</sup>*Id.* at 566.

information given above and the provisions of S. 1691, the logic in support of this legislation becomes elusive. S. 1691 represents an extreme attack on tribal sovereignty, not because tribes have caused harm to individuals, but because certain non-members and non-Indians have disagreed with the substantive decisions made by tribes concerning their land and resources. These individuals prefer that others make decisions for tribes and that tribal land and resources be subject to their direction rather than tribal direction.

Section 1(c) of S. 1691 states that the purpose of the bill is

to assist in ensuring due process and legal rights throughout the United States and to strengthen the rule of law by making Indian tribal governments subject to judicial review with respect to certain civil matters.

This provision implies that tribes do not respect due process and legal rights. The facts actually show the opposite. This provision also implies that tribal governments are not now subject to judicial review. In fact, tribal governments already are subject to judicial review in many areas, usually by tribal courts. Further, many disputes between tribes and states or between tribes and individuals that involve federal questions often end up in federal court, which reviews the actions of the tribal government that form the basis for the dispute. One need only look at the numerous decisions of the United States Supreme Court and the federal courts of appeal for the last year to see that tribal government actions are already being reviewed in federal court.

Section 1(b) of S. 1691 sets forth the findings that supposedly support the need for the legislation. An examination of the findings reveals half-truths, misleading statements, and pure anti-Indian sentiment unrelated to any abuses of authority by tribal governments. For example, Section 1(b)(1) of the bill states that

a universal principle of simple justice and accountable government requires that all persons be afforded legal remedies for violations of their legal rights.

The implication is that tribal governments do not afford legal remedies to persons whose rights have been violated. That simply is not true. Tribal courts and tribal administrative bodies are increasingly affording all persons, non-members and members, with the opportunity to participate in proceedings and to appeal alleged violations of their rights. For example, one of our client tribes has a limited waiver of sovereign immunity in its tax code. In 1988, an oil company sued the tribe in tribal court, which reversed the tribe's action and remanded the case to the tax commission. Eventually, a mutually agreeable settlement was reached. Later, another oil company sued the tribe in a \$2.1 million dispute over severance taxes. The tribal court ruled in favor of the oil company for one period of time and for the tribe on another. These certainly appear to be examples of simple justice and accountable tribal governments.

In a world interested in fairness, simple justice and accountable government should require that Indian tribes be afforded legal remedies for violations of their legal rights. Yet, states boldly assert their 11th Amendment immunity from suit in federal court to thwart tribal attempts to

vindicate their rights under federal laws, while Congress in recent sessions attempts to strip away tribal rights with impunity because tribes are politically powerless and must rely on the honor and good will of members of Congress to support their causes. There is no simple justice in the treatment of tribes recently or for the last 200 years.

Sections 1(b)(4) & (5) of S. 1691 read as follows:

(4) for more than a century, the Government of the United States and the States have dramatically scaled back the doctrine of sovereign immunity without impairing their dignity, sovereignty, or ability to conduct valid government policies;

(5) the only remaining governments in the United States that maintain and assert the full scope of immunity from lawsuits are Indian tribal governments.

These sections dangerously mistake the true state of affairs. The United States did not pass the Federal Tort Claims Act ("FTCA") or the Administrative Procedures Act ("APA") until the middle of this century. Further, these Acts do not by any means totally waive the sovereign immunity of the federal government. Even under the FTCA, the United States remains insulated from suit for intentional torts, constitutional torts, discretionary federal government actions that are "susceptible to policy analysis" (whether or not the government official involved considered policy factors), and several other specific categories of actions spelled out in the FTCA. Each year, more citizens of the United States are left without legal redress because of the application of one specific doctrine of federal sovereign immunity than through the assertion of sovereign immunity by tribal governments when sued. This doctrine states that the United States is not liable for any injuries alleged to arise as an incident to military service. Instead of picking on tribes, here is a worthwhile reform for Congress to tackle. Additionally, under the APA, federal government actions "committed to agency discretion" are exempt from coverage, thus preserving the federal government's sovereign immunity in some cases. My clients have repeatedly asked for specific federal waivers of immunity in contracts with the federal government, only to be refused each time.

Nor have the states opened the courthouse doors to the extent suggested by the proponents of S. 1691. State statutes or court rulings often preserve a state's sovereign immunity when the issue involves the so-called "discretionary acts or functions" of state officials, a cavernous catchall similar to the FTCA discretionary act exemption. Federal and state governments often enact statutes of limitation, ceilings on damage awards, prohibitions on punitive damages, and similar conditions imposed on lawsuits against the government, all of which are forms of the government's imposition of limited sovereign immunity in those contexts. Yet, S. 1691 provides no such reasonable conditions or limitations on the waiver of tribal sovereign immunity, and it is unclear whether tribes could enact such limitations under the terms of the bill.

Sections 1(b)(4) & (5) further ignore completely the distinctions between tribal governments and the federal government or state governments. These differences include the size of the government, the affected population, the tribal government's ability to generate revenues to pay damage judgments, and the complexity of its government operations. Except for a very



small handful of tribes, Indian tribes cannot absorb the financial shock of a major lawsuit to the same extent as federal and state governments.

**V. A Fair and Sensible Solution to the Perceived Problem.**

Rather than the blunderbuss approach of S. 1691, this Committee should carefully review the facts and determine whether credible evidence supports the need to change the current sovereign immunity of tribes and what particular approach to such a change, if needed, would preserve the ability of tribes to continue to exist as governments and separate cultures while correcting the perceived problems. Isolated anecdotes of problems, even if true, do not make a case for a wholesale congressional abrogation of tribal sovereign immunity. With respect to civil rights, limited data exist on the extent of civil rights problems in Indian country. Our data show that tribal courts are taking and deciding Indian Civil Rights Act cases. If one believes that tribal courts are unfair and ignore the abuses of tribal governments, one would expect the data to show the tribal governments winning cases in overwhelming numbers. In fact, a quick examination of cases reported in the "Indian Law Reporter" from 1983 to 1989 found forty published tribal court decisions from twenty-two different tribes involving the Indian Civil Rights Act. Tribal courts found appropriate sovereign immunity waivers and ICRA violations or remanded cases for further proceedings in nineteen cases. In three additional cases, the courts recommended procedures or provided declaratory relief to ensure that tribal governments complied with the due process requirements of the ICRA. Another review of tribal court cases from 1989 to 1998 alleging due process violations revealed that more times than not the court held the government liable for the violations. From 1993 to 1998, tribal appellate courts handled seven cases claiming tribal immunity. In all seven cases, the appellate court allowed due process challenges to proceed in the lower courts. Tribal courts also have overturned and invalidated tribal statutes, and tribal appellate courts have been willing to reverse the judgments of trial courts. Tribal courts have enjoined tribal elections and proscribed procedures that tribal governments must follow.

In short, tribal courts have given enforcement life to the Indian Civil Rights Act and other tribal constitutional guarantees. The greatest single improvement that Congress could make toward ensuring the rights of non-members, non-Indians, and tribal members is not approval of S. 1691, but the provision of adequate funding for tribal courts and tribal justice systems. I urge this Committee to use its influence to secure such funding for tribes.

I would now like to address some of the fine-tuning that might be done to improve tribal protection of individual rights. In the area of torts, most of Indian country would support the idea of a federally-guaranteed intertribal insurance company to provide tribes with low cost insurance coverage for negligent acts that result in injury to a person or property. Private insurance is already available for Indian gaming and Self-Determination Act operations, which are major avenues of interaction between tribes and non-members. The availability of affordable insurance to cover tort claims would help tribes, whose limited financial resources make it financially ruinous to pay either claims or insurance premiums. Tribes would not have to waive their sovereign immunity, but the insurance carrier could be prohibited from asserting the defense when a tort claim is filed.

If Congress is concerned about individuals who contract with Indian tribes but lack the resources to determine and address the existence of tribal sovereign immunity, a carte blanche federal waiver is akin to using an axe instead of a scalpel. Instead, tribes might be required to provide documented notice to their contractors, prior to finalizing any agreements, that the tribe possesses sovereign immunity. Each individual contractor can then negotiate whatever tribal waiver may be appropriate in the circumstances. I would emphasize our view, however, that even such a notice requirement seems unnecessary, as tribes routinely waive their immunity on a limited basis in their commercial agreements.

In the area of civil rights and property rights, Congress could spare the massive harm of S. 1691 by instead considering, in government-to-government consultation with the tribes, possible revisions to the Indian Civil Rights Act. Before going further with this discussion, I emphasize that the possible approach suggested below represents solely my own views in an attempt to open a government-to-government dialogue. These views are not necessarily the views of my clients or of others in Indian country.

Although the hard evidence shows that tribes are waiving their immunity and protecting the civil and property rights of non-members through various means, current jurisprudence still holds that the Indian Civil Rights Act did not create a private cause of action against tribes for alleged violations of the Act. One possible approach worth exploring would be to clarify that in fact the ICRA does create a cause of action in tribal courts. Another, obviously more controversial concept to explore would be to permit limited and carefully defined review of tribal court judgments by the federal courts. This review would proceed from the concerns expressed by the Supreme Court about fundamental fairness.<sup>29</sup>

Many other commentators have ideas about the extension of federal court review to tribal court decisions linked with a clarification of tribal jurisdiction, instead of the current patchwork of civil and criminal jurisdiction. I urge this Committee to hear the views of many others on this subject. It is a subject of vital importance to Indian country and merits focused congressional consideration. In exploring this possibility, however, it is imperative that Indian tribes be consulted on every aspect of these issues, on a government-to-government basis. Such changes should not be unilaterally imposed on the tribes by peremptory legislation.

Even the mere suggestion of federal review of tribal court ICRA decisions is highly controversial, and I am compelled to repeat my two initial disclaimers. First, I believe no federal legislation is necessary at this time, including changes to the ICRA, because Indian country itself is developing administrative and judicial avenues to ensure that the rights of all persons--Indian

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<sup>29</sup>Once framed as a genuine dialogue on this subject between Congress and Indian country, some of the specific details that might be discussed could include restoring *Olinphant* jurisdiction to the tribes in exchange for federal court review; the scope of such review (for example, ensuring that issues like membership and tribal elections stay where they belong, strictly within tribal jurisdiction); necessary exhaustion of tribal appellate remedies; the mechanism and standards by which issues can be brought to federal court (e.g., by certiorari rather than automatic appeal); due consideration of applicable tribal law and custom; and deference to the tribal court's findings of fact.

and non-Indian--are protected. Second, my musings about permitting limited federal court review of tribal court ICRA decisions are just that--my own personal thinking out loud to stimulate debate and the development of creative--not blunderbuss--solutions. These thoughts are solely my own and should not be imputed to my clients or to any other tribal leaders.

This concludes my prepared statement. I am pleased to answer any questions the Committee may have.





# Quinault Indian Nation

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## TESTIMONY ON BEHALF OF THE QUINULT INDIAN NATION

by JOE DE LA CRUZ

United States Senate Committee on Indian Affairs  
Field Hearings On Senate Bill 1691 - Tribal Sovereign Immunity  
April 7, 1998  
Seattle, Washington

Mr. Chairman, and members of the Committee. I am Joe DeLaCruz, former President and Executive Director of the Quinault Indian Nation, positions which I held for 24 years.

- I have served as President of the National Congress of American Indians, the President of Affiliated Tribes of Northwest Indians, and as Co-Chairman of the National State-Tribal Relations Commission.
- I have also served on numerous local, county, state and regional and international boards and task forces, including the Governor's Indian Advisory Committee, State of Washington; Federal Water Rights Policy Task Force; a Congressional Appointment on the National Commission on American Indian, Alaska Native and Native Hawaiian Housing; North American Representative of the World Council of Indigenous Peoples.
- In addition, I have served on state and federal legislative task forces and was instrumental in the development of key legislation in Indian Country, including: the Indian Child Welfare Act; the Indian Self-Determination and Educational Assistance Act; and the related amendments through Title IV—the Self-Governance Act.

I appreciate the opportunity to come before this Committee and present a brief chronology of events that include a series of what I call **bad legislation**, that was pushed by "courthouse-to-the-White-house-politics"—in other words people who wanted the little resources Indian people had left after treaty-making with the United States government. I will also highlight some of the **good legislation**, beginning in 1964 with the U.S. Great Society Legislation that created the Office of Economic Opportunity (OEO). This legislation was the first in our relationship with the United States in which a commitment was met towards building resources to strengthen tribal governments promised 150 years earlier.

### **Bad Legislation**

The Quinault Indian Nation signed a treaty with the United States, known as the Treaty of Olympia where the Quinault Indian Nation ceded several million acres of its former homeland in return for a promise that the United States would set aside a reserved territory for the exclusive use and occupation of Quinault People. The United States set the first reservation boundary in 1873, and in 1889, President Grant issued an Executive Order defining the present-day Boundary. (SEE MAP 1)

In 1891, United States surveyors completed a survey of the Quinault Indian Nation and deleted 17,000 acres of land that was Quinault Reserved land. This was the first diminishment of our lands. (SEE SHADED AREA, MAP 1)

In 1887, Congress passed the Dawes Act, known by many as the "Conquer and Divide Law". This law allotted individual Indian lands for the purpose of farming.

The United States government did not complete surveying and setting reservation plats for allotment until early in the 1900's. They issued 500 allotments on the river bottoms of the Quinault and Queets rivers. Tribal leaders opposed allotting the reservation, because it was not suitable for farming—it was all forestry land.

In 1922, the Quinault Tribe passed a Constitution laying out how they would govern themselves, developing a set of rules and procedures and officially demonstrating their government establishment to the outside world. The Quinault leaders, with support from local people and the Bureau of Indian Affairs, were able to stop the allotment process, and attempted to get the remainder of reserved lands in a Forest reserve for Quinault People. However, in 1924, Tommy Payne, a Quilleuyete Indian, filed a lawsuit to open allotment on the Quinault Reservation and prevailed. So, once again, allotments resumed. Tribal leaders, again, opposed allotments, and the allotment process was stopped yet again. But, in 1931, Halbert, a Chinook Indian, filed another lawsuit, and prevailed. The law suit supported the claim that stated Indians did not need to live on the reservation in order to be entitled to an allotment. By 1932, the entire Quinault Reservation was allotted. (SEE MAP 2)

### **Termination - Public Law 83-280**

From 1932 to 1953, almost all the lands remained in Indian ownership, except for approximately 3,000 acres. Then, in 1953, the United States passed Public Law 83-280, known commonly as the "Termination Act." Washington State passed enabling legislation in 1957 (HB 404 - Chapter 240, Laws of the State of Washington), and further amended state law in 1963. These laws provided for the state to assume criminal and civil jurisdiction over certain Indians, their reservations and their lands. I reference this law because no appropriation was ever made by the Federal or State governments for the jurisdiction they assumed in 1957. It took the Colville Tribe 33 years to get this jurisdictional nightmare corrected with legislation which was passed in

**1986 (See Public Law 83-280 - "A Report Prepared by American Friends Service Committee")**

Soon after the passage of Public Law 280, it appears many companies (both timber and land development) and politicians were lined up at the Reservation borders to capitalize on the Quinault Reservation untouched lands and resources. Oddly enough, it was these same timber and land development companies and politicians who convinced Congress to enact the Termination Act.

**Lands Lost and Anti-Indian Property-Owner's Associations Proliferate**

Between 1953 and 1965, approximately 50,000 acres of Quinault Reservation land went into non-Indian ownership, mostly to timber companies. (SEE MAP 3). In 1962, 1964, 1967 and 1969, real estate developers had massive development tracts approved by Grays Harbor County—including the Taholah Ocean Tracts and Point Grenville Estates (SEE MAP 4). A realty company called Santiago Realty handled sales on these tracts of land in these developments—they falsely advertised beach rights, clam-digging, surfing, and bear and elk hunting in their promotional ads. They sold 75% of the 592 lots by 1968.

The property-owners who purchased lots went to Grays Harbor County to obtain a septic system permit. They received a provisional permit that was stamped "Subject to approval of the Quinault Tribe". The fact is, that all the land in the area of the proposed development site would never pass septic percolation tests due, in part, to high water tables and high clay content, and other problems inherent in beach frontage property. Nevertheless, the Quinault Nation complied with the requests and had Indian Health Service sanitation engineers perform standard percolation tests. However, the tests revealed that the land proved unsuitable for septic drain fields, and Quinault Nation subsequently denied the permits. In so doing, the Quinault Indian Nation acted as a responsible government to protect its people and its resources—the clam beaches. The developer and property owner disagreed and, in 1968, a man by the name of George Garland of Gig Harbor, Washington, and woman named Betty Morris, organized the Quinault Property Owners' Association, with a Seattle address.

These individuals spearheaded organizing other property rights groups such as the Lummi Property Owners' Association (headed by Marlene Dawson); Association of Property Owners and Residents in Port Madison Area (APORMA), Suquamish Reservation; Interstate Congress for Equal Rights and Responsibilities (ICERR) established in 1976—(the key organizers were again, Betty Morris, Howard Gray and Ron Erickson, all from Washington State); United Property Owners of Washington (UPOW); Protect American Rights and Resources (PARR); and Citizen Equal Rights Alliance (CERA).

The leaders and organizers of these organizations claim to represent all property owners, which they do not. They have been blaming the tribes and the BIA for stopping their developments. If the tribe had not taken action 30 years ago, they would have now have 600 failed sewage



systems running raw sewage into the tribal clam beaches. Their refusal to succumb to the political pressures was an act to protect one of its most valued shellfish resources. Additionally, the tribe realized the major potential public health and safety problem posed by the proposed developments.

The Quinault Indian Nation has been the only responsible government working with other governments to solve the problems created by bad state and federal laws. In the Tribal struggle for survival, we have been dealing with the anti-Indian movement for over 30 years. These groups blame the Indians for the depletion of the salmon and other renewable resources. They accuse the Indians of denial of due process of law, denial of equal protection, denial of rights of residency, denial of full use and protection of property, denial of protection from pollution, denial of personal rights. However, there is no record of any kind behind these allegations, nor has there been any attempt to resolve them at the tribal level.

#### **Good Legislation**

In 1934, after all the problems created by the Dawes Act, and a study entitled the "Miriam Report," Congress passed the Indian Reorganization Act—an Act to help rebuild tribal governments and regain or consolidate their former land holdings. In 1964, the United States Great Society Legislation created the Office of Economic Opportunity (OEO). This marked the beginning of re-emerging tribal governments. Tribes were provided small grants to begin developing their infrastructure and tribes began working with counties and other units of government planning and development needs for Indian lands. Following this, funds became available from the Housing and Urban Development for 701 Land-Use Planning, and from the Economic Development Administration for economic planning. The Quinault Indian Nation adopted some of its first planning and regulatory land use zoning in 1966. In 1968, the Johnson Administration began listening to tribes regarding their right to self-determination, and became the first Executive advocates of self-determination for tribes by the United States.

In 1970, President Nixon issued his Executive Statement on self-determination affirming the rights of Indian People, to freely choose their economic and political future. The Quinault Indian Nation, with the help of grants from the Ford Foundation, began developing Tribal Codes to better manage the forest lands and streams on the reservation and amended the Tribal Constitution and various zoning laws

In 1975, when the United States passed the Indian Self-Determination Act, the Quinault Indian Nation was among the first tribes to begin assuming contracting for responsibilities over its own affairs. During this same period, the U.S. passed laws creating national legislation, under the Law Enforcement Assistance Administration, and tribes were included. The tribe took this opportunity to further develop its own Tribal Code of Laws and enhance its criminal justice system.

In 1983, President Ronald Reagan, re-affirmed President Nixon's policy on Indian Self-Determination and further strengthened the statement that the relationship was a government-to-government relationship with the United States government.

Between 1987 and 1989, Congress passed resolutions Senate Resolution 76 and the corresponding House Resolution. These Resolutions were the first legislative expression recognizing the tribal rights to self-determination and government-to-government relations between tribes and the United States. I point to these Presidential Executive statements and the Resolutions, because for the first time in the history of the United States, we have a legislative and executive expression of how the true relationship is between tribes and the United States government.

In 1989, tribal leaders, working on a statement for the bicentennial of the United States Constitution, and the constitutional relationship to tribes, worked with Congress, to develop the Self-Governance Legislation, which was enacted as a demonstration project in 1989 and is now permanent legislation for the Department of Interior. Again, the Quinault Indian Nation was on the cutting edge of this new and developing legislation.

In Washington State, the Quinault Indian Nation with other tribal leaders, helped spearhead the Washington State Centennial Accord signed by Governor Booth Gardner and by 25 of the federally-recognized tribes in Washington State. A copy of the Accord is included in this report. It develops a mechanism for sovereign governments to solve problems.

In 1989, the United States Senate Indian Affairs Committee, held hearings on land and forestry problems on Indian Reservations, created by the Dawes Act, such as the checkerboarding of reservations, the undivided interests created by heirship problems throughout reservations, etc. Senator Dan Evans of the Senate Indian Affairs Committee, proposed legislation to return the North Boundary, lost by the survey error in 1891 to the Quinault Indian Nation. The legislation specified that proceeds go toward land consolidation of these checkerboarded properties. Since 1989, Quinault Indian Nation has purchased back 56,702 acres, through land consolidation efforts, made possible by a Senate Committee that was committed to resolve solutions instead of creating problems. (SEE MAP 5)

I have highlighted some of the Executive Orders and laws embracing the development of government-to-government relations. In my text, and for the record, I want people to look at the Centennial Accord, which has been embraced by the past three governors, the TFW (Timber-Fish and Wildlife) agreement that was worked on by tribal governments in cooperation with other state agencies, industry, the environmental community, and other stakeholders.

I have brought with me today other documents that are too large to put into the record that are examples of where we are today as a government. These documents clearly show that we have been working with other governments and working towards a fair process to solve problems for

all citizens. I brought these documents as examples of government-to-government relations can accomplish, where people, working together, in mutual respect, have solved problems even with impediments created by a history of bad laws.

As I pointed out earlier, for the past 30 years, people who want the little resources we have are painting a picture that we treat people unfairly. However, our tribal court records, our planning records and our Tribal Business Council records do not show that any of these individuals have brought their situations to us anywhere in our system. They have not utilized any portion of our due process, therefore they were never wronged. Like any other government, the Quinault Indian Nation is covered by tort claims, and relevant malpractice insurance for employees working in any area of potential governmental liability. The Tribe has adopted, within its code of laws, Title 99, which lays out specific provisions for waiving sovereign immunity for specific actions. Additionally, the Tribe has laws in place to protect lending institutions and other people or agencies that have business of a financial nature with the Tribe.

#### **Conclusion and Recommendations**

The last 150 years are full of examples of hastily drawn and narrowly conceived legislation that ultimately create negative consequences for Indian people and non-Indians alike. While these negative consequences are not necessarily intended, it was often the hasty conception of legislation that produced negative results. The present legislation is both hastily drawn in the heat of political passion and narrowly conceived to serve the interests of just a few individuals while adversely affecting the lives of hundreds of thousands of Indian people. Immunity from suit for governments is conceived as a time-honored and proper method for protecting the interests of a political community from narrow and sometimes dishonorable attempts for individuals to take for themselves at the expense of many. Indian nations have the same right as the United States of America and each of its fifty states to protect the public interest. This right is guaranteed under international legislation to which the United States is a formal party.

The key to the solution in this case is cooperation and respect. We have just recently celebrated the Centennial in Washington State, the bi-centennial in the United States, and the quincentennial of the First Association of People of the Americas with other people. We could have reflected the deplorable history of treatment of our people. Instead, we shared the progress that has been made in the last three decades. Therefore, this legislation should not go any further. The United States should continue the path of strengthening tribal governments, and together, establish once and for all, tribal structures of government within the structure of the United States.

I hope that this brief chronology will show that we have long-established sovereignty. Just maybe the Indians can show a way to other governments, including the United States, to work together with mutual respect. I would like to emphasize respect, to resolve our differences. Consequently, this legislation should not go any further.



## US Acts and Policy Affects in Indian Country

### Quinault Government Example (1855 to 1989)

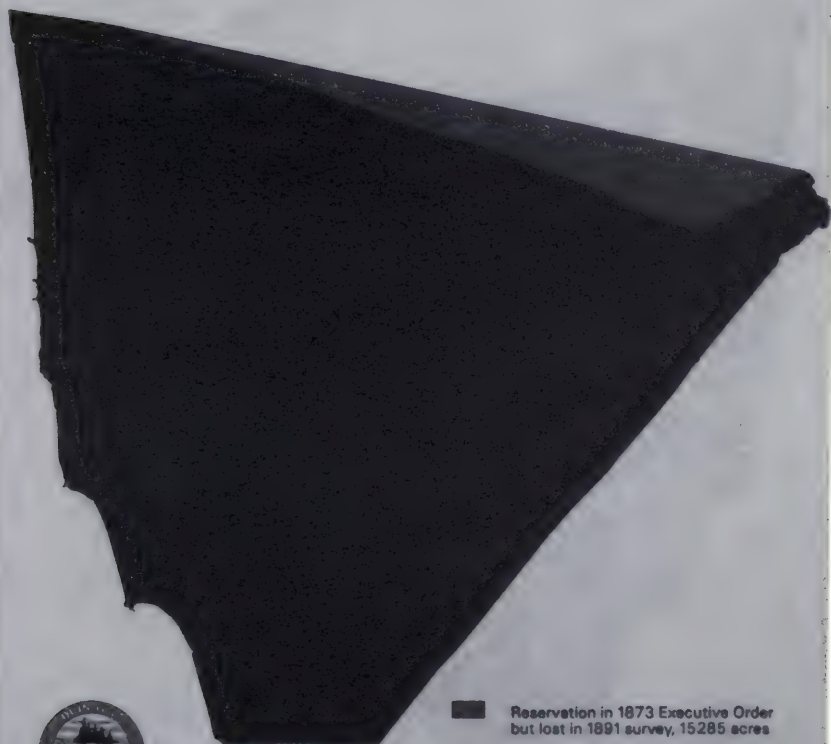
Chronology	Policy Actions	Indian	Non-Indians
1855	Treaty between Quinault and USA	Reduced Quinault territorial base to small proportion of historical use area and placed members of neighboring tribes in Quinault territory and restricted Quinault use of original territories.	Removed some non-Quinault tribes or individuals from the North-South Corridor running south from Puget Sound to the Columbia River making way for railroad construction and increased US government land holdings in the Pacific Region.
1873 (Map#1 of Reservation Boundaries)	Reservation Boundaries set	Defined a land-base protected from non-Indian encroachments and ensured substantial water resources, timber, wildlife, fish, etc.	Increased access to original wilderness containing large quantities of timber.
1887  ( Map#2 of Reservation and lands affected by Act)	Dawes Act (General Allotment Act)	Reduced individual Indian and tribal land-base and opened lands for non-Indian occupation inside reservation boundaries.	Opened on-reservation lands to non-Indian ownership and occupation. Most non-Indians are married to Indians and act as members of Quinault society.
1885	Major Crimes Act	Unilaterally extended US jurisdiction over crimes on Indian reservations to include Murder, Manslaughter, Rape, Assault with Intent to kill, Arson, Burglary, Larceny, etc. placing individual Indians under direct jurisdiction of US for crimes committed against non-Indians.	Extended US government authority into reservations to protect non-Indian individuals under US laws instead of tribal laws.
1889  (Map#1 of Quinault Reservation as defined under Executive Order)	Reservation Executive Order	Formalized the establishment of reserved lands for Quinaults and permitted increased numbers of non-Quinaults to live on reservation lands.	Formalized non-Indian ownership of off reservation lands and ensured protection for Indians living on reservation lands.
1891  ( Map#1 of Quinault Reservation diminished)	Reservation Diminished by US error in survey	Reduced Quinault reserved land base by thousands of acres.	Increased US land holdings in the rainforest.
1922	Tribal Constitution	Though Quinaults had long governed themselves by custom this established a codified set of rules and procedures (recognizable by non-Indians) for the governance of Quinault Reservation.	Established recognizable and understandable rules and procedures by which the Quinault reservation is governed. Non-Indians participate in suggesting language and provisions.
1932  ( Map#2 of Quinault Reservation "checkerboard")	General Allotment of Quinault Reservation	Large tracts of prime coastal land (particular in the NW of the reservation) are taken out of tribal control and sold at very low prices to non-Indians.	Non-Indians unrelated to members of the Quinault begin moving in increasing numbers to Quinault reservation or becoming "absentee land owners" otherwise living in Aberdeen, Tacoma, Seattle or some other remote location.

Chronology	Policy Actions	Indian	Non Indians
1953	PL 280 - Termination Era	Potentially extends the jurisdiction of the State over various Indian reservations, but the US Congress conveyed no money with the potential jurisdictional transfer so jurisdictional authorities are increasingly confused on the reservation.	Non-Indian state governments received the authority from Congress to exercise jurisdiction inside Indian Country, but no funds are provided. The powers of the state of Washington over Indian Country are increased though much confusion develops over the exercise of these powers.
1956	Quinault Tribal amendment of the Quinault Constitution	Expend Tribal Participation-Constitutional change	No direct affect on non-Indian interests or rights.
1960	US Land Sales and Developers push for more land sales on Quinault Reservations	Indians are not advised of developers' plans and their effects on Quinault land interest (individual or tribal).	Non-Indians gain access to land on the Quinault reservation but are not advised of limitations on the possessory rights or about the lack of perked land in the planned development areas in and around Taholah.
1964	US Great Society Legislation: Office for Economic Opportunity (OEO) provides small grants.	Establishment of Tribal Planning Commission (Indian and Non-Indian Membership)	Non-Indians are given direct access to development planning of the Quinault Indian nation
1965	Quinault Council enacts: Zoning Ordinances, Mobil Home Trailer Ordinances, Non voting membership on Grays Harbor County Planning Commission	Tribal and individual Indian lands and resources given protection under Quinault laws; Quinault people gain advanced notice of non-Indian plans for development in Grays Harbor County and advise on what is appropriate and what is not appropriate.	Non-Indian lands are protected along with Indian lands, tribal participation in County planning helped foster cooperation and representation of non-Indian and Indian interests.
1968	Johnson Administration advocates "self-determination policy" for Indian country; Tribal/State talks on PL 280 Retrocession	Quinaults gain more direct access to US government assistance and have more independent ability to exercise self-government	non-Indian lands and interests come under more direct tribal jurisdiction and protection.
late 1960s	Non-Indian Developers plat and sell lots to non-Indians without adequate effort to perk, County gives permits to developers "subject to Quinault Nation approval," on lands that don't perk—Quinault denies permits.	Indians do not have direct access to lands being proposed for development inside the reservation.	Misled by developers to spend their money on lands that were not adequate for settlement, individuals lost money and their rights
1969	Tribal Government Closes beaches to non-Indians to preserve ocean wet lands.	Indians have more limited access to beaches for clam digging, crabbing and other food gathering.	Non-Indians prevented from using beach fronts to their properties without tribal government permission.
1970	Self-Determination Policy: President Nixon :US Executive Policy affirming the rights of Indian peoples to freely choose their own social, economic and political future.	Quinault and other Indian nations move to institute new tribal governmental responsibilities for governing the Quinault Reservation	non-Indians given advisory roles in Quinault government, but some individuals object to tribal governmental authority on the reservation.
1974	Quinault Government institutes Tribal Codes, Tribal Constitutional Amendments- Tribal Forestry Practices Act (advanced beyond state/ federal; US Federal Courts recognize Quinault government's management responsibilities and authorities in salmon fisheries.	Greater control and regulation of tribal civil life, services and increased protection of Quinault social and economic interests.	More specific restriction of non-Indian uses of private lands in accord with tribal planning objectives for the Quinault reservation.

Chronology	Policy Actions	Indian	Non-Indians
1975	Indian Self-Determination and Education Assistance Act	Quinault government directly "contracted" to deliver services on the reservation for Indians and non-Indians while US government procedures forced tribes into greater dependence on BIA administration and control	Received greater number of services including fire protection, waste disposal, and emergency health as well as improved schools.
1983	Government-to-Government Policy: President Ronald Reagan	Reopened negotiation procedures between Indians and the United States (long foreclosed since 1871) so Indians could directly participate in the decision-making affecting their lives.	Gained a forum to directly negotiate with Indian governments and since the Quinault government was among the first to initiate efforts to establish a government to government framework, non-Indians at Quinault increasingly had an open and direct channel via the United States to deal with concerns and interests.
1987-1989	Negotiation of Compact of Self-Governance, Self-Government Policy Centennial Accords between Indian governments and the State of Washington establishing a working framework for government to government relations. Self-Government Compacts	Quinaults assume direct responsibility for social, economic and political development on the reservation and resources are more directly put to use in support of tribal plans. Cooperation between Washington State Executive and Tribal Executive improves social services.	New roads, facilities and living spaces improve access to the Quinault government and delivery of services suitable to non-Indian interests on the reservation.
127 Lawsuit concerning fisheries issues from 1920 - Present. Millions of dollars in expense to defend tribal fisheries jurisdiction			



## Quinault Reservation Boundary established 1873



■ Reservation in 1873 Executive Order  
but lost in 1891 survey, 15285 acres




■ Reservation after 1891 survey,  
195025 acres, including lake

## Quinault Reservation Allotted, 1907-1932



### Fee Property on the Quinault Reservation prior to 1988



	Fee allotments, 58910 acres
	Trust allotments, 124344 acres
	Quinault Indian Nation, 11770 acres





### SCENARIO

You live in the United States. You have a home and twenty acres. Your grandparents left you this land which they had reserved for themselves, when they gave away 20,000 acres to the state. They reserved it for themselves and their heirs in *perpetuity*. "For as long as the rivers run and the grass grows."

It is 1976 now and this is what it is like to live on this land left for your exclusive use.

### ACTION

Someone enters your living room and steals your chair. You call the local police. "Sorry," they say, "Your living room is not in our jurisdiction. Call the state police." (The state police are located 20 miles away.)

The state police arrive but by then the thief is gone. At that moment another person enters the house, this time the kitchen. This person

takes your toaster. "Quick, police!" you cry, "Catch the thief". "Sorry," say the state police, "we have no jurisdiction over your kitchen, you will have to call the federal police."

The federal police arrive. "Oh dear," they say, "this person is a juvenile, the state has jurisdiction over juvenile delinquency, not us. You will have to get the state police back again." So saying, the federal police depart. Meantime, a fight breaks out next door and the combatants come onto your land, you call the local police. The local police arrive. "Sorry," they say, "we have no jurisdiction over these people, they are non-family members. Yes, we have jurisdiction over your family, and this piece of land, but these people are not members of your family and we cannot arrest them."

Fiction? Fantasy? A fairy tale? Not if your home happens to be an *Indian Reservation* in a state that adopted...

**Public Law 83-280**

### Some Cases Under P.L. 280.

#### 1. **Bryan v. Itasca County**, 44 L.W. 4832 (June 14, 1976).

The United States Supreme Court held that Public Law 83-280 does not give Itasca County, Minnesota, jurisdiction to impose personal property tax on a mobile home belonging to an enrolled Chippewa Indian, used as his permanent home and located within the Leech Lake Reservation on trust land.

#### 2. **Omaha Tribe of Indians v. Peters**, 44 L.W. 3746 (June 29, 1976).

By summary order the United States Supreme Court vacated the judgment of the Eighth Circuit Court of Appeals and remanded it for further consideration in light of **Bryan v. Itasca County** 426 U.S. (1976.)

#### **Quilleute Indian Tribe v. State of Washington**, U.S.D.C., W.E. Washington, Civil No. C 74-7615.

Issue: Does Public Law 280 authorize the state of Washington to apply its sales, use, business, occupation and cigarette tax laws to the activities and property of plaintiff tribes and individual Indians within federally recognized reservations in situations where, absent Public Law 280, an immunity from taxation would exist.

#### 4. **United States v. State of Washington**, U.S.D.C., E.D. Washington, Civil No. 3909.

Issue: Whether Public Law 280 gives the state of Washington the authority to impose its excise tax laws on transactions of tribally licensed retailers on the Yakima Reservation on their sales to Indians and non-Indians.

#### 5. **Confederated Tribes of the Colville Indian Reservation v. State of Washington**

Issue: Whether Public Law 280 gives the state of Washington the authority to impose its excise tax laws on transactions of tribally licensed retailers on the Yakima Reservation on their sales to Indians and non-Indians.

#### 6. **Santa Rosa Band of Indians v. Kings County**, U.S. Court of Appeals, Ninth Circuit, Civil No. 74-1565, decided November 3, 1975.

Petition for rehearing was denied at some unspecified date. The case held that Public Law 83-280 does not make county ordinances applicable inside Indian Reservations, but only state laws of general application throughout the state.

#### 7. **Quinault v. Gallagher**, 387 U.S. 907

In this case the Ninth Circuit Court of Appeals held that the question of whether Washington had complied with state law in assuming Indian jurisdiction was a state question which had been decided by the state Supreme Court in the **Paul** case and the **Makah** case.

#### 8. **Snohomish v. Seattle Disposal Co.**, 389 U.S. 1016. See 425 P. 2d 22.

This case turned on the state Supreme Court's saying that zoning by Snohomish County would constitute an "encumbrance" on trust lands in violation of federal. So the case really did not turn on Public Law 280. However, the question is now decided by **Santa Rosa v. Kings County**.

#### 9. **Kennerly v. District Court of the Ninth District of Montana**, 404 U.S. 823. See 90 Cal. Rptr. 794.

In this case the tribal council of Blackfeet Reservation voted to give the state jurisdiction. The Supreme Court however held that such jurisdiction could not be assumed by the state without specific compliance with Public Law 83-280.

Each room in this fictional home represents a geographical and jurisdictional entity on an Indian reservation. Trust land, Fee Patent, individual Indian owned land, are under differing jurisdictional authority (Tribal, Federal, State and County). "Checkerboard" jurisdiction causes great problems for tribal governments and tribal members. There is a crucial breakdown in law enforcement with agencies being unwilling to take responsibility and thereby creating a vacuum of authority. The tribes have indicated their willingness to fill this vacuum but are often denied the jurisdictional authority as a result of PL 83-280.

## PUBLIC LAW 83-280

### A REPORT PREPARED BY AMERICAN FRIENDS SERVICE COMMITTEE

#### **TRIBAL SOVEREIGNTY... does it exist? If so, how much exists?**

When the Europeans arrived in this country the sole governments that existed were obviously those of Indian tribes. This would mean that the Indian tribes at that time possessed SOVEREIGN JURISDICTION.

As the time passed the jurisdiction of the tribes was eroded by various U.S. Acts and treaties. The law confirmed, however, that the Indian tribes still possessed rights and ownerships unique and sovereign.

As a result of *Worcester v. Georgia* (1832) the sovereign jurisdiction of Indian tribes was limited to "internal" as opposed to "external sovereignty", but the "internal sovereignty" was emphatically confirmed. (Internal: the right to govern members within boundaries. External matters, i.e., trade, was the responsibility of the federal government.)

In 1889 the **Northwest Ordinance** recognized the Possessory Title of the Indian tribes.

The **1834 Act of Congress** confirmed that Indian land could only be obtained through treaties and conventions pursuant to the U.S. Constitution.

In the case of *Ex Parte Crow Dog* (1881) the U.S. Supreme Court held that only the Indian tribe had jurisdiction over tribal members on the reservation.

The **Enabling Acts of States** entering the Union often contained a clause that disclaimed jurisdiction over Indian lands within the State.

Treaties between the tribes and the United States invariably specified the land the Indian retained for themselves while they gave to the United States most of the land that they possessed. It is worthwhile noting that the reservation lands owned by the tribes today are only a small fraction of the land that once was theirs and that the reservation lands are not a gift from the United States but were reserved by the tribes for their **own exclusive** use. Hence the word "reservation" came from the fact that the Indians reserved lands rather than having been given them by the federal government.

#### **EROSION OF TRIBAL SOVEREIGNTY or "If you can't steal power away...legislate it away."**

In 1869 Congress authorized the President to settle tribes on reservations and "civilize" them.



### 1885 Major Crimes Act

After the Supreme Court ruling of **Ex Parte Crow Dog** the U.S. extended federal jurisdiction over crimes on Indian reservations to include Murder, Manslaughter, Rape, Assault with Intent to Kill, Arson, Burglary, Larceny. (These seven crimes have since been extended to thirteen). The results of the Major Crimes Act was to emasculate the authority of the tribal court system and the tribal government.

### 1887 The General Allotment Act

This Act authorized the allotting of the tribal lands to individual tribal members, the land to remain in trust for 25 years. Ostensibly the reason for allotment was that the tribal members would become self-supporting members of the community, i.e., farmers, a life occupation totally at odds with their historical ways of making a livelihood. The result was that after the twenty-five year trust period the land became eligible for state taxes. Too often the Indian owners were unaware of the taxes or unable to pay them, and land thus became available for sale to non-Indians. A direct result of the Allotment Act has been the loss to Indian tribes of over 17-1/2 million acres. (Giving up three-quarters of the land mass of the United States was not enough; now a large portion of the remaining 1/2 fell into non-Indian hands.)

### TERMINATION ACT -- An attempt to turn Indians into non-Indians

#### 1953 House Concurrent Resolution No. 108 Termination Act

This Act made possible the "termination" of a tribe. Tribes that were deemed ready for termination were paid a per acre fee and the unique relationship between the tribe and the federal government was then ended. What tribes discovered was that the termination of the reservation meant the termination of federal benefits and services and also the termination of the tribe as an institution.

The Klamath tribe of Oregon was terminated. Each Klamath was to receive \$43,000 on total termination of the reservation and sale of trust land and timber assets. Many Klamaths unschooled in the way of white finance and money management hocked their future \$43,000 for a few thousand dollars in immediate cash. At the present time the effort to restore Klamath has begun.

The Menominee tribe is another tragic example of a disastrous effect of termination. Within a few years of termination the Menominees, a tribe formally paying for all of its own services, was reduced to having to sell lands to pay taxes. The hospital was closed and the infant mortality rate rose dramatically. At the time of termination the tribe had over ten million dollars in the federal treasury. By 1964, the fourteen percent of the county which was the former reservation area was receiving welfare payments. The ten million dollars had been paid out in per capita payments and there was no more tribal treasury. Menominee termination was repealed on December 22, 1973.

The disastrous effects of termination were soon clear to most tribes. As a result, few petitioned the United States for such action. PL 83-280 is seen as the next attempt of the U.S. government to end its responsibility to the Indian people for whom it had assumed wardship.

### PUBLIC LAW 83-280 -- "A noose choking Indian tribes and the Indian way of life out of existence since 1953"

#### 1953 Public Law 83-280

This Act gave to the various states the right to extend state jurisdiction to Indian reservations within their boundaries.

PL 280 allowed for the termination of federal law enforcement and the substitution of the laws of the state in which the reservation was located. Despite the vast increase in state law and order responsibility there were no funds appropriated with the bill. Lack of sufficient funds has often hampered the efficient provision of law enforcement. Counties that have large reservations within their borders are unable to provide sufficient personnel (the Yakima reservation was provided with 1-1/4 officers to cover an area of 1,366,505 acres and a population of 5,975.) Juvenile crime is seen by most of the tribes to be best adjudicated by the community yet in most cases the jurisdiction for juveniles under PL 280 rests with the state authorities.

#### PL 280...What does it authorize...What does it say

PL 83-280 was passed by the U.S. Congress August 15, 1953. This Act authorized the transference of civil

and criminal law enforcement jurisdiction from the federal government to the various states. (The concurrent tribal authority still remains the same.) The various states were divided into three categories.

Certain states were granted **mandatory assumption of jurisdiction**. These were:

1. **California**
2. **Minnesota**, except over the Red Lake Reservation
3. **Nebraska**, the Omaha tribe retroceded state jurisdiction
4. **Oregon**, except over the Warm Springs
5. **Wisconsin**
6. **Alaska**, upon reaching statehood, except for criminal jurisdiction on Metlakatla Indian community (1970).

#### **States with constitutional disclaimers of jurisdiction over Indian tribes.**

The following states, despite jurisdictional disclaimers over Indian reservations in both their enabling acts (by Congress) and their own constitutions, nevertheless assumed PL 280 jurisdiction:

1. **Arizona**, air and water pollution laws only
2. **Montana**, criminal jurisdiction over Flathead Indian tribe only.
3. **North Dakota**, civil jurisdiction over consenting tribes, no tribe has to date consented.
4. **Utah**, civil and criminal jurisdiction upon tribal consent.
5. **Washington**, civil and criminal jurisdiction in eight specific subject areas. Option for tribes to request total state jurisdiction.

#### **States with no constitutional disclaimers.**

1. **Florida**, civil and criminal jurisdiction.
2. **Idaho**, civil and criminal jurisdiction in seven areas.
3. **Nevada**, civil and criminal jurisdiction upon tribal request. (Nevada has since adopted a law providing retrocession of jurisdiction on all of its reservations, this is on a county by county basis.)

In 1968 the passage of PL 90-284 **The Indian Civil Rights Act** made the consent of the tribes mandatory for the assumption of further state jurisdiction.

On January 1975 PL 93-638 **Indian Self-determination and Educational Assistance Act** was passed by Congress. This Act recognizes the right of Indian tribes to manage their own affairs to the greatest possible extent and also stresses the need of tribes to exercise the principles of self-determination.

PL 280 is seen by many Indian people as the major stumbling block to empowerment and eventual self-sufficiency.

Over the years since the passage of PL 280 the Indian tribes have found the confusion of jurisdiction and the encroachment of the states into Indian reservations, has caused grave problems in the management of tribal affairs. State encroachment under the PL 280 authority includes zoning, pollution control, taxation, health and safety regulations, etc. Taxation encroachment has been halted due to the U.S. Supreme Court decision in **Bryan v. Itasca County, 1976**. In a 9-0 decision the Court found the PL 280 did not give states the right to tax Indian reservations.

### **RECENT INDIAN ACTION ON PL 280 -- S 2010 Indian Law Enforcement Act of 1975**

The National Congress of American Indians met in Denver, February 1975 and resolved that PL 280 constituted a major threat to tribal sovereignty. As a result of the Denver meeting the tribes and their attorneys drafted legislation entitled "Indian Law Enforcement Improvement Act of 1975" to be known as S 2010. This bill was introduced June 25, 1975 by Senator Henry Jackson. Hearings on S 2010 took place December 3 and 4, 1975, before the Subcommittee on Indian Affairs of the Committee on Interior And Insular Affairs, United States Senate. Subsequent hearings were held March 4 and 5, 1976.

### **RETROCESSION...S 2010 A national Indian answer to PL 83-280**

An analysis of S 2010 states:

*The basic principle of S 2010, adopted by the National Conference of PL 83-280 is the principle of local option repeal of PL 83-280. That is that true self-determination of Indian people requires that each tribe determine for itself whether all or any measure of state jurisdiction should apply in the Indian country it controls and whether tribal jurisdiction should be current with state or federal jurisdiction.*

On December 3, 1975, tribal leaders came to Washington D.C. to present testimony on the problems that have resulted from PL 83-280. They spoke of the need for a bill such as S 2010.

Mel Tonasket, President National Congress of American Indians, Councilman Colville Confederated Tribes:

*I have been looking forward to this hearing for all of my adult life and I know that many of the other tribal leaders here, of far more experience than I, have been awaiting this hearing since 1953, the date of enactment of Public Law 83-280. Public Law 280 has been choking the Indian way of life out of existence since 1953.*

*Public Law 83-280 is an outgrowth of the termination philosophy of the early 1950's. Public Law 83-280 was not a termination bill, but was one act in a series of bills whose eventual design was termination. Public Law 83-280 was a law and order statute whose aim was merely the transfer to states of jurisdiction over civil and criminal causes of action on Indian reservations.*

*After 22 years, it is now conclusively proven that Public Law 83-280 is a total failure by any standard. And the termination philosophy which underlines Public Law 83-280 is defunct.*

Joe DeLaCruz, President, Quinault Tribal Council, Taholah, Washington:

*S 2010, which you have before you today, is a bill which is intended to place the Indian people back in a position where they can exercise their rightful authority to control the land and the people of their reservation as strong governments based upon clear legal jurisdiction over their territory and peoples. The legislation which took some of that power away, Public Law 83-280, adopted in 1953, has been the source of endless problems and suffering for the Indian people made subject to its provisions. I am sure that all here today agree that Public Law 83-280 was a misguided attempt to forcibly assimilate my people. The problem today is what to do about it. The answer of the Indian governments is S 2010.*

Roger Jim, Yakima Tribal Councilman, Toppenish, Washington:

*This bill represents the desires of the Indian people and should not be found to be objectionable by other interests. This bill's basic provision provides that those tribes placed under state jurisdiction, by a now discredited termination policy, will be returned to the same status as Indian tribes that missed the consequences of this termination policy. This bill is firmly within the policy of Congress and administration.*

Roger Jim also spoke to the committee of the problems resulting from PL 280 and the confusion of jurisdiction on Indian Lands.

*This breakdown is directly caused by the State assumption permitted under Public Law 83-280. The present system of a partial, checkerboard system of justice could not be worse no matter what system is devised. Congress owes the people, Indian and non-Indian, on the Yakima Reservation that action be taken to bring order out of this mess. The foundation of this mess is Public Law 83-280.*

Odrick Baker, La Courte Oreilles, Wisconsin:

*The state and county judicial systems, its juvenile program as well as the foster children laws of the state demonstrate a deplorable and inhuman and callous disregard for Indian children. The doors of secrecy behind which minor tribal members are imprisoned constitute a serious violation of their civil rights inasmuch as it extinguishes the right to culture and family and in some cases disinherit them from lands and resources handled by probate courts. The failure of the state to license tribal governments in their work with foster children and juvenile delinquents results in the complete withholding of cooperation and information. Legal recognition and jurisdiction is considered very important. Because of Public Law 280, the State of Wisconsin is attempting to tax trust property of the tribe. In its efforts to tax, they have attached and confiscated tribal moneys held at our local bank.*

Lucy Covington, Colville Tribal Councilwoman, and since Tribal Chairwomen, Nespelem, Washington.

*Under Public Law 83-280, the State of Washington has attempted to assume jurisdiction over juveniles on the reservation. Indian children are constantly being taken from Indian homes and placed in foster care with non-Indians or placed for adoption with non-Indian families.*

*These children grow up with a sense of alienation from the culture surrounding them. Attempts by our tribal social services programs to deal with juvenile matters have met with opposition from the state which resists any efforts of our people to deal with these problems by ourselves. In addition, the existence of State Public Law 83-280 jurisdiction on our reservation has had bad effects in the area of criminal jurisdiction. The state asserts its jurisdiction over offenses on the reservation, but refuses to provide the manpower necessary to protect the residents of the reservation property. As a result, the state has shown very little interest in protecting the personal and property rights of Indians, while at the same time proclaiming its jurisdiction over our lives.*



In March 1976, the hearings on S 2010 were largely to determine the government position on the proposed legislation. The various states were given the opportunity to express their feelings on return of jurisdiction to the federal government and the Indian tribes. John Keeney, Deputy Assistant Attorney General Department of Justice had this to say on behalf of the Department of Justice:

*We strongly support the concept of Indian tribes having the right to decide for themselves whether they are to be under state or federal jurisdiction, and that any requests for a return to federal jurisdiction should come from the tribes alone. We believe that the tribes, rather than the states, should be given the option, in an orderly fashion and with reasonable control by the Department of the Interior, to return to that criminal and civil jurisdiction which prevailed in Indian country prior to 1954 and the enactment of Public Law 280.*

James Dolliver, Administrative Assistant to the Honorable Daniel J. Evans, Governor of the State of Washington:

*Let me begin by saying it is the policy of the Governor in the State of Washington that we believe in retrocession. I think the record will show in our state that the Governor has at least in one instance granted retrocession to the Suquamish Port Madison Tribe. It was approved by the Secretary of the Interior. He was in the process of granting retrocession to other tribes who requested. Regrettably, someone asked the question of the Attorney General whether inherent executive authority rested in the Governor to do this. We assumed that it had, and the Attorney General, after much study, said that in fact it did not. We felt bound by the Attorney General's decision, but that does not lessen the Governor's support of retrocession. We feel that Indian persons are fully competent to conduct their affairs, and if retrocession is what they desire, we support it.*

Statement of Jack Olsen, District Attorney, Umatilla County, Pendleton, Oregon:

*Mr. Chairman, those very principles which we consider dear to the hearts of every American citizen, those very principles which served as the catalyst to the development of this great land - liberty and the right of self-determination - are in fact still being denied to that very group of Americans who first settled this continent. It is inconceivable to me that any nation should be denied the right to self-determination; and in fact, it is still being denied here. We espouse liberty, yet we deny liberty. It will be a sad day for America if this denial is perpetuated. Mr. Chairman, on a more practical vein it is essential that jurisdiction be returned, at least to the Confederate Tribes of the Umatilla Indian Reservation. Our county consists of over 3,200 square miles and our*

*reservation is some 286,000 acres. With these vast areas state and county law enforcement simply cannot provide the protection it ought to be providing. This applies both to the Indian and to the non-Indian living on or passing through the reservation.*

The State of Nebraska expressed opposition to retrocession. The major faction being the "checkerboarding" of Indian and Non-Indian lands and the consideration of loss of revenue to the state.

Ralph H. Gillan, Assistant Attorney General, State of Nebraska:

*There is little or no question that, if this bill is passed, the Omaha and Winnebago Tribes, at least will ask for civil as well as criminal retrocession. The Winnebago Tribe has already asked for both criminal and civil retrocession, but this session of the Nebraska Legislature declined to adopt the resolution. Since the payment of state sales, income and cigarette taxes, and probably other taxes, is dependent upon the state having civil jurisdiction, there will, of course, be an almost irresistible incentive for the tribes to remove that jurisdiction. It is very possible that even the Santee Sioux will follow suit. The Santee Sioux Reservation is approximately 220 miles from Omaha, so the problems of going to federal court will be even greater for persons on that reservation.*

(The question of state revenue gain through taxation has been settled with the 9-0 decision, June 1976 in *Bryan v. Itasca County*. The U.S. Supreme Court found the PL 83-280 does not grant any taxing jurisdiction to states.)

In the last decade the national policy towards Indian tribes and reservations has been stated as that of tribal self-determination. In 1968 PL 90-284 Indian Civil Rights Act made further state assumption of jurisdiction possible only upon tribal request.

## SELF DETERMINATION AND TRIBAL SOVEREIGNTY

In 1975 PL 93-638 affirmed the principle of Indian self-determination.

July 1976, President Ford met with 200 Indian governmental leaders and pledged his support to the realization of the goal of self-determination for tribes and the reassertion of tribal jurisdiction over tribal lands.

Despite the many promises there has been minimal action to return jurisdiction over Indian lands to those most able to assert it -- the Indian people themselves.

Indian people, both individually and as tribes, are united in the desire to govern themselves. The destruction of the environment, the decay in the quality of life is seen by Native Americans to be the result of poor and thoughtless management and unacceptable values. It is safe to say that the U.S. treatment of both the environment and people of alien cultures has not been flawless. Too often expediency and lack of understanding have destroyed the best of both. Today, the Indian people are demanding the reassertion of their right to govern both their land and their people. A culture belongs to those who love and respect it -- only they can preserve the very best aspect for delight and strength of future generations.

### WASHINGTON STATE UNDER PL 83 280

Washington State implemented the provisions of PL 83-280 by legislative action in 1957. In 1963 it amended and extended this Act. These two Acts have certain very important differences.

**1957 SB 56.** The assumption of PL 280 jurisdiction which became RCW 37.12.010. The terms of the 1957 Act show that the State of Washington was concerned for the sovereignty of the Indian tribes within its borders. a.) The Act could only go into effect on a reservation upon specific request by that tribe (this was later to become a requirement throughout the nation with the passage in 1968 of PL 90 284, the Indian Civil Rights Act); b.) No property was to involved; and, c.) Treaty hunting and fishing rights were precluded. There were, however, certain grave shortcomings in the Act. a.) No trial period was required in order for the tribe to determine the effects of state jurisdiction; b.) No method was included to allow for the retrocession of state jurisdiction should the tribe, or the state, so desire it.

Eleven tribes requested total state jurisdiction on their lands. **1. Chehalis, 2. Muckleshoot, 3. Nisqually, 4. Quileute, 5. Quinault, 6. Skokomish, 7. Squaxin Island, 8. Suquamish, 9. Tulalip, 10. Colville, 11. Swinomish.** When the tribes requested state law enforcement they believed that they could obtain superior services, when they found that this was not the case they also found that the mechanism for the return of jurisdiction was nonexistent. Most of the reservations that requested state jurisdiction have since asked that it be returned to the federal and tribal authorities.

### 1963 TERMINATION LEGISLATION IN THE STATE OF WASHINGTON. EXTENSION OF JURISDICTION WITH NO TRIBAL CONSENT CLAUSE

The state legislature extended and amended the 1957 Act by asserting *total jurisdiction over all fee patent land, and partial jurisdiction over all land* (tribal trust, individual trust, allotted land and fee patent.) With no consent clause required, the legislature with one act ignored the concept of tribal sovereignty.

The partial jurisdiction asserted by the State of Washington consisted of eight subject areas. **1.) compulsory school attendance; 2.) public assistance; 3.) domestic relations; 4.) mental illness; 5.) adoption proceedings; 6.) juvenile delinquency; 7.) dependent children; 8.) operation of motor vehicles upon public streets.**

The obvious cultural implications of these eight areas was not lost on the tribes, numerous court cases were brought to obtain relief from what was seen as cultural strangulation.

The responsibility for Indian children was taken from tribal government and placed into the hands of a culture with entirely different standards in child raising. The extended family concept is not present in the dominant culture yet it is one that is both traditional and logical for tribes.

### CHECKERBOARD JURISDICTION... The game of confusion in law enforcement.

Only the government that has jurisdiction has the legal right to exercise law enforcement. When a crime is committed on Indian land in the State of Washington it is necessary to determine which authority has the jurisdiction...the tribe, the federal government or the state and county government. The determination must often be made on the spot by a police officer; to do this certain facts must be established:

the status of the land,  
the status of the crime,  
the status of the persons involved.

a.) **The status of the land.** Trust, the jurisdiction on trust land rests with the federal authorities, the tribal authorities and in the eight subject areas with state and county authorities. **Fee Patent:** The jurisdiction belongs to the state authorities concurrent with the tribe. This fact is often ignored by the state.

b.) **The status of the crime.** Does the crime fall within the eight areas of jurisdiction assumed by the State in 1963? Does the crime belong under the thirteen major crimes under the jurisdiction of the federal authorities or is it under the jurisdiction of the tribal court?

c.) **The status of the persons involved.** Indian or non-Indian, juvenile or adult.

It is small wonder the state and county authorities are often reluctant to get involved in the confusion, the reluctance, however, leaves the Indian tribes with little or no protection, or as Roger Jim of the Yakima Nation describes it, "The reservation has the law, but no order." The tribes have been forced to provide law enforcement for their people at great expense and met with no recognition by the state of their having legal jurisdiction.

assumption of partial jurisdiction without consent of tribes (1963). The *Yakima Nation v. Yakima County and State of Washington* case incorporates the argument made by Quinault tribe in *Quinault v. Gallagher* (1966) and amicus briefs compiled by every tribe in the state. The legislation presently before the U.S. Senate S 2010, has the support of every tribe of the State of Washington. The tribes are united in their determination to reassert tribal jurisdiction over tribal lands.

### **RETROCESSION...**

**First you see it, then you don't.**

On January 11, 1971, the Suquamish Tribe of the Port Madison Reservation presented a resolution for retrocession August 26, 1971 and the Secretary of the Interior accepted the proclamation april 5, 1972.

The Quinault tribe believed that the original request for state jurisdiction (1958) was illegally obtained. Governor Evans voided state jurisdiction on the above grounds in 1965. In 1972 the State Attorney General was requested to present an opinion on the legal authority of the Governor of Washington to retrocede jurisdiction to an Indian reservation. The Attorney General's opinion (Wash. A.G.O. 1972, No. 9) noted that he could find no authority to retrocede partial jurisdiction over the eight subject areas assumed in 1963, neither did he find authority to retrocede jurisdiction which had been proclaimed by the Governor under either the 1957 or 1963 Acts pursuant to a petition by a particular tribe. The power of the Governor was confirmed to rescind a previous proclamation on discovery of error.

The result of this Attorney General's opinion has been to freeze state jurisdiction over tribes. At the present time the Ninth Circuit Court is considering the question of the legality of State of Washington assumption of jurisdiction by simple legislative action rather than constitutional amendment (1957) and the



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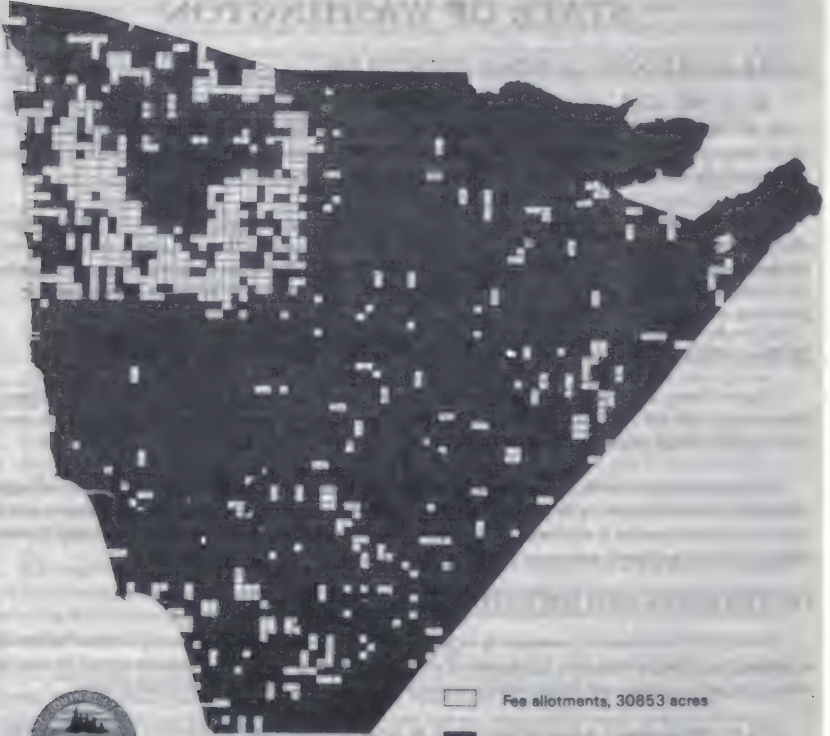
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MAP #4

**Taholah Ocean Tracts and Moclips Ocean Tracts  
in Sec20, T. 21 N., R 12, Quinault Indian Reservation  
Approved by Grays Harbor County, 1968**



# Current Property Status on the Quinault Reservation



- Fee allotments, 30853 acres
- Trust allotments, 119539 acres
- Quinault Indian Nation, 56702 acres
- New Federal Lands



# CENTENNIAL ACCORD

## between the FEDERALLY RECOGNIZED INDIAN TRIBES in WASHINGTON STATE and the STATE OF WASHINGTON

### I. PREAMBLE AND GUIDING PRINCIPLES

*This ACCORD dated August 4, 1989, is executed between the federally recognized Indian tribes of Washington signatory to this ACCORD and the State of Washington, through its governor, in order to better achieve mutual goals through an improved relationship between their sovereign governments. This ACCORD provides a framework for that government-to-government relationship and implementation procedures to assure execution of that relationship.*

*Each Party to this ACCORD respects the sovereignty of the other. The respective sovereignty of the state and each federally recognized tribe provide paramount authority for that party to exist and to govern. The parties share in their relationship particular respect for the values and culture represented by tribal governments. Further, the parties share a desire for a complete accord between the State of Washington and the federally recognized tribes in Washington reflecting a full government-to-government relationship and will work with all elements of state and tribal governments to achieve such an accord.*

### II. PARTIES

*There are twenty-six federally recognized Indian tribes in the state of Washington. Each sovereign tribe has an independent relationship with each other and the state. This ACCORD, provides the framework for that relationship between the state of Washington, through its governor, and the signatory tribes.*

*The parties recognize that the state of Washington is governed in part by independent state officials. Therefore, although this ACCORD has been initiated by the signatory tribes and the governor, it welcomes the participation of, inclusion in and execution by chief representatives of all elements of state government so that the government-to-government relationship described herein is completely and broadly implemented between the state and the tribes.*

### III. PURPOSES AND OBJECTIVES

*This ACCORD illustrates the commitment by the parties to implementation of the government-to-government relationship, a relationship reaffirmed as state policy by gubernatorial proclamation January 3, 1989. This relationship respects the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues.*

*This ACCORD is intended to build confidence among the parties in the government-to-government relationship by outlining the process for implementing the policy. Not only is this process intended to implement the relationship, but also it is intended to institutionalize it within the organizations represented by the parties. The parties will continue to strive for complete institutionalization of the government-to-government relationship by seeking an accord among all the tribes and all elements of state government.*

*This ACCORD also commits the parties to the initial task that will translate the government-to-government relationship into more efficient, improved and beneficial services to Indian and non-Indian people. This ACCORD encourages and provides the foundation and framework for specific agreements among the parties outlining specific tasks to address or resolve specific issues.*

*The parties recognize that implementation of this ACCORD will require a comprehensive educational effort to promote understanding of the government-to-government relationship within their own governmental organizations and with the public.*

### IV. IMPLEMENTATION PROCESS AND RESPONSIBILITIES

*While this ACCORD addresses the relationship between the parties, its ultimate purpose is to improve the services deliv-*

ered to people by the parties. Immediately and periodically, the parties shall establish goals for improved services and identify the obstacles to the achievement of those goals. At an annual meeting, the parties will develop joint strategies and specific agreements to outline tasks, overcome obstacles and achieve specific goals.

The parties recognize that a key principle of their relationship is a requirement that individuals working to resolve issues of mutual concern are accountable to act in a manner consistent with this ACCORD.

The state of Washington is organized into a variety of large but separate departments under its governor, other independently elected officials and a variety of boards and commissions. Each tribe, on the other hand, is a unique government organization with different management and decision-making structures.

The chief of staff of the governor of the state of Washington is accountable to the governor for implementation of this ACCORD. State agency directors are accountable to the governor through the chief of staff for the related activities of their agencies. Each director will initiate a procedure within his/her agency by which the government-to-government policy will be implemented. Among other things, these procedures will require persons responsible for dealing with issues of mutual concern to respect the government-to-government relationship within which the issue must be addressed. Each agency will establish a documented plan of accountability and may establish more detailed implementation procedures in subsequent agreements between tribes and the particular agency.

The parties recognize that their relationship will successfully address issues of mutual concern when communication is clear, direct and between persons responsible for addressing the concern. The parties recognize that in state government, accountability is best achieved when this responsibility rests solely within each state agency. Therefore, it is the objective of the state that each particular agency be directly accountable for implementation of the government-to-government relationship in dealing with issues of concern to the parties. Each agency will facilitate this objective by identifying individuals directly responsible for issues of mutual concern.

Each tribe also recognizes that a system of accountability within its organization is critical to successful implementation of the relationship. Therefore, tribal officials will direct their staff to communicate within the spirit of this ACCORD with the particular agency which, under the organization of state government, has the authority and responsibility to deal with the particular issue of concern to the tribe.

In order to accomplish these objectives, each tribe must ensure that its current tribal organization, decision-making process and relevant tribal personnel is known to each state agency with which the tribe is addressing an issue of mutual concern. Further, each tribe may establish a more detailed organizational structure, decision-making process, system of accountability, and other procedures for implementing the government-to-government relationship in subsequent agreements with various state agencies. Finally, each tribe will establish a documented system of accountability.

As a component of the system of accountability within state and tribal governments, the parties will review and evaluate at the annual meeting the implementation of the government-to-government relationship. A management report will be issued summarizing this evaluation and will include joint strategies and specific agreements to outline tasks, overcome obstacles, and achieve specific goals.

The chief of staff also will use his/her organizational discretion to help implement the government-to-government relationship. The Office of Indian Affairs will assist the chief of staff in implementing the government-to-government relationship by providing state agency directors information with which to educate employees and constituent groups as defined in the accountability plan about the requirement of the government-to-government relationship. The Office of Indian Affairs shall also perform other duties as defined by the chief of staff.

## V. SOVEREIGNTY and DISCLAIMERS

Each of the parties respects the sovereignty of each other party. In executing this ACCORD, no party waives any rights, including treaty rights, immunities, including sovereign immunities, or jurisdiction. Neither does this ACCORD diminish any rights or privileges of either party or of Indian persons or entities under state or federal law. Through this ACCORD parties strengthen their collective ability to successfully resolve issues of mutual concern.

While the relationship described by this ACCORD provides increased ability to solve problems, it likely will not result in a resolution of all issues. Therefore, inherent in their relationship is the right of each of the parties to elevate an issue of importance to any decision-making authority of another party, including, where appropriate, that party's executive office.

Signatory parties have executed this ACCORD on the date of August 4, 1989, and agreed to be duly bound by its commitments:

# The State of Washington



## Proclamation

**WHEREAS**, it is the intent of the Governor to reaffirm the government-to-government relationship established in the Centennial Accord of August 4, 1989 with the federally recognized Indian tribes within the boundaries of Washington state; and

**WHEREAS**, the state of Washington recognizes that there are 27 separate and distinct federally recognized sovereign tribal governments in Washington state and acknowledges that the tribes have an historical relationship with reserved rights defined by treaties with the United States government, federal statutes, and executive orders of the President; and

**WHEREAS**, the state of Washington seeks to strengthen the relationship with the federally recognized tribal governments to promote and enhance tribal self-sufficiency; and

**WHEREAS**, the state of Washington reaffirms the spirit and intent of the Centennial Accord and directs its agencies to develop policy consistent with the stated principles therein; and

**WHEREAS**, the state and federally recognized tribal governments respect the sovereignty of one another;

**NOW, THEREFORE**, I, Gary Locke, Governor of the state of Washington, do hereby proclaim that the state of Washington accepts the fundamental principles and integrity of the government-to-government relationship between the state and the federally recognized Indian tribes within Washington state, and that the principles of the Centennial Accord shall guide Washington state's policy in relations with the federally recognized tribal governments.

Signed this 21<sup>st</sup> day of July, 1997.

*Gary Locke*  
Governor Gary Locke







Perspectives on the Columbus Quincentenary

*"This we know. All things are  
connected, like the blood which  
unites one family.*

*All things are connected."*

*...Chief Seattle*

## Professor Milnar Ball

*Professor Ball is the Caldwell Professor Constitutional Law at the University of Georgia School of Law, and is a Presbyterian Minister. He has published numerous articles, including "Constitution, Court, Tribes" (1987, American Bar Foundation Research Journal)*



A distinguished member of another Indian Nation heard that I would be here, today, and he sent me a letter. In that letter, he said this: "The Lummi Indians are among the greatest people you will ever meet. I go up there every chance - not just for the seafood but because I like to see a community that continually moves forward." And he added: "I wish I was a celebrity and was invited up there, I can tell you. Maybe you can talk southern for them."

Well, I am no celebrity but I am from Georgia and can certainly talk southern and say truthfully that you have done me a great honor by your invitation to be here. I give thanks that I may sit with those who are among the greatest people I shall ever meet. I come as a student with much to hear and much to learn. I stand to speak now not because I have special knowledge but to pay tribute to you who are here and to the organizers of this important meeting.

It gives me no pleasure to say what I must, but I am determined to speak such truth as is given me howsoever shameful that truth may be to me as an American lawyer and as a Presbyterian minister - which I also am. I am mindful of the position in this morning's native prayer that the speakers be given the strength and courage to speak the truth.

I believe that there is not one United States of America but two, existing side by side. There is a United States that has acknowledged the independent sovereignty of Indian Nations and has made with those Nations treaties which it honors and fulfills. But there is also a United States that has violated its treaties with Indian Nations, sometimes through fraud, sometimes deceit, sometimes terror-

ism. I give thanks for the first United States and weep for the second.

I believe that the second United States has prevailed over the first, honorable one during much of its portion of the last five hundred years. I believe further that this United States will continue to prevail for as far as I can see into the next five hundred years. But I do not have the gift of prophecy and so cherish the hope that I am wrong. I also believe in miracles.

Allow me to describe both United States of Americas.

The first is to be seen already in 1778, while still under the Articles of Confederation and before the Constitution. In that year it signed the first major treaty with an Indian Nation, the Delaware. That treaty expressly contemplated an invitation whereby the Delaware Nation would be invited to form a state providing that if citizens of one treaty partner committed crimes upon the citizens of the other, the wrongdoers would be punished by both non-Indians and Indians according to the laws and customs of both. When the Constitution was approved, it declared treaties already made, like the one with the Delaware, and treaties to be made, like the 1855 Treaty of Muckl-teh-oh, to be the supreme law of the land.

Then in 1832 in the great Supreme Court case of *Worcester versus Georgia*, Chief Justice John Marshall acknowledged and protected the independence and sovereignty of Indian Nations. He noted that, by sanctioning treaties with them, the Constitution admits that Indian Nations rank as treaty-making powers. And he concluded that they

are - these are his words - "distinct, independent political communities, retaining their original natural rights..."

If we follow Chief Justice Marshall's way of thinking, then we can say, for example, that when it made the 1855 Treaty of Muckl-te'h-oh, the United States was acknowledging that it was treaty-making with treaty-making sovereigns. The very fact of the Treaty is a kind of testimony to equality among Nations.

In 1871, sixteen years after that Treaty, Congress voted to end treaty-making with Indian Nations. But that legislation did not mean Indian Nations ceased to exist as Nations in the eyes of the United States. Nor did it mean existing treaties were no longer valid. The statute expressly stated, in clear language: "Nothing [in this act] shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made...with any...Indian Nation or tribe." The treaties are still the supreme law of the land, and the federal courts of the United States continue to the present day to recognize their validity.

From the 1778 Treaty with the Delaware to the Constitution of 1789 to Chief Justice John Marshall's 1832 decision in *Worcester versus Georgia* to the 1855 Treaty of Muckl-te'h-oh and the federal court decisions of the present, there has been a United States that respects the dignity and integrity of Indian Nations, honors the treaties made with them, and fulfills the promises given in those treaties.

The most ancient and basic injunction of international law - and of personal relations, too - is "pacta sunt servanda": promises are to be kept. Treaties are to be fulfilled. There is a United States of America, the one I cherish, that has met its obligations, and I am proud of it. But there is also another, and I am bound to describe it as well.

We have government of limited powers. It may not act unless the Constitution expressly permits it to do so. Otherwise the people have delegated to it no right of action.

The Constitution contains only two bases for the United States authority in dealings with Indian Nations. One is the treaty clause, which allows the federal government to make treaties with Indians as with any Nation. The other is the commerce clause which empowers the federal government to regulate commerce "with foreign Nations, and among the several states, and with the Indian tribes."

Notice how limited the commerce clause is. It does not allow the United States to intervene in the internal affairs of Indian Nations any more than it allows the United States to intervene in the internal affairs of Great Britain or China. It only allows the federal government to regulate commerce between another Nation and the United States.

If neither a treaty nor the commerce clause provides for United States authority in Indian country, on what basis is that authority exercised? The answer to that question requires that I describe the second United States.

This United States was on display in the 1903 Supreme Court case of *Lone Wolf versus Hitchcock*. There, Indian signatories had fully performed their obligations under the Treaty of Medicine Lodge when the United States violated that treaty in various illegal ways, including fraud. Instead of rectifying the wrongs, the Supreme Court ratified them. It said Congress could abrogate the provisions of an Indian treaty whenever and however it wished to do so free of judicial oversight.

The commerce clause did not permit this. No treaty permitted it. In fact, in the *Lone Wolf* case, the Congress had violated a treaty that was the supreme law of the land. How could it do so? How could the Supreme Court allow it to do so? In recent years the Court has given some answers and it shames me to report them.

In 1954 the Court handed down the famous opinion in *Brown versus Board of Education* that ended school segregation and offered hope to African-Americans. But the following year, the same Court announced its opinion in *Tee-Hit-Ton Indians versus United States* that gave no hope to Native Americans. There the Court held Congress could extinguish the Tlingit right to property in Alaska. No treaty permitted this. The commerce clause did not permit it. And the Fifth Amendment specifically prohibited such action without payment or just compensation. None was paid.

What explanation did the Court offer? It could not cite a treaty or the commerce clause, so it said - and it pains me to repeat the words - that:

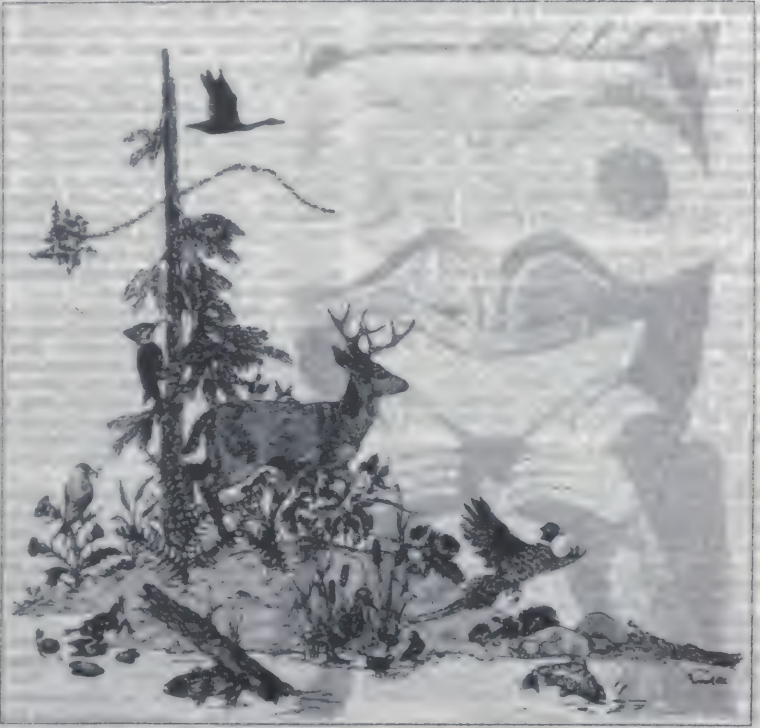
"Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale but the conqueror's will that deprived them of their land."

This is an outrageous fiction. It employs insulting language, invents history, and abandons legitimacy. There was no conquest of the Tlingit by force of arms. There was no treaty or constitutional provision to support what Congress did to them. The pernicious fiction of conquest was invented by the modern Supreme Court in an attempt to mask United States lawlessness.

A second, equally pernicious fiction, was invented by the Supreme Court in *Oliphant versus Suquamish Indian Tribe* in 1978. This time the fiction was not conquest but incorporation. Justice Rehnquist wrote: "Upon incorporation into the territory of the United States, the Indian tribes thereby



# Tribal Timber/Fish/Wildlife Programs 1988-1990



## EXECUTIVE SUMMARY

### WHAT IS TFW?

For the past three years tribes and tribal organizations in Washington State have participated in Timber/Fish Wildlife (TFW), a cooperative resource management process to address forest practices on state and private lands. The success of the agreement is built on a foundation of open participation by tribal governments, state agencies, the timber industries, and the general public. For the tribes, one of the primary components of the success of TFW has been the decision-making process that is based on consensus rather than majoritarian rule. The consensus decision-making process ensures the tribes have a meaningful role in the management of forest practices.

"Washington state's landmark Timber/Fish/Wildlife Agreement is as much a marvel today as it was the day it was reached. TFW is proof that timber, fish and wildlife management can be addressed as a whole - that all parties can be winners - without endlessly tying up the process in litigation and disputes. The success of this effort is due largely to the equal participation of all interested parties, including Washington's tribal nations.

I urge the Congress to continue to support tribal participation in Timber/Fish/Wildlife. For centuries, Indian tribes have earned their living from the land without irreparably damaging the resources. They know the importance of caring for the land that gives them life. It is a lesson from which we all can learn, especially in these modern times."

— Booth Gardner, Governor, State of Washington

### WHY TFW?

In the early 1970s forest management in Washington was a battlefield. Logging activities on state and private lands placed Indian tribes and conservationists at odds with the timber industry. State regulators had failed to assume a leadership role in resolving the impasse and the legal skirmishes were seriously escalating.

Tribes were faced with losses of natural fish production habitat in Washington. These losses were part of a mix of problems encountered with the increasing uses of the natural resources in the state, including the extensive logging of watersheds where salmon spawn. These losses threatened not only the livelihoods of tribal communities but the very basis of their culture and spirituality. Tribes were being pushed closer and closer to retaliation through demonstration and litigation. Fortunately, at the same time, tribes were experiencing many successes through the cooperative fishery management process being developed between the Washington Department of Fisheries and the treaty fishing tribes. Tribal leaders and state officials thought this cooperative approach could also be applied in the forest practices arena.

### HOW WAS SUCH A COMPLEX AND DIVISIVE ISSUE PACKAGED INTO THIS AGREEMENT?

The only thing that was certain in the spring of 1986 was more uncertainty over the management of forest lands in Washington State. More legal challenges would be filed. Timber companies would continue to slump in unstable market conditions. No real regulatory protection of fish, wildlife, water quality, and other environmental concerns could be guaranteed. The only thing that everyone agreed upon was that something had to be done. With a simple model of consensus-based problem solving before them and many complex issues in hand, TFW cooperators held over 100 meetings in a four-month period. That winter, the TFW Agreement was born.

### WHAT HAS TFW ACCOMPLISHED?

\* TFW has been hailed as a national model. The involvement of the tribes, industry, state agencies, and environmental groups in a common process is itself a remarkable achievement. When this is coupled with the process for integrating timber, wildlife, fisheries, water quality and cultural resources, it is unprecedented.

\* TFW has provided an alternative means other than litigation to implement the Stevens Treaties. The promises set forth in the treaties were quickly forgotten. Non-Indians dominated the limited resource. Development, timber harvesting and other factors severely reduced or destroyed vital habitat necessary for salmon. These pressures on the

tribes resulted in the federal government intervening on behalf of the tribes for the re-instatement of the Stevens Treaties. The provisions included a guaranteed share of fish. Another provision, not completely defined by the court, is an environmental right that ensures there will be fish to share. This provision, more than any other, has the most effect on TFW. Tribal and state officials realized that cooperation, rather than costly litigation, was the best way to accomplish the objectives of the treaties.

\* TFW has established a common set of goals and mechanisms to address future conflicts. TFW enables resource managers to respond to problems with site-specific solutions developed through cooperative problem solving.

Each tribe has developed a base level program that ensures tribal participation in TFW and Forest Practices Act regulations. Components of each tribal base level program include:

- Review and document Forest Practices Applications and identify those requiring field visits.
- Participate in field investigations as Interdisciplinary Team members.
- Participate as tribal representatives on TFW committees.
- Conduct long-range planning.

In addition to base programs, tribes are required to work on specific project-oriented problems within their respective regions. These specific projects include intensive management planning, ambient monitoring, data collection, water quality work, cultural and archaeological protection and habitat enhancement. The Northwest Indian Fisheries Commission, as a central coordinator, provides a clearinghouse, central database development, policy analysis, technical coordination, logistical support, long-range planning, and an information management system.

\* TFW provides benefits to the tribes, state, general public and timber industry. The coordinated approach provides a forum to integrate responsibilities and management authorities. This creates cost savings for all parties and dramatically improves efficiency. Avoidance of litigation creates a healthier use of funds for the future and a more stable economic environment for the timber industry and public. Comprehensive management protects the resource better than a series of court orders.

### WHAT DOES THE FUTURE HOLD AND HOW MUCH WILL IT COST?

First and foremost, it should be recognized that this cooperative process is a cost-saving mechanism. There is a considerable amount of experience with the costs

#### TIMBER/FISH/WILDLIFE PROGRAM TRIBAL ALLOCATION AND PROPOSAL FOR FY-1992

Tribe/Organization	FY-1985	FY-1989	FY-1990	FY-1991	FY-1992
Lummi Tribe	\$129,299	\$129,299	\$129,299	\$129,299	\$188,303
Nooksack Tribe	\$56,259	\$56,259	\$56,259	\$56,259	\$82,806
SKAGIT SYSTEM COOP:	\$70,812	\$70,812	\$70,812	\$150,000	\$195,967
Swinomish Tribe					
Upper Skagit Tribe					
Sauk-Sulentic Tribe					
Tulalip Tribe	\$92,232	\$92,232	\$92,232	\$95,232	\$312,669
Silligumish Tribe	\$3,000	\$3,000	\$3,000	\$50,000	\$108,725
Squamish Tribe	\$50,020	\$50,020	\$50,020	\$50,020	\$77,206
Muckleshoot Tribe	\$94,940	\$94,940	\$94,940	\$94,940	\$249,668
Puyallup Tribe	\$63,840	\$63,840	\$63,840	\$63,840	\$252,955
Nisqually Tribe	\$45,800	\$45,800	\$45,800	\$50,000	\$92,889
Squaxin Island Tribe	\$48,690	\$48,690	\$48,690	\$50,000	\$236,750
P-N-P TREATY COUNCIL:	\$130,000	\$130,000	\$130,000	\$150,000	\$264,550
Skokomish Tribe					
Port Gamble Tribe					
Jameson Tribe				\$50,000	\$50,000
Lower Elsie Tribe					
Makah Tribe	\$63,002	\$63,002	\$63,002	\$63,002	\$96,902
Hoh Tribe	\$34,238	\$43,238	\$43,238	\$50,000	\$64,000
Oullette Tribe	\$52,420	\$52,420	\$52,420	\$52,420	\$140,917
Quinalt Tribe	\$138,664	\$138,664	\$138,664	\$138,664	\$296,641
Chahalla Tribe	\$0	\$0	\$0	\$0	\$50,000
Shoshwater Tribe	\$0	\$0	\$0	\$0	\$50,000
Yakima Indian Nation	\$235,716	\$235,716	\$235,716	\$235,716	\$388,798
Colville Confederated Tribes	\$104,024	\$104,024	\$104,024	\$104,024	\$385,148
UPPER COL. UNITED TRIBES:	\$110,604	\$110,604	\$110,604	\$110,604	\$136,564
Spokane Tribe					
Kalispel Tribe					
NWIFC	\$477,440	\$468,440	\$468,440	\$256,980	\$480,000
<b>TOTAL</b>	<b>\$2,000,000</b>	<b>\$2,000,000</b>	<b>\$2,000,000</b>	<b>\$2,000,000</b>	<b>\$4,150,283</b>

In recognition of the increased needs for services and absence of increased budget for increased tasks, the NWIFC has re-allocated funds originally utilized for long-range planning.



associated with the alternative. This does not mean it is without costs. It means it is a wise investment in the short and long-term.

The state has already contributed more than \$15 million for its involvement in TFW. The timber industry has agreed to provide field and oversight participation, which when viewed in total of all landowners, is equal to or greater than that amount contributed by the state. Timber industry analysts have also estimated there is considerable costs associated with the regulatory changes agreed to in TFW. Environmental groups, even with their limited resources, have contributed \$350,000 per year. The other partner is the tribes.

Tribes have received TFW funding through the Bureau of Indian Affairs for the past three years due to Congressional support. These funds enable the tribes to manage and protect vital natural resources. Federal funding is appropriate for the trust responsibility of the U.S. to implement the Stevens Treaties.

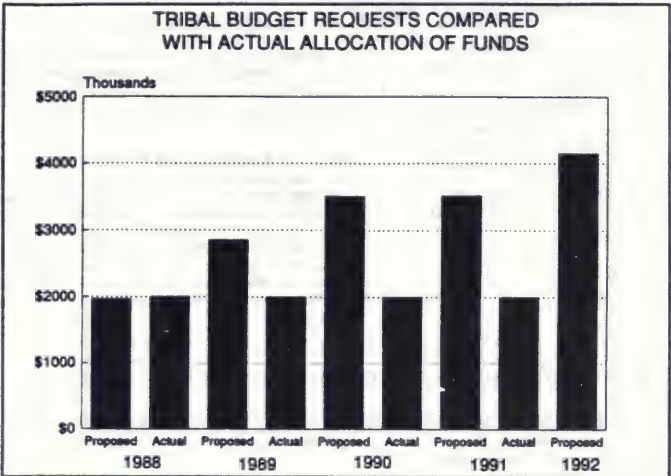
Initially, tribes presented to Congress and the Bureau of Indian Affairs what TFW would cost. The costs were expected to be increased incrementally as TFW was implemented. Unfortunately, this was not accomplished.

Today there are increased pressures on the tribes to continue their involvement in TFW. The state and timber industry recognize that the tribes are an integral part of forest management. Without tribal participation, there can be no consensus or resolution to current issues. This involvement has taxed the abilities and resources of the tribes, causing a shift in priorities away from long-range planning and base level program activities, and has moved tribes towards a more negative and reactive position.

The 1992 budget request of \$4,150,283 reflects only the overall implementation of the original TFW agreement, and not the emerging issues facing the tribes. These issues include new legislation to address wildlife concerns, cultural and archaeological concerns, and rapid conversion of forest lands to urban areas. The additional funds will shore up base level programs and replace funds previously slated for long-range planning and data collection. An estimated additional \$2.8 million would be necessary to adequately support participation in new legislative issues.

## IN CONCLUSION

Tribal involvement in TFW is at a threshold. TFW is based on the ability to move away from a reactive and negative approach to forest management and towards a positive, pro-active method. However, this requires that the focus be shifted towards long-range planning, refinement of goals, and development of comprehensive legislative and regulatory packages. This requires the tribes to stay in step with the state and timber industry during this transition. This proposed budget and report will explain past, current and evolving activities involving TFW. Thank you for your support.



## Introduction: Why TFW?

In the early 1970s, forest management in Washington was a battlefield. Logging activities on state and private forest lands placed Indian tribes and conservationists at odds with the timber industry. State regulators, meanwhile, failed to assume a leadership role in resolving the impasse.

Timber harvesting on state and private lands in Washington is regulated by the 1974 Forest Practices Act. Implementation of the Act is overseen by the state Forest Practices Board (FPB). In 1975, 1977 and 1982, the FPB revised regulations adopted as a result of the Act.

In 1986, the FPB was set to make another round of revisions addressing protection of streamside vegetation and cumulative effects of timber harvesting activities. Each previous set of changes in the Act had touched off new battles between the tribes, forest products industry, environmentalists, and state regulators.

The spring of 1986 was no different.

The package of proposed regulations was called a disaster for the timber industry, while advocates of fish and wildlife said the changes were inadequate.

The Washington Department of Natural Resources (DNR), the state agency charged with implementing the rules and regulations was faced with mounting legal challenges and increasing pressure from the timber industry, tribes, and environmental community.

The timber industry was faced with ongoing uncertainty and confrontation over forest practice regulations during a time of extremely poor market conditions. The result was an unfavorable business climate that showed little hope for improvement.

An event that provided a legal challenge to the state regulatory system and added to the uncertainty of the industry occurred in 1979, when the U.S. Supreme Court upheld treaty Indian fishing rights as defined in *U.S. v. Washington* (the Boldt Decision). The decision created considerable uncertainty among those entities regarding tribal authority to regulate activities in watersheds sustaining salmon runs.

The tribal right to habitat protection was reserved through treaties negotiated in the Northwest by Governor Isaac Stevens in 1854 and 1855. Each of the treaties contains similar language pertaining to fishing rights: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with the citizens of the territory...together with the privilege of hunting ... on open and unclaimed lands."

There were two distinct segments in the *U.S. v. Washington* litigation: Phase I and Phase II. Phase I involved the determination of the nature and extent of tribal fishery harvest rights. Those basic harvest rights were affirmed by the United States Supreme Court in 1979 and the federal court has retained jurisdiction to fully implement those fishing rights.

The tribes argued in Phase II that the right of taking fish incorporates the right to have treaty fish protected from environmental degradation (*U.S. v. Washington*, Phase II).

"Ever since we first came to the conclusion that 'there must be a better way' than confrontation to solve the problems surrounding our state's magnificent natural resources, the Washington Forest Protection Association, the treaty Indian tribes, and the Northwest Indian Fisheries Commission have shared a special affinity for each other's work.

The Native American tribes of Washington were key players in helping to find innovative solutions to immensely complex problems. Nowhere was their effort more crucial or more beneficial than in helping to turn conflict to consensus in the process known as Timber/ Fish/Wildlife (TFW). The result was a monument to cooperation, unique in American history. On the toughest issues, the tribes often served as the catalyst that led to agreement. The people of Washington are enjoying the benefits of that effort today, but the really big winner is our state's natural resources."

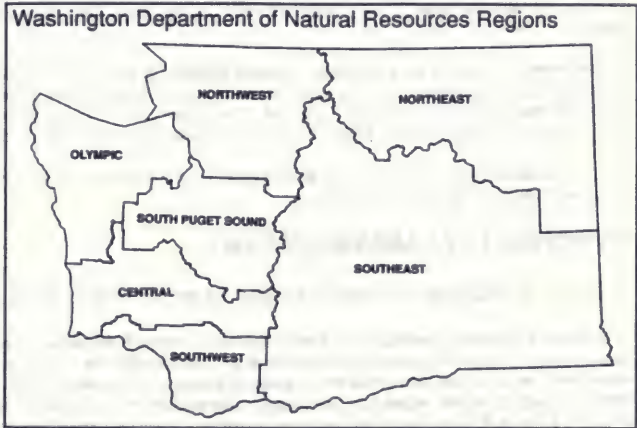
— Bill Jacobs, Executive Director, Washington Forest Protection Association

In response to the tribes' claim, the court stated, "the most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken. In order for salmon and steelhead trout to survive, specific environmental conditions must be present: (1) access to and from the sea, (2) an adequate supply of good-quality water, (3) a sufficient amount of suitable gravel for spawning and egg incubation, (4) an ample supply of food, and (5) sufficient shelter. An alteration of any one of these essential requirements will affect the production potential of anadromous fish. Furthermore, the court indicated that "it is undisputed that these conditions have been altered and that human activities have seriously degraded the quality of the fishery habitat." (*U.S. v. Washington*, 506 F. Supp. 187, 1980)

Over the years, there has been a gradual deterioration and loss of natural fish production habitat in Washington streams. Although there are many individual factors contributing to this, the general trend toward reduced production habitat is more the result of a combination of activities performed by man — activities which alter and destroy one or more habitat conditions required for successful fish production. Generally, these factors can be categorized under the broad headings of watershed alteration, such as forestry, water storage dams, industrial developments, stream channel alterations, and residential developments.

In 1980, Federal District Court Judge Orrick ruled in favor of the tribes. Orrick held that the State government must refrain from degrading fish habitat as required by the Stevens Treaties. "Were this trend to continue, the right to take fish would eventually be reduced to the right to dip one's net into the water...and bring it out empty." (Id.)

The Orrick decision and its implications created extensive public concern and debate. In response to Orrick's decision, a Washington State Assistant Attorney General stated, "the ruling could lead to the tribes' having veto power over real estate projects, logging practices, highway construction and the use of pesticides in the western half of the state."



The Assistant Attorney General went on to say: "The decision could affect literally everything that touches the environment. The potential for impact on the economy and development and use of resources would be substantially greater under this decision than anything we've seen under the 1974 decision (Phase I). This may address how we continue our forest practices, the use of pesticides, what water may be withdrawn from rivers, where you can build highways and docks, real estate development and shopping centers — the whole bit."

Though the case is still pending, Phase II issues and impacts remain. The parties of *U.S. v. Washington* recognized the potential for litigation of the Phase II issues. The federal government, as trustee for the tribes, is responsible and accountable to ensure the tribes' treaty rights are fully protected.

In the spring of 1986, the only thing that was certain was more uncertainty over the management of forest lands in Washington State. More legal challenges would be filed, the timber industry would continue to slump in unstable market conditions, and no real regulatory protection of fish, wildlife, water quality and other environmental concerns could be guaranteed. All of the parties had reached the same fork in the road. A decision had to be made.



Cooperation by all of the parties was not an option that had been considered up to that point in 1986. The treaty Indian tribes had seen how cooperation with the state had led to improved management of the fishery resource. In the summer of 1986, timber industry representative Stu Bledsoe, Executive Director of the Washington Forest Protection Association, was invited to attend a meeting of the Northwest Indian Fisheries Commission. Commission Chairman Bill Frank, Jr. asked Bledsoe if the timber industry would be willing to discuss forest practices with a goal of finding common ground that could serve as the foundation for cooperation. The historic Timber/Fish/Wildlife (TFW) Agreement was born.

There was a bond of cooperation between all of the parties that, just months before, had been on the verge of continuing down the same deeply rutted road of confrontation.

With the Northwest Renewable Resources Center serving as mediator, about 40 representatives from the tribes, timber industry, environmental organizations, and state government were invited to a three-day retreat in late July. They were asked to explore the possibility that they could "agree to agree".

Lists of goals and needs were developed for each party. Possible answers that offered "win-win" solutions to old problems were discussed. Defensive positions were left at the door. Parties that had never before sat down together in the spirit of cooperation found that they could even agree on some issues. They saw a way to end the war in the woods.

TFW cooperators agreed to try and resolve all issues identified at the retreat. This was accomplished through an intensive series of 100 meetings in a four-month period. A Policy Group, Working Group and various subcommittees developed a draft agreement in December 1986 and a final agreement in February 1987 that was reviewed through a public process, adopted by the Forest Practices Board, and implemented unanimously through the state legislature.

The result is an agreement that is unique in the nation. TFW is not an institution. It is a living process built on trust, commitment and above all, cooperation.

## What has TFW Accomplished?

TFW has provided an alternative means for implementing the Stevens Treaties.

A century ago, salmon abounded in the Pacific Northwest. Almost every accessible area, even in the deep interior, nurtured runs of salmon which renewed themselves as they had for millennia. However, in 1850s, the United States entered into various treaties with Indian tribes located in Washington Territory in efforts to peacefully settle the West. In these treaties, the Indians traded their land interest in the territory for the exclusive use of the lands within the reservations, the right of continued fishing, and other guarantees. When the treaties were negotiated, fish were the mainstay of the Indians' economy and the focal point of their culture. All the tribes of the Northwest shared a vital and unifying dependence on anadromous fish.

Unfortunately, the provisions in the treaties guaranteeing the tribes reserved rights to fish were soon forgotten. The institutional framework of state government and laws evolved to the point that non-Indian settlers were allowed to monopolize the fisheries resource to the extent of almost total exclusion of the Indians. Federal and state institutions also allowed the urbanization and intensive settlement of the area, the rapid development of dams for electrical power, logging and irrigation, and the nonpoint source pollution of the watersheds which reduced the quality and amount of accessible spawning grounds and rearing capacity for the treaty protected fishery resources.

As a result of the forgotten promises and obligations of the federal government, the tribes sought redress and implementation of the Stevens Treaties provisions through the courts. The legal battles began at the turn of the century and continued into the early 1980s. Beginning in the early 1980s, however, there was recognition by tribal and state governments that cooperation, rather than litigation, could accomplish the objectives of implementing the Stevens Treaties. Cooperative consensus-building processes like TFW can avoid the legal issues and costs, both political and financial. Recognition of the need to work with the tribes on a government-to-government basis is creating institutional change within state and local governments without the need for litigation. Cooperative efforts

such as the unprecedented Centennial Accord between the tribes and Washington State, TFW and others can serve as alternative mechanisms to litigation for the implementation of the Stevens Treaties. Institutional changes within state and local governments are providing opportunities to develop relationships with the tribes as individual governments with legitimate issues and concerns that have to be addressed in a consensus-based system of decision-making.

However, to ensure the ability of the tribes to participate in cooperative natural resource processes that affect their governmental interests, funding support must also be institutionalized. The federal government must include base level funding for tribal planning and implementation of these types of efforts. The federal government's role is no less critical than any other participant to address some of the most complex and socially significant issues in natural resource management and tribal-state-federal relations.

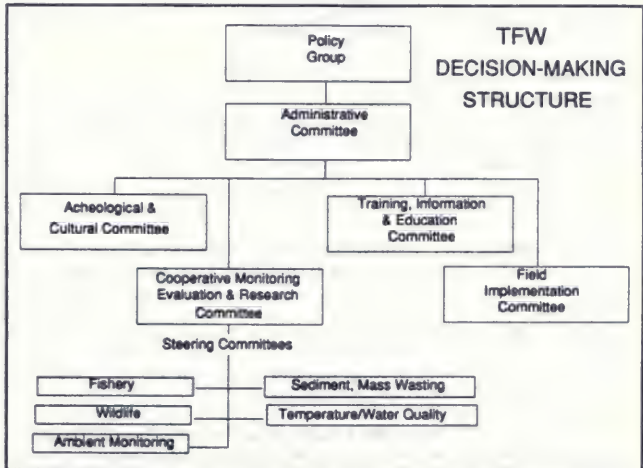
TFW has established a framework for tribal governments to affect policy and technical decision-making.

As a cooperative process to address natural resource management, TFW has provided a mechanism for the tribes to participate in both policy and technical decision-making that affect their interests and resources. Alternative processes to litigation provide a legitimate role for tribal governments in the management of the resources and land uses that impact issues of tribal governmental concern. Implementation of either court orders or cooperative agreements will require adequate financial resources for tribal policy and technical participation as co-managers of the natural resources. Federal support for tribes to implement cooperative agreements, of course, are beneficial for long-term collaboration and mutually supportive accomplishments.

TFW has established a common set of goals.

TFW is an experiment that combines the experience of the parties through consensus-built decisions. Implementation of the decisions is then monitored by the participants. To accomplish this, extensive discussions are held and planning is conducted to identify expectations before a decision is implemented. The decision is then monitored and evaluated to determine whether to retain or change decisions based on new experience and/or research. The annual TFW reviews provide the forum for interim evaluation. However, the parties have also agreed to a long-term commitment of eight years in order for some research results to be assessed.

The TFW Agreement is not cast in stone. Participants understand and encourage evaluation and modification of the Agreement to the extent the changes improve forest practices. Experiences will determine if the needs of the parties are being met. This is the Adaptive Management system incorporated into the Agreement, which supports monitoring and evaluation of the effectiveness of the process.



The Agreement contains the sum of the parties knowledge and experience related to the agreed-upon goals that guide TFW discussions. Following are the five goals that all parties embrace and support.

The wildlife resource goal is to provide the greatest diversity of habitats, particularly riparian, wetlands and old growth habitats. The goal also seeks to ensure the greatest diversity of species within those habitats for the survival and reproduction of native wildlife on forest lands.

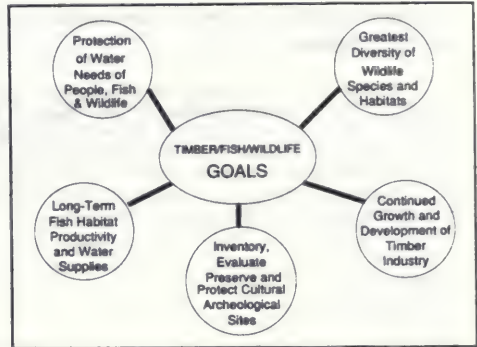
The fishery resource goals are long-term habitat productivity for natural and wild fish, and the protection of hatchery water supplies.

The water quantity and quality goals are protection of the water needs of people, fish and wildlife.

The archaeological and cultural goals are to develop a process to inventory archaeological and cultural places in managed forests. Another part of the goal is to inventory, evaluate, preserve and protect traditional cultural and archeological spaces, and ensure tribal access.

The timber resource goal is the continued growth and development of the state's forest products industry which has a vital stake in the long-term productivity of both the public and private forest land base.

In addition to these goals, participants recognized that the negotiations could not succeed without agreeing on certain groundrules to govern expectations and behavior of all parties. The importance of working together to seek resolutions satisfactory to all points of view has been recognized as vital to the future success of this effort.



TFW has developed a mechanism to address future conflicts and emerging issues.

TFW is a process based upon a broad representation of governmental, public, political, legal, and economic interests. The foundation of the process is that decision-making is based on consensus rather than majoritarian rule. This process is different than the traditional administrative process utilized by state and local governments. The traditional administrative process is usually comprised of a central regulatory body (such as the Forest Practice Board), which develops proposals and options (such as the State Environmental Policy Act (SEPA) or other regulatory mechanisms), incorporates public testimony, and then determines the best course of action (generally a compromise of all the concerns). TFW, however, is composed of the various "stake-holders" and allows them to determine the balance of all interests and identify the best course of action.

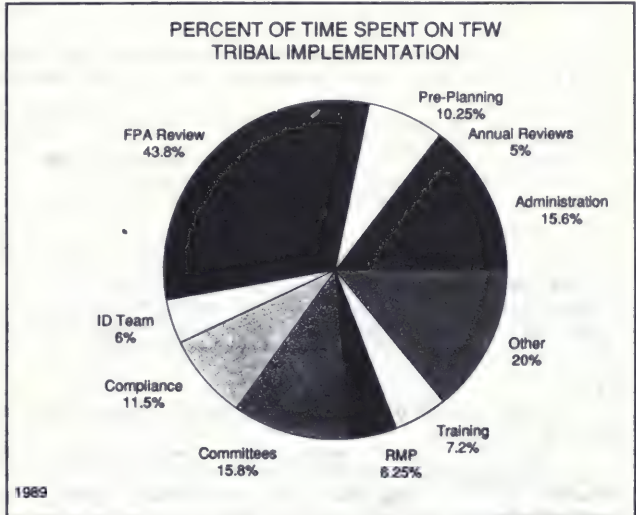
The success of TFW has provided a model approach for other states and Canada to utilize when addressing forest practices and resolving state/tribal or interstate disputes over natural resource issues. Tribal participants have given presentations in Alaska, Idaho, Oregon, North Carolina, North Dakota, Wisconsin, Minnesota, Michigan, and Canada on the success of the TFW process. Several of the states have implemented a consensus-based process with similar success. Canada is considering applying this approach to issues involving forest practices and Indian fishing rights. The State of Washington has begun to implement consensus-building processes in other administrative functions of government to address tribal and natural resource issues. These include new and emerging issues involving forest practices on state and private lands, an "Agriculture-Natural Resource Forum" to deal with conflicts between agricultural practices and protection of the environment and human health, and more recently, a process to address water resource planning throughout the state.



## TFW Provides Benefits to the State, General Public, and Timber Industry:

A coordinated approach of multi-governments and agencies has provided greater opportunities to integrate responsibilities and management authorities. Integration of these efforts has resulted in more efficient use of limited financial and professional resources for all parties. A collaborative resource management approach instills cooperative relations, more efficient implementation and, as a result, greater ability to avoid litigation.

For the timber industry and general public, TFW has provided greater stability and predictability of forest management regulations and better protection of the public's resources. Predictability and stability are the cornerstone of the industry's economics. TFW provides an opportunity for the industry and public to participate in the management of the timber and natural resources. Participation by private landowners and the public in the management of the resources allows for cooperative and efficient implementation of forest practice rules and regulations. The TFW cooperative management approach also reduces the need for extensive compliance and enforcement of the regulations. Furthermore, cooperative participation by industry and the general public has helped foster better relations with tribal communities.



Given the rapid expansion of commercial logging activities fueled by higher than expected prices, it has become increasingly difficult to complete basic TFW activities. In addition, other processes and new legislation have further exacerbated the problem.

## TRIBAL TFW ACTIVITIES:

Each tribe or tribal organization operates a base level TFW program that ensures tribal participation in TFW and Forest Practices Act regulation. The Department of Natural Resources (DNR) is the lead agency for administering the Forest Practices Act and has final decision making authority. TFW opened the door for tribes to have direct input of their specific concerns. It also provided tribal technical expertise to aid in more informed decision-making.

The base level of activities varies by tribe depending on factors such as the size of the geographic management area, number of Forest Practices Applications (FPAs) submitted in their area, and the number of miles of stream habitat to be managed. Components of each tribal base level program include:

- Review and document FPAs; identify those requiring field visits.
- Participate in field investigations such as Interdisciplinary (ID) team reviews.
- Participate as designated tribal representatives on TFW committees.

Following is a summary of tribal TFW activities for Fiscal Years 88, 89, and 90. Also included is a description of a specific tribal effort to address concerns within their area. More detailed information is available by contacting the tribes, Northwest Indian Fisheries Commission, or the Portland Area Office of the Bureau of Indian Affairs.

## LUMMI TRIBE

### FY 88

- \* Conducted channel morphology studies, including surveys of channel cross-sections and pool dimensions. Studies provide information on gross changes to channel morphology and impacts to habitat used by salmon in various life stages.
- \* Participated in Canyon Creek Technical Committee, a multi-agency group focused on remediation of stream habitats damaged by past logging practices.
- \* Provided technical assistance to Nooksack Tribe for TFW stream rehabilitation pilot project.
- \* Participated in initial development of TFW Orphaned Roads Pilot Project.
- \* Provided technical and logistical assistance to geology research being conducted in a critical watershed in the Nooksack River basin.
- \* Initiated contact with state and private sector groups announcing tribal cultural and archaeological program.
- \* Completed preliminary inventory of cultural use sites, areas and resources for use in tribal database.
- \* Initiated cross-cultural workshops with Department of Natural Resources (DNR).
- \* Addressed school children about fish habitat and geology for local "Day in the Woods" Program.
- \* Committees and training: TFW Policy Group; Administrative Committee; Sediment, Hydrology and Mass Wasting Committee (SHAM); Slope Stability Workshop; Ambient Monitoring Workshop; and computer software classes.

### FY 89

- \* Assisted with multi-agency Deadhorse Creek acclimation pond. Pond is part of natural stock recovery program on North Fork Nooksack River.
- \* Worked with Georgia-Pacific Corp. and agencies on road reconstruction project in West Cornell. Result was more stable road location, reduction of sediment, and improved long-term channel stability.
- \* Participated in Nooksack Co-op Group. Group is proto-TFW and is focused on resource rehabilitation in the Nooksack basin.
- \* Served on Orphaned Roads Ad Hoc Committee. Provided field assistance to DNR for pilot project site.
- \* Participated in Sustainable Forestry Roundtable (new legislation). Provided technical assistance to Rate of Harvest Steering Committee.
- \* Participated in Racehorse Creek Flood Emergency Response Team. Addressed potential for channel shift and resultant damage to fish habitat and private homes.
- \* Expanded inventory of cultural use sites to include Whatcom County and San Juan County. Accompanied TFW Interdisciplinary Teams to potential impact sites and completed draft cultural resource management plan for use on state and private lands.
- \* Continued cross-cultural workshops.
- \* Committees and training: TFW Policy Group, Administrative Committee, SHAM Committee, Fish Committee, Northwest Region Team Building, conference on forestry and forest systems, and Ambient Monitoring Committee.

### FY 90

- \* Initiated basin studies in two watersheds. Purpose is to better plan resource management to prevent impacts to streams and improve stream recovery.
- \* Continued Sustainable Forestry Roundtable (new legislation) participation.
- \* Presented overview of Nooksack fisheries and forestry for Agricultural/Forestry group.
- \* Worked with U.S. Forest Service on cumulative effects methodology.
- \* Participated in Spring Chinook Technical Group.
- \* Wrote fisheries section and provided technical review of South Fork Sub-area background document for Whatcom County Planning Department.
- \* Accompanied TFW Interdisciplinary Teams to potential cultural resources impact sites including those on the north and south forks of the Nooksack River and San Juan Islands. Completed draft of cultural resource management plan.
- \* Continued cultural values workshops.

\* Committees and training; TFW Policy Group; Administrative Committee; SHAM Committee; Cooperative Monitoring, Evaluation and Research Committee; basin screening work group; slope stability workshop; American Geophysical Union debris flow field trip.

The Lummi Tribe conducts an extensive cultural and archaeological program as part of its TFW effort. The Lummi TFW Cultural Resource Program is designed to identify and protect cultural and archaeological sites, areas and resources in the tribe's traditional area.

Over 24 cultural use sites on state and private lands in the tribe's traditional area have been identified through the program. These include vision questing sites, cleansing sites, and areas where traditional medicines and ceremonial materials are collected. Information about the sites has been compiled by the tribe and is used in evaluating the nature and extent of cultural impacts from proposed Forest Practice Applications. The tribe is finalizing a Cultural Resource Management Plan that can be used by state, federal and other agencies to manage and protect these sites.

The tribe's TFW Cultural Resource Program has been extensively involved in the Values Project Northwest, which is designed to improve cross-cultural communication between resource-dependent agencies and affected tribal communities. The project, coordinated by the tribe and the Florence R. Kluckhohn Center, brought together tribal staff and community members with managers and field personnel from the state Department of Natural Resources to learn more about value-based differences and how well, or poorly, these values are understood.

## NOOKSACK TRIBE

### FY 88

- \* Staff reviewed about 350 Forest Practice Applications (FPAs) and responded on 37 with comments to DNR. This included attending eight ID teams pertaining to the concerns of the Nooksack Tribe.
- \* The Nooksack Tribe worked jointly with the Lummi Tribe in rehabilitation projects in river basins that have significant erosion problems.
- \* Staff attended a workshop on slope stability as it relates to forest practices.



Paul Johnny, Nooksack TFW technician, rolls a log into place as part of the tribe's efforts in the TFW Corrective Action Program.

### FY 89

- \* Staff continued to review about 350 FPAs and responded on 50 with comments to DNR. This included attending five ID teams.
- \* The Nooksack Tribe continued to work jointly with the Lummi Tribe in rehabilitation projects in river basins that have significant erosion problems.
- \* Staff participated in ambient monitoring field methods training.
- \* Staff collected data for the Ambient Monitoring Program; completed 7.2 stream miles within the North Fork Nooksack drainage.

### FY 90

- \* Staff continued to review about 350 FPAs and responded on 50 with comments to DNR. This included attending three ID teams.
- \* The Nooksack Tribe continued to work jointly with the Lummi Tribe in rehabilitation projects in river basins that have significant erosion problems.
- \* Staff participated in ambient monitoring workshops, anthropological courses, and computer classes.
- \* Worked jointly with the Lummi Tribe to collect ambient monitoring data this year.



The Nooksack Tribe has been extensively involved in stream rehabilitation and habitat restoration from the early stages of TFW.

Under the TFW Corrective Action Program, the tribe, U.S. Forest Service, Department of Natural Resources and several timber companies joined forces to rehabilitate and enhance salmon and steelhead habitat in the Nooksack River watershed. The program focused on the upper reaches of the watershed, where past logging practices created landslides, unstable stream channels and debris dams that have damaged or destroyed large amounts of fish habitat.

On Racehorse Creek, tribal and state workers slowed erosion of the steep, mostly bare slopes lining the stream by anchoring logs and root wads along the creek. In addition to slowing the rate of erosion along the creek, side channel rearing habitat was created for naturally spawning salmon and steelhead. On Canyon Creek, workers anchored logs in the stream to trap gravel and increase salmon spawning habitat. An additional 12 miles of critical salmon spawning habitat was opened up on the river's South Fork after workers carved a four-step series of pools in a 20-foot waterfall that had blocked fish passage.

The Nooksack watershed was one of two selected for the Corrective Action Program, which served as a statewide model for implementation of TFW.

## SKAGIT SYSTEM COOPERATIVE (SSC): SWINOMISH TRIBE; UPPER SKAGIT TRIBE; SAUK-SUIATLE TRIBE

### FY 88

- \* Organized SSC TFW program.
- \* Hired full-time staff person in August 1988 to work on the TFW Program (two months in FY-1988).
- \* All forest practice applications (226, covering approximately 12,000 acres) received from the beginning of the TFW program were entered into a computer database for analysis.
- \* Staff participated in two ID teams. Nine field days were spent reviewing forest practice sites, three days were spent in training, and four days in meeting. The balance of the time was spent in developing the database and setting up procedures to implement the program.

### FY 89

- \* SSC staff increased field work involvement including ground truthing of potential fisheries impacts, expansion of interaction with DNR, and increased participation in "Big Picture" TFW activities.
- \* Staff participated on the committee to develop new water typing methods.
- \* SSC developed a work plan for their program for TFW which consisted of objectives and methods for meeting those objectives.
- \* SSC received and reviewed 343 forest practice applications involving approximately 24,000 acres for potential fishery impacts and entered information into the database for analysis.
- \* The effort in FY-1989 involved 85 days in field review, 21 days of training, and 35 days in meetings. The balance of the time spent in the office.
- \* Seventeen FPAs required formal written comments and numerous others were addressed through informal meetings or phone calls.

### FY 90

- \* Additional staff were hired in order to meet SSC TFW objectives outlined in the work plan.
- \* Staff participated in Sustainable Forestry Roundtable (new legislation) activities such as the Forest Practice Board Areas of Concern.
- \* SSC received, reviewed and documented 363 forest practice applications involving over 21,000 acres.
- \* Staff continued to participate on ID teams which has resulted in significant gains in fishery resource protection.
- \* SSC has used its data base to track forest practices by sub-basin in an 80-square-mile test area of the Skagit River to monitor timber harvest rates and locations in an area where streams are severely aggrading.
- \* SSC has cooperated with private timber companies and the State Department of Fisheries in stream restoration projects. For example, SSC jointly installed in-stream log structures and cooperated on a rearing pond project.
- \* SSC initiated monitoring projects on streams to track stream recovery from timber harvest impacts.
- \* SSC has conducted stream retying and has seen a productive component of habitat protection in the Skagit watershed. We have electroshocked and upgraded 21 streams to type 3, which has resulted in substantially greater fisheries habitat protection.

\* Staff alerted DNR to potential fishery habitat problems. Without the tribal TFW program these habitat issues would have gone unnoticed and may have resulted in significant damage to the fishery resource.

Skagit System Cooperative (SSC) tribes are active primarily in the Skagit River basin. SSC personnel have cooperated with private timber companies and the State Department of Fisheries in a number of stream restoration projects. SSC, Washington Department of Fisheries and the Port Blakely Mill Company jointly installed in-stream log structures in a tributary to Hansen Creek that will substantially improve fish habitat. In addition, SSC is cooperating with the U.S. Forest Service on a rearing pond project in the Bacon Creek drainage.

SSC TFW personnel also recently began monitoring projects on a tributary to Hansen Creek and in lower Finney Creek to track stream recovery from timber harvest impacts.

## TULALIP TRIBES

### FY 88

- \* Conducted Temperature Monitoring and Critical Development Study, which included placing and analysis of data from 13 thermographs and one weather station.
- \* Conducted ambient monitoring activities. Developed work plan and monitored 36 miles of habitat on specific stream reaches.
- \* Conducted water quality collection and analysis as a result of geologic failures on the South Fork Stillaguamish River. Collected and analyzed water for turbidity and suspended solids. Conducted in-stream analysis and monitoring of substrate and channel physical changes.
- \* Participated on the following TFW committees: Water Quality Steering Committee; Sediment, Hydrology and Mass Wasting Steering Committee; Fish Steering Committee; Cultural Resources Steering Committee; Administrative Committee; Policy Committee.
- \* Attended the following TFW training sessions: TFW Training; In-stream Flow Incremental Methodology; Recognizing Archaeological Sites; Remote sensing; Slope stability, Geomorphology, Channel Morphology and Hydrology.

### FY 89

- \* Conducted ambient monitoring on Deer Creek, Woods Creek, Portage Creek, and several tributaries to the South Fork Stillaguamish River.
- \* Continued and expanded thermograph program.
- \* Took active role in the Lake

"The Washington Environmental Council wholeheartedly supports Congressional funding for Washington Indian tribes participating in the Timber/Fish/Wildlife process.

The technical skills of the various tribes and the full and generous use of those skills in the many cooperative forums is also vital. The months of long negotiations on the South Forks of the Tolt River are just an example. The Tulalip Tribes geologist and fisheries experts were constantly involved and provided the information and willingness to work together that made a resolution possible.

This is just one example of the many places where the tribes are involved day in and day out. We can neither go on, nor succeed without them."  
— Marcy Golde, Director, Washington Environmental Council Forestry Project

Roesiger monitoring team appointed to monitor FPA compliance in the basin.

- \* Initiated and participated in a cumulative effects analysis project in the North Fork Tolt River basin.
- \* Participated in an orphaned roads inventory in the Stillaguamish River basin.
- \* Participated in the following TFW committees: Sediment, Hydrology and Mass Wasting Steering Committee; Fish Steering Committee; Cultural Resources Steering Committee; Administrative Committee; Policy Committee; Wildlife Technical Advisory Committee; Deer Creek Technical Committee.
- \* Attended the following TFW training sessions: TFW Training; TFW Ambient Monitoring workshop; "Forestry and Landslides" workshop; Forest Hydrology course; Wildlife Diversity in Landscape Patterns; Geographic Information System workshop; Training in operating and programming Omnidata Polycorders.

### FY 90

- \* Continued North Fork Tolt River cumulative effects assessment.
- \* Developed proposals for Dry Creek and Benson Creek habitat rehabilitation.
- \* Developed Woods Creek cumulative effects assessment and proposal.
- \* Participated in Department of Natural Resources geographic information system project.
- \* Conducted Watershed and Stream Channel Cumulative Effects project.

- \* Participated in Department of Natural Resources Orphaned Roads Project.
- \* Participated on the following TFW committees: Sediment, Hydrology and Mass Wasting Steering Committee; Fish Steering Committee; Cultural Resources Steering Committee; Administrative Committee; Policy Committee; Wildlife Steering Committee; Deer Creek Technical Committee; Sustainable Forestry Roundtable (new legislation) participation: Wildlife Committee; Thresholds Committee; Rate of Harvest Committee; North Fork Tolt River Geotechnical Committee.

The Tulalip Tribes are active TFW participants in both the Stillaguamish and Snohomish watersheds. Tribal personnel conduct extensive analyses of the cumulative effects of forest practices in the two watersheds and review approximately 700 FPAs annually.

In addition to site reviews, tribal TFW staff have performed intensive field surveys to assess major geologic and biological impacts of forest practices in the watersheds. For example, field investigations were conducted on major geologic failures on the North Fork Stillaguamish, the Skykomish and a tributary to the Snoqualmie. A debris flow on a tributary to the North Fork Stillaguamish was surveyed to determine its cause and origin, and a water quality problem as a result of forest practice activity was investigated on a tributary to the South Fork Stillaguamish.

In most cases where forest practice applications were reviewed by staff in the field, changes were recommended to reduce potential impacts to fish, wildlife, water quality, cultural and archaeological, and other resources.

## STILLAGUAMISH TRIBE

### FY 88

- \* Reviewed Forest Practice Applications (FPAs).
- \* Attended field interdisciplinary (ID) teams on priority sales.
- \* Began to develop a database for tracking timber harvests by basin.

### 1989

- \* Continued to review FPAs
- \* Participated on field ID teams.
- \* Monitored the Stillaguamish basin for compliance and impacts.
- \* Attended several training sessions on logging practices, slope stability and channel morphology.

### FY 90

- \* Continued to review FPAs
- \* Participated on field ID teams
- \* Developed a computer database for timber activities and for cultural and archeological resources.
- \* Attended meetings as a member of the TFW archeological and cultural committee.
- \* Began to organize TFW breakfast meetings in Stillaguamish area.
- \* Wrote grant to conduct an orphaned road investigation in the Stillaguamish River basin.
- \* Surveyed and electroshocked streams to determine stream classification types.
- \* Worked with other tribes on Sustainable Forestry Roundtable (new legislation) technical issues.

TFW breeds cooperation outside of the formal process of the agreement. For example, the Stillaguamish Early Action Watershed Planning process has created an arena for TFW cooperators and the U.S. Forest Service to work on a basin wide management plan. By using the systems approach, the participants can address the forest practice impacts and their relationship to agricultural, urban runoff and septic impacts.

A cooperative landslide stabilization project is ongoing in the Deer Creek Basin. Georgia Pacific, the Department of Natural Resources and the U.S. Forest Service have all donated labor and services to the effort to protect the fish resources of the river system from the effects of the slide.

In addition, the tribal TFW program recently received a Department of Ecology Centennial Clean Water Grant to conduct an orphaned forest road inventory in the Stillaguamish Basin. All local TFW participants will be involved in the project.



## SUQUAMISH TRIBE

### FY 88

- \* Developed Suquamish tribal TFW program. Established office, hired personnel, developed preliminary procedures for processing permits, notification and information management.
- \* Developed working relationship with other TFW participants.
- \* Participated in TFW training.
- \* Conducted Forest Practice Application (FPA) review, both field and office.
- \* Coordinated with other agencies to develop recommended conditions on FPAs.
- \* Conducted reviews of selected sites both before and after timber harvests.
- \* Raised awareness of regulators to environmental problems.

### FY 89

- \* Conducted FPA review, both office and field.
- \* Coordinated with other agencies to develop conditions for FPAs.
- \* Conducted public education (presentations and participation with citizens).
- \* Raised awareness of regulators to environmental problems.
- \* Conducted environmental monitoring (flow monitoring, adult escapement, and habitat monitoring).

### FY 90

- \* Conducted FPA review, both office and field.
- \* Coordinated with other agencies to develop conditions for FPAs.
- \* Conducted public education (presentations and participation with citizens).
- \* Raised awareness of regulators to environmental problems.
- \* Conducted environmental monitoring (flow monitoring, adult escapement, and habitat monitoring).
- \* Developed working relationship with other TFW participants.
- \* Training: TFW orientation; Geographic Information System seminar; and ambient monitoring training.

Conversion of forest lands to urban areas is proceeding at a rapid pace in many parts of Washington, especially on the Kitsap Peninsula.

Because the Kitsap Peninsula is an area of low land gradient, its streams are relatively small and its watersheds are riddled with wetlands. In addition to these unique characteristics, the area is rapidly urbanizing. As a result, Suquamish Tribe TFW personnel spend a great deal of time on forest practice issues related to conversion of land from managed forest to other land use and harvesting in wetlands. Numerous site visits are conducted with various parties for wetland harvest areas, before, during and after timber harvesting.

Tribal TFW staff also have been assisting Kitsap County government during its transition process of developing a Forest Practices Application review process.

## MUCKLESHOOT TRIBE

### FY 88

- \* Established working relationships with other agencies including industry, city, county, state, federal, private organizations, and other tribes. Obtained equipment for effective office, field work, and monitoring.
- \* Reviewed 216 Forest Practice Applications (FPAs), provided written and oral comments, and participated in Interdisciplinary (ID) team reviews.
- \* Monitored activities and research within the scope of the 19 projects of the Cooperative Monitoring, Evaluation and Research Committee.
- \* Attained mitigation by Weyerhaeuser Company to enhance the Greenwater River with eight permanent fish habitat structures. These structures were constructed of logs, and designed by Muckleshoot TFW staff. The endeavor was in part a mitigation effort for damage caused by a timber harvest.

"Participation by Washington State Indian tribes has been an important cornerstone in successful Timber/Fish/Wildlife negotiations and plan implementation. Their cultural and economic investments in the long-term health of our natural resources are a force in support of positive change. They have served as a point of pressure in our battle to improve the means by which we protect this state's natural resources."

— Christine Gregoire, Director, Washington Department of Ecology

- \* Conducted ambient monitoring, including five months of extensive field work.
- \* Re-typed several streams, resulting in better fisheries protection. Streams suspected to contain fish were electroshocked, and if fish were found, the re-typing process upgraded the classification of the creek.
- \* Participated on the TFW Water Quality Steering Committee; Fisheries Committee; Temperature Steering committee.
- \* Operated and monitored three thermographs to monitor forest management and fisheries interaction as part of several on-going temperature monitoring studies.
- \* Participated on TFW Cultural/Archeological Committee.

## FY 89

- \* Participated in aerial photo shoot by the Department of Natural Resources (DNR). The organization and education acquired by the use of these photos greatly assisted in the effectiveness and efficiency for forest practice monitoring.
- \* Obtained valuable soils information from the DNR, and were trained in evaluation of slope stability. These resources have been a most valuable asset in forest practice monitoring.
- \* Attended annual pre- and post-harvest reviews with DNR, Plum Creek Timber Co., Champion International, and Weyerhaeuser Timber Co. Proposed harvest units were presented and commented upon, making it possible to address tribal concerns for resource protection in the design and structure of the timber sales.
- \* Re-typed several streams, resulting in better fisheries protection. Streams suspected to contain fish were electroshocked, and if fish were found, the re-typing process upgraded the classification of the creek.
- \* Reviewed 356 FPAs, provided written and oral comments, and participated in ID team reviews.
- \* Developed proposals for cooperative fish and wildlife enhancement projects within the tribe's Usual and Accustomed Area.
- \* Attended various meeting to coordinate activities, direction, monitoring projects, ideas, and field implementation. Meetings included: DNR breakfast meetings; Native American Fish and Wildlife Society conferences; American Fisheries Society symposiums; New Watershed Perspective Research; Sensitive Areas meetings; Wetlands training; geographic information system training; rate of harvest work groups; community planning; county coordination; landowner/developer coordination meetings. Several training and education workshops were also attended.

"The tribes have been involved in all aspects of TFW throughout the state. For example, they have participated in Interdisciplinary Teams, development of Resource Management Plans, review of Priority Issues, review of Forest Practice Applications, and field checking to monitor compliance with the Forest Practice Rules and Regulations and the TFW Agreement.

The tribes have been able to provide expertise in review of forest practice impacts to fish and fish habitat. Over time they have shown themselves to be effective in promoting additional protection to streams and instream habitat and have been an important ally in our efforts to protect fish and fish habitat."

— Joseph Blum, Director, Washington Department of Fisheries

## FY 90

- \* Reviewed Forest Practice Applications, provided written and oral comments, and participated in ID team reviews.
- \* Attended annual pre- and post-harvest reviews for DNR, Plum Creek Timber Co., Champion International, and Weyerhaeuser Timber Co. Proposed harvest units were presented and commented upon, making it possible to address tribal concerns for resource protection in the design and structure of the timber sales.
- \* Re-typed several streams, resulting in better fisheries protection. Streams suspected to contain fish were electroshocked, and if fish were found, the re-typing process upgraded the classification of the creek.
- \* Reviewed 413 FPAs, provided written and oral comments, and participated in Interdisciplinary Team reviews.
- \* Attended various meetings to coordinate activities, direction, monitoring projects, ideas, and field implementation. Meetings included: Native American Fish and Wildlife Society conferences; American Fisheries Society symposiums; New Watershed Perspective Research; Sensitive Areas meetings; Wetlands training; geographic information system training; Sustainable Forestry Roundtable (new legislation) participation; rate of harvest work groups; community planning; county coordination; landowner/developer coordination meetings. Several training and education workshops were also attended.

In cooperation with the TFW Cooperative Monitoring, Evaluation and Research Committee, Muckleshoot TFW personnel operate and monitor three thermographs on the Greenwater River. This is the second year of the project, which is examining river temperature trends to determine how clearcuts and insufficient streamside vegetation zones are affecting water temperatures in a portion of the river.

Muckleshoot TFW personnel monitor water and air temperatures at three stations along the river: one in an old-growth area providing adequate shade; one in an area that has been recently clearcut; and one at the river's mouth. A lack of shade from trees and other vegetation along streams can result in higher-than-normal water temperatures, which can harm salmon and other fish. This study is particularly important in light of a severely depressed run of spring chinook in the river system.

## PUYALLUP TRIBE

### FY 88

- \* Developed program and cultivated working relationships with other TFW participants.
- \* Reviewed and evaluated Forest Practice Applications (FPAs).
- \* Developed program support activities.
- \* Participated in timber harvest site reviews and Interdisciplinary (ID) team.

### FY 89

- \* Represented tribal concerns related to fish and wildlife habitat in watersheds within the tribe's area of interest. Concerns included in-stream parameters, channel features, riparian zone integrity, fish and wildlife habitat, wetland environments, and water quality concerns.
- \* Reviewed and evaluated FPAs.
- \* Participated in ambient monitoring training.
- \* Participated in ID team reviews.
- \* Participated in geographic information system (GIS) training.

### FY 90

- \* Reviewed and evaluated FPAs.
- \* Participated in TFW Program Data Management Subcommittee.
- \* Participated in stream rehabilitation project on Little Minter Creek in cooperation with state and local agencies and the Squaxin Island Tribe.
- \* Sponsored development of resource management planning teams for drainage in the tribe's area of concern. Served as leader and facilitator of workgroup.
- \* Served as tribal representative and secretary for the Sustainable Forestry Roundtable (new legislation) Mixed Use Zone Subcommittee.
- \* Participated in pre-harvest reviews which directly resulted in conditioning of environmentally sensitive harvest proposals.
- \* Participated in TFW Cooperative Monitoring, Evaluation, and Research Committee's Watershed Threshold Determination Subcommittee.
- \* Attended two GIS training sessions.
- \* Initiated efforts to standardize reporting capabilities of the computerized database containing FPA harvest information to reflect watershed rate of harvest information for drainage in the tribe's area of concern.

The Puyallup Tribe's TFW program was active in a cooperative stream rehabilitation project with the Washington Department of Fisheries, Kitsap County Conservation District, landowners, and the Squaxin Island Tribe. The project involved the design and placement of log weirs in Little Minter Creek in the Carr Inlet Watershed. Pool development and other important fish habitat factors in the stream were enhanced as a result of the project.

## NISQUALLY TRIBE

### FY 88

- \* After playing an instrumental role in the drafting and completion of the historic Timber, Fish, and Wildlife Agreement, the Nisqually Indian Tribe began building its TFW program by establishing base level activities. In addition, the tribe initiated preliminary habitat assessments of streams within the forested areas of the Nisqually River drainage.
- \* In conjunction with the Weyerhaeuser Timber Co., the tribes proposed initiation of a pilot project to develop a Resource Management Plan (RMP) for the Nisqually River.



## FY 89

- The tribe maintained and expanded the base-level activities of the TFW program, adding a computerized filing and tracking system using a database program to update and, if necessary, collate trends and sort and group data acquired in the FPA review task.
- Nisqually tribal TFW staff continued to assume a leadership role in the RMP process throughout the year, especially in the area of fisheries.

## FY 90

- In early 1990, the Nisqually Tribe's TFW staff directed the completion of the first cooperative RMP in Washington State. The plan area encompasses nearly 100,000 acres of forested timber land in the Nisqually River drainage. It centers on the Mashel River, the largest of the Nisqually River tributaries.
- After presentation to the public and the Washington Forest Practices Board, the Nisqually RMP began its three year implementation phase on July 1, 1990. The tribe, continuing its leadership role in the process, proposed the formation of implementation sub-committees to oversee the implementation of action items identified in the plan. The tribe currently chairs the fisheries/water quality implementation sub-committee.

Thirteen parties, including the Nisqually Tribe, state agencies, timber companies, environmental groups and others, voluntarily chose to participate in development of the plan. A primary goal of the plan is to find a balance in the use of the plan area for timber, fish, wildlife, water and other resources.

The tribe initiated implementation of certain RMP elements, including establishing an intra-gravel sediment analysis projection the Mashel River, and providing for sequential forest cutting in unstable soil areas. The tribe also conducted initial development of interim guidelines for protection of wetlands from impacts by forest practices, and identified a location for a hatchery satellite rearing pond within the RMP area. In addition, the tribe is establishing a process to encourage acquisitions to protect the Nisqually River corridor from non-forestry conversions.

Developing the RMP enabled the cooperators to learn more about each other, their concerns, programs, responsibilities and philosophies. It built solid, continuing communications which have already helped to clarify and resolve issues. This effort contributed in identifying short- and long-term cooperative efforts to balance timber and other natural and cultural resources in the Nisqually River drainage.

## SQUAXIN ISLAND TRIBE

## FY 88

- The first nine months of the program was spent on setting up the program, reviewing Forest Practices Applications (FPAs), and participating on the TFW Cooperative Monitoring, Evaluation and Research Steering Committees. The tribal TFW program was active in the evaluation and implementation of the TFW Ambient Monitoring Program, which included the training of Northwest Indian Fisheries Commission monitoring teams and the setting up of the tribe's own monitoring schedule.
- Served on TFW Water Quality Steering Committee.
- Attended workshops on slope stability and ambient monitoring.

## FY 89

- Fielded one full-time monitoring crew. Approximately 15 stream miles of baseline habitat data was collected.
- Served on TFW Field Implementation Committee; Sediment, Hydrology and Mass Wasting Committee; Water Quality Steering Committee; Cultural Steering Committee.
- Attended workshops on riparian resource management; TFW training; ambient monitoring, valley segments, geographic information systems, and wetlands delineation.
- Conducted mid-winter bald eagle surveys in cooperation with Washington Department of Wildlife.
- Initiated snag recruitment program with three local timber companies.
- Initiated stream re-classification and stream obstruction mapping.
- Participated in stream rehabilitation project on Little Minter Creek with state and Kitsap County agencies, local landowners and the Puyallup Tribe.
- Participated in TFW Second Annual Review.

## FY 90

- \* Increased efficiency of ambient monitoring program by working cooperatively with Washington Conservation Corps, which provided the tribe with full-time technicians. Twenty stream miles of data was collected during the field season. Maps were developed to show land use, mass wasting and bank cutting, vegetation types, anadromous barriers, anadromous fish habitat, and valley segments.
- \* Served on TFW Water Quality Steering Committee; Cultural Steering Committee; Thresholds Committee.
- \* Attended workshops on ambient monitoring; valley segments, and slope instability.
- \* Initiated cooperative efforts with Weyerhaeuser Co. to develop basin-wide plans in the Deschutes watershed to address cumulative impacts of timber harvesting to fish habitat.
- \* Conducted mid-winter bald eagle and spotted owl surveys in cooperation with Washington Department of Wildlife.
- \* Continued stream re-classification and stream obstruction mapping.
- \* Initiated Deschutes Road Inventory Project.
- \* Participated on Thurston County Erosion Control Board to develop ordinances addressing forestry in urban areas.
- \* Sponsored field trip for Thurston County Commissioners, staff, developers, and state agencies to review forest practice conversions.
- \* Participated in TFW Third Annual Review.

Effects of heavy logging activity and severe winter storms in 1989-90 caused severe damage to the resources in the Deschutes River Basin. With the cooperation of the landowner, Squaxin Island TFW personnel performed site reviews both in the air and on the ground. Road and in-stream failures were located and recorded. Results of the initial survey culminated in the implementation of the Deschutes Road Inventory Project.

In addition, approximately 35 stream miles of baseline fish habitat data has been collected by tribal TFW staff in the tribe's area of concern during the past two years.

## POINT NO POINT TREATY COUNCIL: JAMESTOWN KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE; LOWER ELWHA KLALLAM TRIBE; SKOKOMISH TRIBE

## FY 88

- \* Attended training sessions on cultural resource identification, slope stability, and design and layout of riparian management zones.
- \* Inventoried stream and habitat conditions in tribal usual and accustomed areas to retype streams and identify potential restoration projects.
- \* Conducted public education efforts, such as presentations to school groups and citizen groups on habitat protection and the TFW process.
- \* Worked with county governments on sensitive area planning and implementation.
- \* Reviewed U.S. Forest Service timber sale planning on federal lands to ensure consistent habitat protection within watersheds.

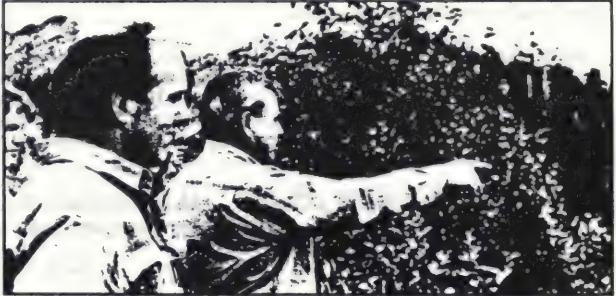
## FY 89

- \* Attended training sessions on cultural resource identification, slope stability, and design and layout of riparian management zones.
- \* Conducted public education efforts, such as presentations to school groups and citizen groups on habitat protection and the TFW process.
- \* Participated in citizen-government advisory groups, including Dungeness River Management Teams (DRMT).
- \* Conducted stock and habitat analysis of depressed fisheries and development of fisheries enhancement proposals on the Dungeness River in cooperation with the Washington Department of Fisheries.
- \* Initiated temperature monitoring in the Dungeness and Pysht rivers.
- \* Discovered, confirmed and ensured protection of cultural sites on Jimmy Come Lately Creek in cooperation with the U.S. Forest Service.
- \* Conducted surveys to map distribution and conducted sampling to estimate abundance of salmonids in Jimmy Come Lately and Siebert creeks, and Pysht River.
- \* Participated on TFW Ambient Monitoring Committee.

- Attended training sessions on cultural resource identification, slope stability, and design and layout of riparian management zones.
- Reviewed U.S. Forest Service timber sale planning on federal lands to ensure consistent habitat protection in watersheds.

## FY 90

- Participated in Fish Risk Assessment, Wildlife Risk Assessment and Priority Habitat and Species Committees.
- Restored planning efforts for depressed spring chinook salmon on Dungeness River in cooperation with private salmon enhancement corporations, state and federal resource agencies.
- Continued habitat surveys of Jimmy Come Lately Creek with U.S. Forest Service.
- Conducted habitat improvement planning in cooperation with U.S. Forest Service in the Skokomish drainage area.
- Initiated pilot study of sediment sampling in selected Treaty Council area streams.
- Pushed for recognition of a watershed impact assessment approach through identification of cumulative impact analysis of forest practice activities. This resulted in initiation of a problem area basins survey by the Forest Practices Board.
- Conducted ambient monitoring inventories on Gamble, Seabeck, and Snow creeks and the Tahuya and Skokomish rivers. Landowner contacts promoted tribal involvement in fisheries protection efforts.
- Assisted in development of Olympic Experimental State Forest Plan.
- Expanded public education/involvement activities to include presentations at the University of Washington and local high schools, professional organizations, environmental groups, and citizen monitoring groups.
- Attended training sessions on cultural resource identification, slope stability, and design and layout of riparian management zones.
- Reviewed U.S. Forest Service timber sale planning on federal lands to ensure consistent habitat protection in watersheds.



Jim Lichatowich, right, Point No Point Treaty Council habitat biologist, Mike Reed, Washington Environmental Council, and others survey the upper Pysht River for indications of cumulative effects from forest practices in the watershed.

Within the Point No Point Treaty Council Tribes' usual and accustomed area, TFW staff have surveyed and identified 22 basins requiring special attention by the Department of Natural Resources. In cooperation with TFW participants, the tribes are developing a process for review of forest practices in these basins to address our concerns.

The tribes have made ongoing efforts to coordinate with the Departments of Natural Resources, Ecology, Fisheries, and Wildlife as well as neighboring tribes to study the cumulative impact of logging on watersheds in the Treaty Council area. This work began on the Pysht River and will be extended to additional streams throughout the Treaty Council area. Sediment and temperature data collected by the tribes this summer has assisted in assessing critical habitat thresholds to ensure greater protection from impacts associated with commercial logging and conversion of forest land to urban development.

## MAKAH TRIBE

## FY 88

- Reviewed 225 Forest Practices Applications (FPAs), providing written and oral comments. Also participated in Interdisciplinary (ID) teams and pre-file reviews.
- Re-typed streams for more appropriate fisheries protection.



- \* Identified potential and existing resource problems, as well as forest practice violations; contacted agencies and landowners.
- \* Initiated temperature studies on the Sooes River. The drainage was heavily logged in the 1960s and 70s, with a corresponding loss of shade for the river. Because the river is the source of water for the tribal hatchery, it is crucial that problem areas be identified.
- \* Initiated discharge studies in the Sooes, Sail, and Sekiu rivers in an attempt to correlate discharge with stream surveys.
- \* Conducted weekly spawning surveys in the Sekiu River to document escapement. Information will also be used to assess natural productivity of streams and help correlate findings with land management activities, as well as to identify important areas in need of protection.
- \* Conducted summer low flow salmonid surveys to assess habitat and habitat deficiencies.
- \* Conducted bald eagle surveys along a 15-mile stretch of the Strait of Juan de Fuca.
- \* Hosted TFW Cultural and Archaeological workshop.

#### FY 89

- \* Reviewed 241 FPAs and provided written and oral comments; participated in ID teams and pre-file reviews.
- \* Re-typed streams to provide more appropriate fisheries protection.
- \* Expanded ambient monitoring program to include monitoring for suspended sediment in the Sekiu River.
- \* Identified potential and apparent resource problems as well as forest practice violations; contacted appropriate agencies and landowners.
- \* Sampled spawning gravels throughout Sekiu River for percentage of silts and sands, which are detrimental to salmon egg survival.
- \* Continued temperature study in Sooes River.
- \* Continued spawning surveys in the Sekiu River and expanded program to include Clallam and Pysht rivers.
- \* Continued summer low flow habitat surveys.
- \* Discovered two previously unknown cultural sites and registered them with the state office of Archaeological and Historical Preservation.

#### FY 90

- \* Reviewed 262 FPAs and provided written and oral comments; participated in ID teams and pre-file reviews.
- \* Completed Sekiu River sediment study.
- \* Conducted temperature studies in Crooked Creek and Big River.
- \* Expanded spawning gravel sampling for percentage of fine sediment to include the Pysht, Hoko and Clallam rivers.
- \* Continued spawning surveys in the Sekiu, Pysht and Clallam rivers.
- \* Continue summer low flow habitat surveys.
- \* Participated in TFW Cultural and Archaeological Committee, Olympic Experimental Forest Local Technical Group, and Pysht River Resource Management Plan Fishery Advisory Group.

Examining and stemming the effects of sedimentation from timber harvesting and road building has been a focus of the Makah Tribe's TFW effort.

Until recently, little consideration was afforded to fisheries by local forest landowners, and many streams in the Makah Tribe's Usual and Accustomed Areas have been heavily impacted. Most of the lower gradient reaches of major rivers in the area have suffered impacts including sediment deposition, resulting in loss of salmon pool habitat, siltation of spawning gravel, a lack of large in-stream wood for habitat diversity, and temperature problems caused by a lack of shade. Though these pressing problems remain, accomplishments have been made to improve river habitat areas.

Tribal TFW personnel have sampled major river drainages in the area for percentages of fine sediment in spawning gravel by conducting core samples. Results have indicated levels of sediment which many studies have shown to be detrimental to the survival of salmon eggs. Additional efforts are planned to further document fine sediment levels and assess the impacts to egg survival and to determine naturally occurring levels of fine sediment. This will help show the relationship between sediment and local forest land management and document sediment threshold levels detrimental to fisheries.

## QUILEUTE TRIBE

### FY 88

- \* Surveyed streams and creeks to define fish habitat.
- \* Upgraded water type maps to indicate fish habitat.
- \* Consulted with state and private foresters as to operational modifications, when necessary, to protect fish habitat and preserve water quality.
- \* Monitored and consulted with the U.S. Forest Service on its timber harvesting plans and practices.
- \* Monitored all other logging related activities as to their potential impact to fish habitat.
- \* Conducted compliance checks to ensure that the regulations are being carried out.
- \* Monitored and consulted with the various state and federal natural resource agencies to make sure that their policies are in the tribes best interest.
- \* Attend Department of Natural Resources pre-file and pre-harvest meetings.
- \* Participated in seminars, workshops and symposiums to learn about the latest developments in resource management.
- \* Participated on TFW Cooperative Monitoring, Evaluation and Research Fish Committee.

### FY 89

- \* Surveyed streams and creeks to define fish habitat.
- \* Upgraded water type maps to indicate fish habitat.
- \* Reviewed all Forest Practices Applications in the Quileute Tribe's Usual and Accustomed Area and conducted field reviews of all applications involving existing or potential fish habitat.
- \* Consulted with state and private foresters as to operational modifications, when necessary, to protect fish habitat and preserve water quality.
- \* Monitored and consulted with the U.S. Forest Service on its timber harvesting plans and practices.
- \* Monitored all other logging related activities as to their potential impact to fish habitat.
- \* Conducted compliance checks to ensure that the regulations are being carried out.
- \* Monitored and consulted with the various state and federal natural resource agencies to make sure that their policies are in the tribes best interest.
- \* Participated in ambient monitoring program.
- \* Served as member of the TFW ad hoc budget allocations committee.
- \* Conducted an extensive gravel sampling program in Dickey River system to establish sediment levels.
- \* Conducted temperature monitoring program to establish summer low-flow water temperatures.
- \* Initiated identification of tribal cultural sites for protection from timber harvesting and related activities.
- \* Conducted ambient stream monitoring surveys.

### FY 90

- \* Surveyed streams and creeks to define fish habitat.
- \* Upgraded water type maps to indicate fish habitat.
- \* Reviewed all Forest Practices Applications in the Quileute Tribe's Usual and Accustomed Area and conducted field reviews of all applications involving existing or potential fish habitat.
- \* Participated in ambient monitoring program.
- \* Consulted with state and private foresters as to operational modifications, when necessary, to protect fish habitat and preserve water quality.
- \* Monitored and consulted with the U.S. Forest Service on its timber harvesting plans and practices.
- \* Monitored all other logging related activities as to their potential impact to fish habitat.
- \* Conducted compliance checks to ensure that the regulations are being carried out.
- \* Monitored and consulted with the various state and federal natural resource agencies to make sure that their policies are in the tribes best interest.
- \* Attend Department of Natural Resources pre-file and pre-harvest meetings.
- \* Participated in seminars, workshops and symposiums to learn about the latest developments in resource management.
- \* Continued tribal participation on the local advisory group for the Olympic Experimental State Forest.

- \* Continued gravel sampling program in Dickey River system to establish sediment levels.
- \* Continued temperature monitoring program to establish summer low-flow water temperatures.
- \* Initiated Dickey Drainage Sedimentation Study. Core sampling was conducted to collect baseline data on sediment levels.
- \* Implemented study in the Dickey Drainage to quantify summer rearing habitat for juvenile salmonids, in particular coho and steelhead.
- \* Investigated debris flows in the Sol Duc Ranger District, documenting their impact on fish habitat and their relationship to timber harvesting practices.
- \* Motivated the Olympic National Forest to assemble a team of specialists to identify sensitive drainages and recommend remedial action.
- \* Worked with the state Department of Ecology to upgrade the status of the Sol Duc River to increase riparian zone protection.

As part of its TFW commitment, the Quileute Tribe conducted both an extensive gravel sampling program to establish sediment levels in some area streams, as well as a temperature monitoring program to gather data on stream temperatures during summer low-water flows.

Data collected as part of the two programs is being incorporated into a comprehensive resource monitoring database. The database will include information now being gathered on tribal cultural and archaeological sites needing protection from timber harvesting and related activities, as well as data from coho summer rearing habitat surveys now underway.

## HOH TRIBE

### FY 88

- \* Reviewed all Forest Practice Applications (FPAs) within the Hoh Tribe's usual and accustomed (U&A) fishing/hunting/gathering area.
- \* Determined which FPAs will impact public resources, with emphasis placed on impact on fisheries habitat.
- \* Conducted field review of all FPAs which indicate the potential to impact public resources and submitted written comments to landowners -- federal, state, or private -- stating the tribe's concerns.
- \* Conducted ambient monitoring of streams in tribe's U&A.
- \* Performed a key role in ambient monitoring during the last two years.

### FY 89

- \* Participated on the Olympic Experimental Forest (OEF) Technical Advisory Board.
- \* Investigated all debris flows to determine cause and effect relationships, with particular emphasis on how they affect fisheries habitat.
- \* Proposed enhancement, mitigation and restoration plans to landowners that impact fisheries habitat.
- \* Influenced the OEF Plan to respond to the need to develop sensitive area plans for every basin in the Hoh River drainage. This is currently being implemented.
- \* Determined the cause and effect of debris flows in the Hoh River basin.
- \* Clarified WAC 222-24-050, which addresses the responsibility for logging road maintenance.
- \* Helped develop a methodology, now being used by the Department of Natural Resources in the Hoh and Clearwater watersheds, to determine if a headwall is unstable.
- \* Helped inventory unstable roads within the Hoh River drainage area and assisted in flagging problem areas.
- \* Participated in a study of the effects that landslide siltation is having on salmonid habitat, using ambient monitoring techniques and core sampling. This study utilizes control streams inside the Olympic National Park to compare with streams outside the Park to determine if negative impacts are occurring in areas subject to logging.
- \* Initiated development of Sensitive Area Plan (SAP) for the Hoh basin. Mitigation for previous damages associated with logging will be addressed, as well as restoration and enhancement measures for the habitat. This SAP will be used as a blueprint for SAP development in other areas of the Pacific Northwest.
- \* Performed a key role in ambient monitoring program.



## FY 80

- Participated on the Olympic Experimental Forest (OEF) Technical Advisory Board.
- Investigated all debris flows to determine cause and effect relationships, with particular emphasis on how they affect fisheries habitat.
- Proposed enhancement, mitigation and restoration plans to landowners that impact fisheries habitat.
- Helped inventory unstable roads within the Hoh River drainage area and assisted in flagging problem areas.
- Participated in a study of the effects that landslide siltation is having on salmonid habitat, using ambient monitoring techniques and core sampling. This study utilizes control streams inside the Olympic National Park to compare with streams outside the Park to determine if negative impacts are occurring in areas subject to logging.
- Performed a key role in ambient monitoring program.

The Hoh Tribe's TFW program was responsible for determining one cause and effect of debris flows in the Hoh River basin. It was found that most debris flows initiate from landslides from deteriorating half-bench sidecast logging roads that were built prior to 1973. These debris flows are having a devastating effect on the salmonid habitat in the Hoh River and its tributaries, as well as in other river systems.

The tribe's investigation also was responsible for clarifying the state law which addresses the responsibility for logging road maintenance. It was acknowledged by the Department of Natural Resources that if public resources are harmed by poor logging road construction or maintenance, the landowner is responsible and liable for damages and mitigation.

## QUINAUT NATION

## FY 88

- Reviewed 327 Forest Practice Applications (FPAs), conducted 21 field reviews and attended four pre-harvest reviews.
- Participated on several TFW committees, including the Policy Group, Administrative, Field Implementation, and Research and Monitoring Committees.
- Participated in the Fishery and Forestry Interactions training.
- Participated on Temperature Work Group study and model development project.
- Participated in the initiation of the Hoh/Clearwater resource management planning process.
- Updated water type maps to reflect fish usage in streams.



Reggie Ward, Jr., Quinault tribal member and TFW environmental technician, measures a stream as part of data collection efforts.

## FY 89

- Reviewed 1,600 FPAs, participated on nine Interdisciplinary (ID) teams, conducted 165 field reviews, and attended 54 pre-harvest reviews.
- Continued to participate on several TFW committees, including the Policy Group, Administrative, Field Implementation, and Research and Monitoring Committees. New committees joined were the Wetland Working Group, Fisheries, and Water Quality.
- Participated in the Ambient Monitoring, Wetlands Identification, Stream Channel Morphology and Forest Management, Logging Systems, and Geographic Information System workshops.
- Continued to participate on the Temperature Work Group study and model development project.
- Initiated the collection of ambient monitoring data for the TFW research and monitoring committee.
- Updated water type maps to reflect fish usage of streams.

\* Continued to participate in the Hoh/Clearwater resource management planning process which was expanded and renamed the Olympic Experimental Forest.

#### FY 90

- \* Reviewed 1,325 FPAs, participated on nine ID teams, conducted 137 field reviews, and attended 17 pre-harvest reviews.
- \* Continued to participate on several TFW committees, including the Policy Group; Administrative; Field Implementation; Research and Monitoring; Wetland Working Group; Fisheries; and Water Quality.
- \* Participated on the newly formed Sustainable Forestry Roundtable (new legislation) Task Force.
- \* Participated in the Ambient Monitoring, and Slope Instability and Forest Management workshops.
- \* Continued to participate in the collection of field data for the Temperature Work Group study and model development project, and the ambient monitoring project.
- \* Updated water type maps to reflect fish usage of streams.
- \* Continued to participate in the Olympic Experimental Forest project.
- \* Provided the Forest Practice Board the list of Problem Areas for their statewide program.

Quinalt Nation TFW staff are conducting an important study of post-TFW Riparian Management Zones (RMZ) to determine how well the zones are providing for fish habitat, as well as to monitor compliance with TFW RMZ compliance.

As part of the study, each RMZ was sampled every 100 feet. The zones were measured and the number of trees and snags by species and size class were recorded, as well as the height of 5 percent of the standing trees in the RMZ. Old and new blow-down trees were documented by species and size. Location of the blow-downs, whether in the stream, bridging the stream, or away from the stream, was also noted. The amount of large organic debris, crucial to good fish habitat, below the average high water mark was also recorded.

In addition, the Quinalt TFW program is developing a qualitative landslide inventory for the tribe's entire Usual and Accustomed Area to locate and map landslides in an effort to determine unstable slopes. The effort will also help guide future quantitative landslide survey work.

#### YAKIMA INDIAN NATION

#### FY 88

- \* Reviewed 496 Forest Practice Applications (FPAs). Each of the applications were reviewed to determine if a field visit was necessary.
- \* Staff were involved in all of the Interdisciplinary (ID) team reviews that were called by the Department of Natural Resources (DNR) in the Southeast Region. Landowner and Program staff meet on many of the applications to work out details of plans to protect tribal resources while allowing the landowner to realize a profit from timber harvest. DNR agreed to withhold application approval on Cultural Resource concerns until the landowner made a good faith attempt to contact the Program Cultural Resource Specialist and work out a plan to protect cultural resource areas.
- \* Re-typed a number of streams as a result of electro-shocking work performed during the course of fisheries resource assessment for FPAs. This process not only provides for better management on a site to site basis, but also provides valuable data for future cumulative effects analysis.
- \* Conducted monitoring and evaluation field visits to determine the effectiveness of conditions placed upon FPAs. Riparian Management Zone, (RMZ) data was collected to determine if the DNR regulation had been enforced and if the RMZs that resulted from the regulation were adequate to protect fisheries and wildlife resources.
- \* Conducted gravel sampling of the Little Naches River. An analysis was performed to determine the trend over years of sediment loading in this watershed.
- \* Completed a video record of slope failures within the Little Naches River watershed.
- \* Served on the TFW Cooperative Research Evaluation and Monitoring (CMER) Committee; Wildlife and Ambient Monitoring CMER sub-committees. The Chairman of the Yakima Indian Nation, TFW Special Committee, served on the TFW Policy Committee.
- \* Participated in field testing of methods for data gathering on RMZs within the grant area.
- \* Initiated coordination with the Northwest Power Planning Council. Discussions took place regarding activities of the CMER Committee as they relate to various Power Council programs within the tribe's area of concern. Of particular importance was the beginning of discussions regarding integration of the CMER Ambient Monitoring Program and the Council's Coordinated Information System.

- Attended meetings with the various large block forest industry landowners to review pre-harvest plans.
- Attended tribal, state, environmental and forest industry conferences on development of annual review, evaluation of budgetary needs and coordination of information exchange.

## FY 89

- Received and processed 817 FPAs. Of this total, 621 were located within the tribe's area of concern. Staff made 183 site visits to seek more specific information. This assessment process resulted in concerns for potential damage to tribal resources, and filing of 152 individual reports by program staff. Each report detailed the concerns and included recommendations as to conditions that might be placed on the practice so as to eliminate or reduce the negative impacts to an acceptable level.
- Program staff were involved in all of the ID team reviews that were called by DNR in the Southeast Region and selected ones in the Southwest and Northeast Regions. Landowners and program staff met on many of the applications and were successful in working out details of plans to protect tribal resources while allowing the landowner to realize a profit from timber harvest.
- Conducted monitoring and evaluation field visits to determine the effectiveness of the conditions that were placed upon the forest practices. A variety of reports were generated as a result of these site visits and are also in addition to those reported.
- Coordinated data gathering as a monitoring tool and evaluation tool.
- A number of streams were retyped as a result of electro-shocking work performed during the course of fisheries resource assessment for FPAs.
- Compiled location and surrounding habitat data for the Northern Spotted Owl for FPA conditioning recommendations.
- Served on CMER Committee; Wildlife Steering Committee; Ambient Monitoring Steering Committee. The Chairman of the Yakima Indian Nation, TFW Special Committee, served on the TFW Policy Committee.
- Attended meetings of Sediment, Hydrology and Mass Wasting and Water Quality Steering Committees.
- Participated in development of Upper Yakima Resource Management Plan (RMP). The Upper Yakima RMP effort includes a Policy Group, and a number of Task Groups. Tribal representatives served on all Task Groups of the RMP.
- Worked with the Northwest Indian Fisheries Commission field data gathering teams in collection of stream morphological data and work on Stream Segmentation Study projects.

## FY 90

- Fisheries, Wildlife, Cultural and Archeological staff continued to participate in review, conditioning, and monitoring of FPAs and permits.
- Continued to conduct monitoring and evaluation field visits to determine the effectiveness of the conditions placed upon the forest practices within the tribe's area of concern.
- Continued membership on the TFW Policy Committee; Administrative Committee; CMER Steering Committee; and CMER Wildlife subcommittee.
- Continued work with U.S. Forest Service staff to share information on mixed ownership lands and wildlife, cultural and fisheries management.
- Assisted DNR in development of Forest Practice Application Classification Systems.
- Continued to meet with forest industry landowners on review of pre-harvest plans.
- Participated in Sustainable Forestry Roundtable (new legislation) negotiations.
- Assisted Washington Department of Wildlife with Priority Habitats and Species Project.

The Yakima Indian Nation's area of involvement related to Washington State forest practices review is the approximately 10,000 square miles of watersheds that drain the eastern slopes of the Cascade Mountain range. This area extends from the Canadian border to the Columbia River along the state's south boundary.

A major fisheries habitat and water quality project initiated and carried out by the tribe's TFW program during the past three years was stream sediment level sampling of the Little Naches sub-basin of the Naches/Tieton watershed. This project was expanded during 1989 and 1990 to include the Klickitat River watershed and the Ahtanum sub-basin of the Naches/Tieton watershed. Program staff also participated in field sampling for levels of stream sediment in nine of the 15 sub-basins within the 750,000-plus acres of the Yakima River watershed.



## COLVILLE CONFEDERATED TRIBES

FY 88

- \* Reviewed approximately 100 forest practice applications both in the office and field.
- \* Delivered written and oral comments to Department of Natural Resources (DNR) and Department of Wildlife (DOW) officials.
- \* Established communication networks with private timber companies and environmental organizations.
- \* Developed program by obtaining technical equipment for the office and field, establishing manual and computer filing systems, and developing a computer database as well as beginning a database consisting of field studies.
- \* Established professional networks within the tribal organization by working with the tribe's soils scientist, hydrologist, and field forester.
- \* Checked forest practice regulation compliance through on-the-ground inspection of timber sales both on and off reservation. Fish and wildlife mitigation plans were written when violations occurred. Field meetings were conducted with landowners to help educate them with regards to good conservation practices. Several interdisciplinary meetings were attended to provide fish and wildlife expertise concerning potential impacts from timber sales.
- \* Participated at the state level on the TFW Wildlife Steering Committee and the Field Implementation Committee. The committees set TFW goals for wildlife and review potential research projects and resolves technical problems which arise in the field, respectively.
- \* Participated at regional pre-harvest sale reviews with both the DNR and private industry. Staff also attended meetings involving a regional TFW working group which addresses technical issues.
- \* Attended and presented information to logging operator training sessions sponsored by the regional TFW working group.

"I would hope that the members of Congress appreciate the fundamental role the treaty tribes play in the Timber/Fish/Wildlife process. We would not have TFW if the tribes were not involved, and without TFW, timber lands management in the State of Washington on private lands would be through the courts."  
 — Curt Smith, Director, Washington Department of Wildlife

1989

- \* Reviewed 354 FPAs, an increase of over 250 percent. Tribal field review of applications off reservation dropped significantly because of lack of time. Actual field review of applications remained at approximately 100 applications. Written and oral comments pertaining to fish and wildlife were provided on at least 50 state and private timber sales.
- \* Local tribal field data collection was increased to help enlarge the database relating to forest practices.
- \* Water quality information relating to fisheries such as turbidity, water temperatures, and stream flows was collected.
- \* Collected pre-harvest shade values on one sale to help determine the potential impact from logging on water quality and fish habitat.
- \* Collected fish population numbers to monitor logging impacts.
- \* Conducted ambient monitoring on one stream to quantify changes in stream channel morphology related to logging practices.
- \* Initiated a pilot program to help monitor sediment in streams.
- \* Mapped winter range habitat areas for large ungulates such as elk, moose, and deer. Map locations for sensitive animal species were also plotted and a tracking system was developed to help identify these areas when forest practice applications are filed.
- \* At least 20 on-the-ground meetings were held with logging operators and landowners to discuss good conservation practices.
- \* Attended at least five on-site Interdisciplinary (ID) team meetings to provide technical assistance to state agencies concerning fish and wildlife resources.
- \* Continued involvement on state committees and helped provide products such as the Wildlife Issue Paper and ID team evaluation, which were presented at the Second Annual TFW Review.
- \* Tribal TFW biologists played a major role in the development of priority issues at the regional level. The only priority issue in the state which helps protect big game winter range was developed cooperatively by the tribes, state, and industry in the Colville region.

## FY 90

- Enlarged our working area to more properly reflect an area east of the Columbia River where logging activity could potentially impact tribal fish and wildlife interests.
- Increased field monitoring on 350,000 acres of watershed with additional intensive projects such as freeze core sediment sampling to help determine the amount of fine sediment in fish spawning areas.
- Intensively monitored about 87,315 acres of watershed for stream temperatures.
- Approximately 4 square miles of watershed are being monitored on a long-term basis to better understand sediment dynamics on an area which was heavily impacted from logging.
- Ambient monitoring crews have monitored at least 15 miles of watershed on three streams to date.
- Experimental techniques used to measure fish egg survival are currently under way in 73,910 acres of watershed.
- Approximately 46,000 acres of wildlife habitat will be evaluated and monitored before the completion of the budget year.
- Committee participation included the aforementioned groups and, in addition, the Temperature Work Group which is a part of the Cooperative Monitoring and Evaluation Research Committee.
- Participated on the DOW field study of Riparian Management Zones and Upland Management Areas.
- Participated on Loomis Block Advisory Committee, a group composed of state agencies, environmental groups, private industry, and the tribes. The role of the group is to coordinate land use activities to protect public resources on approximately 500,000 acres of state-owned forest land.
- Continued monitoring on three major watersheds determined by the State Forest Practices Board to be sensitive areas.

The Colville Confederated Tribe's TFW effort has resulted in development of two mitigation plans regarding forest practice violations which resulted in tribal fish and wildlife resource damage. One project has been completed; the second is expected to be completed in October, 1991. The success of the mitigation projects has reduced the number of forest practice violations and continues to be a deterrent against public resource damage.

In addition to participating in TFW Cooperative Monitoring, Research and Evaluation Committee projects, the tribe is conducting its fish and wildlife habitat monitoring program. Some of these projects include intensive sediment sampling of streams encompassing approximately 350,000 acres of watershed. It is anticipated that again that many acres will be sampled in 1991. About 87,000 acres of watershed are intensively monitored for stream temperature; approximately 400,000 acres of watershed are monitored less intensively. Water quality was monitored on approximately 31 streams in the spring of 1990.

Experimental techniques to measure fish egg survival are currently being used in 73,910 acres of watershed. Experimental techniques to monitor sediment in about 102,000 acres of watershed were carried out successfully in 1989-90. It is anticipated that approximately 46,000 acres of wildlife habitat will be evaluated and monitored in 1991 and 1992.

## UPPER COLUMBIA UNITED TRIBES: SPOKANE TRIBE; KALISPEL TRIBE

## FY 88

- Reviewed an average of six Forest Practice Applications (FPAs) each working day.
- Established database of FPAs for quick retrieval of pertinent information.
- Participated in Cooperative Monitoring, Evaluation and Research projects. Conducted temperature study on Chamokane Creek and Cee Cee Ah Creek.
- Participated in CMER Ambient Monitoring Fisheries Project.

## FY 89

- Conducted stream channel geomorphology research on Cee Cee Ah Creek.
- Conducted investigation into UCUT salmonid populations feeding habits and benthic invertebrate densities.
- Conducted Sand Creek habitat assessment using Ambient Monitoring Fisheries Research methods.
- Conducted ambient monitoring on LeClerc Creek, Skookum Creek, Ruby Creek, Cee Ah Creek, Tacoma Creek, Cedar Creek and Sand Creek.
- Conducted population estimation for Brown Trout on Chamokane Creek.
- Participated on the following TFW committees: Sediment, Hydrology and Mass Wasting; Cooperative Monitoring, Evaluation and Research Committee; Fisheries Committee; and Ambient Monitoring Steering Committee.

- \* Attended the following workshops: TFW annual training session; Upper Columbia Basin Soils Workshop; and ambient monitoring training.

#### FY 90

- \* Continued temperature monitoring and modeling on Chamokane Creek and Cee Cee Ah Creek.
- \* Continued ambient monitoring on Cee Cee Ah Creek.
- \* Continued intensive fisheries population and feeding habits studies.
- \* Participated in monthly Upper Columbia Basin TFW meetings and served as co-chair; Attended yearly pre-harvest reviews with Department of Natural Resources, Plum Creek Timber Co., and Boise Cascade Corp.
- \* Developed TRAX system manual for tracking sensitive animal species within the Spokane and Kalispel area of concern.
- \* Mapped deer winter range on Forest Practice Application (FPA) map.
- \* Mapped all 1990 FPAs on map to address cumulative effects.

Committee participation is a critical part of the tribal TFW effort. The TFW biologist for the Upper Columbia United Tribes Fisheries Department, serves as co-chair the Wildlife Steering Committee (WSC). As wildlife management issues are discussed and acted upon in this state wide forum it is imperative that the tribes have representation. This representation is needed to protect the wildlife managed both on and off reservations.

A major accomplishment of the WSC was development of the Wildlife Action Plan which dictates how TFW will manage wildlife in the state. This plan has given the tribes ability to participate in setting management goals for wildlife, something that was not possible before TFW.

## Northwest Indian Fisheries Commission TFW Activities:

The NWIFC's activities are an integral part of the TFW process. The Commission's efforts in tribal coordination, representation and clearinghouse activities keep member tribes fully abreast of the process and information generated to ensure their review and comments are presented. The NWIFC continues to improve its efficiency to conduct these and other functions necessary to make TFW a success and provide the greatest possible tribal participation. Following is a summary of NWIFC TFW activities for Fiscal Years 88, 89, and 90, along with descriptions of specific efforts to address tribal needs.

#### FY 88:

- \* Consolidated tribal budgets and produced the narrative for the initial request for funding to implement TFW.
- \* Participated in the process development committees and the newly formed standing committees for implementing TFW.
- \* Coordinated the scheduling and documentation of inter-tribal policy and technical meetings to address TFW issues. Also coordinated meetings between appropriate tribal representatives and other TFW participants to discuss identified issues.
- \* Provided an information clearinghouse to the tribes, including planning and implementation documents, scientific and technical reports, correspondence and data. All received and generated information was provided to the tribes for their consideration. When appropriate, the NWIFC also shared information with other TFW participants.
- \* Purchased and distributed capital equipment necessary for new tribal TFW technical staff to participate in the process.
- \* NWIFC staff co-chaired the Cooperative Research and Monitoring Committee, developing procedural guidelines and study designs for projects to answer lingering questions from the TFW Agreement.
- \* Developed a computerized fish habitat data base and began work coordinating its integration with geographic information systems
- \* Initiated an ambient monitoring program to develop and test field methods. Three two-member teams investigated various field methods to identify stream characteristics.

#### FY 89:

- \* The NWIFC continued to participate on all standing and ad-hoc TFW committees as tribal representatives. Staff co-chaired the Policy Committee and the Cooperative Research and Monitoring Committee.



- Continued to coordinate tribal technical and policy caucus meetings, and meetings with other TFW participants, to address tribal concerns.
- Continued to consolidate tribal budget proposal and support efforts.
- Coordinated and conducted TFW Team-building sessions for all parties for the seven regions in the state.
- Continued to provide a clearinghouse function for the tribes and other TFW parties.
- Established electronic communications link for the tribes to receive TFW information such as meeting notices, news items and data transfers.
- Initiated the development of a map library and clearinghouse including the distribution of revised water type maps.

#### FY 90:

- Participated in the newly formed Sustainable Forestry Roundtable (new legislation) Process, an extension of the TFW Process, which includes counties as a participant.
- The NWIFC continued to participate on all standing and ad-hoc TFW committees as tribal representatives.
- Continued to coordinate tribal technical and policy caucus meetings, and meetings with other TFW parties, to address tribal concerns.
- Continued to consolidate tribal budget proposal and support efforts. Coordinated development of a funding allocation method for justifiable distribution of grant money.
- Continued to provide a clearinghouse function for the tribes and other TFW parties.
- The Cultural/Archeological Committee hired staff to define the scope of education and protection needs of sites on forest lands.
- Participated in the scoping stage for the development of a Forest Practice Application database and linkage with a GIS to make access and distribution more efficient.
- Initiated a pilot project to test methods for reviewing and changing streams and roads digital data gathered and developed under TFW.
- Established a computer application that divides information for distribution, either by hard copy and/or map and attribute data to the affected tribe(s).
- An Ambient Monitoring Coordinator was hired to conduct further research and development of field methods, as well as to train and supervise six two-member field teams. The coordinator also provided technical assistance in ambient monitoring field methods to participating tribes.
- Ambient monitoring data collection continued with five two-member teams. The addition of an optical mark reader data terminal substantially enhanced computerization and statistical analysis of data collected by field crews.

## COORDINATION OF TECHNICAL ASSISTANCE

The NWIFC provided mechanisms and forums for the tribes to communicate on TFW issues among themselves and between the tribes and other TFW participants.

Scheduling and documentation of inter-tribal policy and technical meetings to address TFW issues also was coordinated. Participants included tribal policy officials and staff involved in the TFW decision-making structure that includes NWIFC Commissioners, the Commission's Environmental Policy Committee and tribal environmental biologists.

Upon request, the NWIFC coordinated meetings between appropriate tribal representatives and other TFW participants to discuss identified issues.

The NWIFC assisted in the development of coordinated tribal recommendations and responses to TFW issues. This included preparations for identified meetings to assess the effectiveness of the TFW Process, such as the TFW Annual Reviews.

Formation and support of a consolidated tribal TFW grant proposal to Congress also was coordinated by the NWIFC. This included development of a proposal to allocate TFW funds appropriated to the tribes and tribal organizations to implement the TFW effort.

## NWIFC REPRESENTATION

The NWIFC assisted in the representation of tribal positions and concerns of the tribes in the TFW Process to ensure their consideration and incorporation into this process.

NWIFC staff also participated on standing and ad-hoc TFW committees as tribal representatives. The Commission conveyed tribal positions to these committees and reported back to the tribes.

The NWIFC participated in the development and distribution of information provided by various TFW committees established to implement the TFW Agreement. Many tribal representatives and NWIFC staff served on the following committees to review, comment and direct TFW activities:

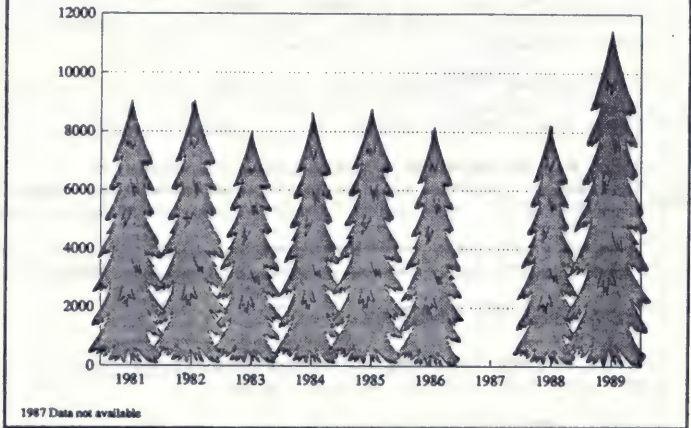
- Policy Committee and subcommittees
- Administrative Committee
- Cooperative Monitoring Evaluation & Research Committee
- Training Information & Education Committee
- Field Implementation Committee
- Cultural/Archeological Committee
- Information Management Committee

## INFORMATION MANAGEMENT

Information was provided to the tribes by the NWIFC, including planning and implementation documents, scientific and technical reports, correspondence and data. All received and generated information was provided to the tribes for their consideration. When appropriate, the NWIFC also shared information with other TFW participants.

### NUMBER OF FOREST PRACTICE APPLICATIONS

Source: Department of Natural Resources



The NWIFC also coordinated the development and implementation of more efficient methods for sharing TFW information. This included developing methods to improve the tribes' ability to access and utilize information available from all TFW participants.

Applications for activities related to TFW, such as Forest Practice Applications and Environmental Impact Statements, were provided to the tribes by the NWIFC. As agencies computerize their application processes, the NWIFC is coordinating to ensure that the tribes have access to that data to allow for quicker responses.

The NWIFC coordinated development and implementation of a joint co-management habitat information system to share and update data with state agencies. This included field surveys to identify fish presence and barriers.

anadromous fish, and updated water type maps which affect timber operations and resource protection. For example, NWIFC staff identified sources of information, surveyed fishery biologists to update information, determined computer data access, and defined procedures for making changes.

A tribal electronic communication system for notification of meetings, news items and information-sharing with tribes was initiated by the NWIFC. NWIFC staff continually seeks better ways to convey notification and information to the tribes in a more efficient and timely manner.

The NWIFC coordinated the development and implementation of state-of-the-art computerized information management tools, such as databases and Geographic Information Systems.

## NWIFC GEOGRAPHIC INFORMATION SYSTEM (GIS) IMPLEMENTATION PROGRAM

A GIS, combined with the habitat database now being developed, will form the nucleus for long-range planning and protection of natural resources. The tribes will utilize this system to negotiate, manage and protect these resources. Northwest tribal programs have focused on the ability to utilize and develop state-of-the-art information gathering techniques. With a GIS the tribes will be able to do their own analysis of federal and state resource information, furthering their ability to act accordingly within government-to-government activities.

The NWIFC has coordinated efforts with state and federal agencies to incorporate GIS capabilities as a tool for resource planning and decision making for the tribes. The Commission has purchased computer hardware and software to handle the dividing and distribution of digital data to the tribes. The Departments of Natural Resources and Wildlife have been contacted to establish mechanisms for sharing their store of digital and attribute information. The NWIFC has developed additional layers of data to exchange technical information.

The NWIFC coordinated with the tribes and other parties on the development and implementation of guidelines and procedures for establishing GIS and other related databases. This included, but was not limited to, designing desired tribal databases, linking existing databases, and establishing procedures to change and update information.

The NWIFC represented the tribes on committees addressing the development and use of GIS capabilities. Several committees have already been formed, such as the Land Information System Regional Planning Committee, the Washington State Geographic Information Council, and the TFW Information Management Committee.

A clearinghouse was provided by the NWIFC for the tribes to receive GIS related information. This included meeting notices, documents, reports and studies, computerized and "paper copies" of digital data, and maps.

## NWIFC AMBIENT MONITORING

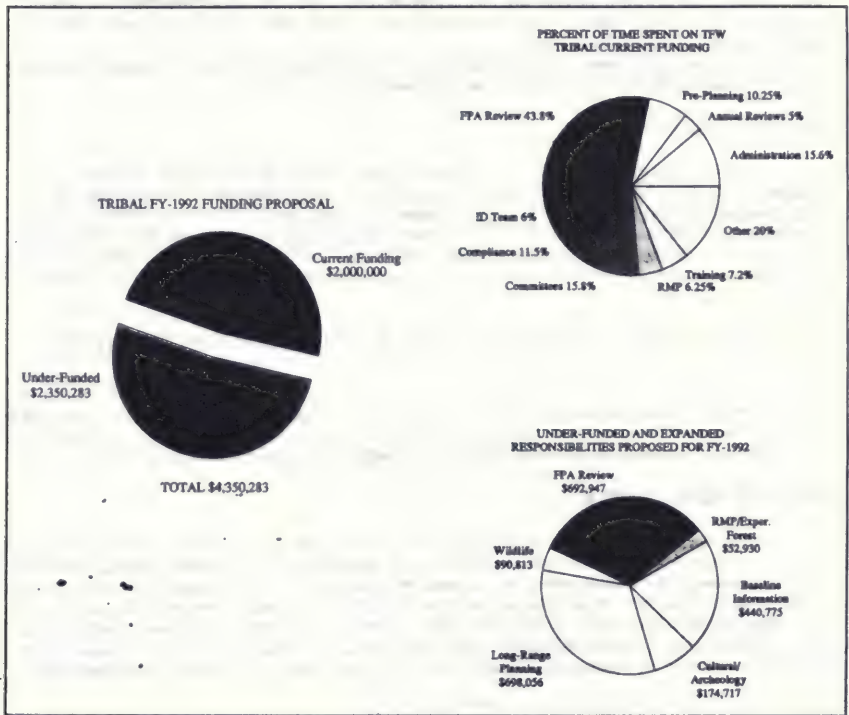
The NWIFC assisted the tribes and other TFW participants in establishing a program with the best available field methods and training to collect and analyze data for decision-making.

The NWIFC coordinated with the TFW Ambient Monitoring Program. This includes coordinating with the technical staffs of the tribes and the Ambient Monitoring Steering Committee, assisting tribes to implement their own data collection, and supervising NWIFC Ambient Monitoring crews.

Tribal efforts to carry out the Ambient Monitoring Program work plan were coordinated by the NWIFC. This included providing training and transferring field methods and techniques to tribal and NWIFC field crews from the Ambient Monitoring Steering Committee. The NWIFC also assisted in training sessions for TFW participants covering the use of field methods and data collection. The NWIFC coordinated ambient monitoring field crews to augment tribal crews collecting data. The NWIFC also assisted in the computerization of the field data. The method to input the data has been improved and will provide a faster turn-around of data for analysis by the tribes and the Ambient Monitoring Steering Committee.



## FY-1992 Funding Request with Utilization of Existing and Proposed Funding



## UNDER-FUNDED NEEDS AND EXPANDED RESPONSIBILITIES

It was recognized from the beginning that funding would need to be increased as tribal programs were being developed, and as government-to-government relations became more a standard operating procedure. Along with this development of tribal programs, there have been increasing pressures from increased logging activities, new participants, new programs, and new legislation. A key element during the development phase of TFW activities is the need for coordinated and systematic long-range planning. This has proven to be extremely difficult given ongoing and expanding activities within the program. The tribes have recognized that long-range planning will serve to protect tribal resources far into the future.

## IMPLEMENTATION OF TIMBER/FISH/WILDLIFE

A milestone of the TFW process is the Third Annual Review. The third annual review was established for participants to evaluate success and failures of the TFW Agreement. Each participant determines whether the Agreement is meeting their expectations and if there is a commitment to continue with the process.

Tribal concerns for the continued implementation of TFW include:

- Full implementation of a government-to-government process between the tribes and the Department of Natural Resources: Policy and technical dispute resolution; forest practice decision-making; conflicting priorities and demands; and efficient use of limited resources.
- Full funding for tribal participation: Cultural programs; cumulative effects; research and monitoring; State Environmental Policy Act review; compliance; data base and GIS management; and education.

## TECHNICAL SUPPORT

The tribes have shared the use of a few staff with specific expertise spread out over the state. These include two geologists, two wildlife biologists and two cultural resources experts. They have provided their expertise when possible to tribal TFW staff, which are primarily fisheries and habitat biologists. The current staffing level is inadequate and the TFW and Sustainable Forestry Roundtable (new legislation) processes have proposed additional tasks for these, as well as others with needed expertise. Sedimentation problems, wildlife habitat needs, and an inventory of tribal cultural and archeological sites associated with forest practices could be addressed with expanded technical staff capabilities.

## COOPERATIVE MONITORING, EVALUATION AND RESEARCH COMMITTEE (CMER)

This committee is the technical arm of TFW which reviews, develops and oversees all research and monitoring for TFW. CMER relies on TFW participants for experts to provide their time for this process. The tribes need additional types of expertise as identified above in Technical Support to independently participate and aid in this effort.

## AMBIENT MONITORING

The tribes and the NWIFC have been able to support a small number of field crews to collect data for the Ambient Monitoring Program developed and overseen by a CMER steering committee. The Ambient Monitoring Program is charged with collecting the baseline and re-visit site data to evaluate changes and effects related to forest practices. This effort was identified by TFW policy representatives as critical to the accurate assessment of the adaptive management approach. Because of an expansion of base program needs in the past four years, ambient monitoring and field data collection have been severely reduced, endangering long-term planning. The tribes have not been able to take on the workload for the program and require additional funding and field staff to continue an adequate effort.

## GEOGRAPHIC INFORMATION SYSTEM (GIS)

Computer Geographic Information System (GIS) capabilities are being incorporated as a tool to improve natural resources assessment and decision making. TFW is expanding the availability and accessibility of digital data necessary to run a GIS. State agencies are building forest practice application, hydrography, transportation, wildlife priority habitats and fisheries presence databases that will be added to existing digital data. The tribes are developing "areas of concern" data to aid in their notification of forestry activities. Of the 26 tribes participating in TFW, only five have capabilities to utilize this technology. Funding is needed to afford all tribes the ability to coordinate development, access and utilize this capability.

## INTERDISCIPLINARY TEAM PROCESS

The Interdisciplinary (ID) Team Process was designed and implemented by TFW to afford an opportunity to all parties to address site-specific issues of concern. TFW participants can form an ID Team of technical expertise to aid the DNR in decisions needed to complete a forest practice application. The tribes are contacted to participate on all ID Teams. To adequately participate they must have expertise in technical fields related to forest practices, such as hydrology, soil science, fishery and wildlife biology, geology, and cultural and archeological resources. Currently there are a limited number of staff with this expertise to participate. More technical staff are needed to effectively represent tribal interests.

## FOREST PRACTICE APPLICATION REVIEW

DNR is planning to use their information system, including GIS, to enter data and then allow access to all TFW parties. The amount of time spent on reviewing Forest Practice Applications (FPAs) is dependent on many factors, such as the number of applications received, the size of harvest, proximity to other resources, and travel time required to visit the site. Normally, the tribes review FPAs for obvious concerns, conduct field visits, participate in ID Teams to develop site solutions, monitor the timber harvest and compliance to ensure conditions have been followed, and follow-up compliance to assess long-term impacts.

For the past five years the economic value of timber has increased demand, which has increased the number of FPAs. This situation has caused TFW participants to focus their attention on the large number of FPAs submitted, and have not been able to fully monitor timber harvest impacts. Follow-up compliance or review of resulting timber harvest doubles the work load of field staff. As stated above, the number of FPAs per year vary, and this has an effect on the ability to conduct compliance monitoring.

## WATER TYPING

The DNR has developed the Water Typing Process to assess the level of protection streams need in association with forest practices. Under TFW, procedures have been established to afford any party the opportunity to make corrections. Tribal technical staff in the field can review this information and make changes as needed. It is planned that this process will be included in the DNR GIS to improve access and updating. The tribes will require the ability to access this system and continue to focus on submitting updated information.

"State tribal members have been stalwart players not just in TFW but also the Sustainable Forestry Roundtable, which I hope will soon ratify another historical agreement on timber operations and resource protection in Washington. Several times when Roundtable negotiations were close to falling apart, it was the tenacity of the tribal members that pulled the factional groups together. The tribal members are experienced negotiators who have been vital in reaching and holding consensus agreements like these together.

It was their leadership in recognizing the importance of all natural resources — not just trees, but water quality, fisheries and wildlife — that made the tribes a critical participant in the TFW agreement. Their continued role in TFW, including participation in interdisciplinary teams that review proposed timber harvests on certain private lands, has been a key contribution in the management of millions of acres of forest land in Washington."

— Brian Boyle, Commissioner of Public Lands

## TRAINING, INFORMATION AND EDUCATION

Training is a critical and costly component of TFW. Annual statewide TFW training sessions were conducted during the first and second years of TFW implementation. These were supplemented by several training sessions on specific topics, such as riparian zones, offered by the University of Washington's Center for Streamside Studies, and in sedimentation offered by the U.S. Forest Service. Because of the tribal lead role in implementing the TFW Ambient Monitoring Program, funding for training of both NWIFC and tribal personnel is crucial.

Unstable slopes, sedimentation and erosion comprise the largest number of priority issues identified through the Forest Practices Application process. As a result, training in hydrology, soils and sedimentation will be particularly crucial for tribal TFW personnel.

Information and education, both internal and external is another important part of TFW. Tribal members, staff and policy leaders, as well as the general non-Indian public must be informed and educated about the tribal role in TFW and developments in the process that affect them directly. Brochures, newsletters, reports, videotapes and other communication vehicles are needed to help the tribes and the public better understand TFW.



## IMPLEMENTATION OF NEW LEGISLATION AND REGULATIONS

Approximately 18 months ago, the State Department of Natural Resources (DNR) was facing new legal challenges to the Forest Practice Act. One such case was Lake Roesiger, where Snohomish County successfully sued the Department of Natural Resources over forest practices near the lake. This case is still in legal proceedings, however, the Superior Court held that the current forest practice classification scheme was inadequate to properly address the requirements of the State Environmental Protection Act (SEPA).

As a result of the growing concerns by the citizens throughout the state and the legal challenges brought against DNR, the Commissioner of Public Lands, Brian Boyle, enlisted the assistance of the tribes and other TFW participants to seek a cooperative effort in addressing issues not previously covered in full by TFW. These issues were brought forward by the Forest Practices Board, local government and various interest groups in the state.

After 18 months of extensive negotiations, a draft legislative and regulatory proposal was developed that included recognition for the need to ensure the tribes can participate in the implementation of the agreement in the following areas:

### Ten Percent Late Successional Forest for Wildlife Habitat:

One of the primary and most substantial components of the legislative proposal is that 10 percent of a landowners forested property in any Water Resource Inventory Area (WRIA) will be managed primarily for late successional wildlife habitat. Currently, there are no direct regulatory provisions for the protection of wildlife habitat.

The Department of Wildlife (DOW), coordinating with the tribes as co-managers of the resource, will develop wildlife management templates for the forested land base. This land base will provide not only protection of some older forest stands but will also be a mechanism to recruit older age classes of forests over time.

### Snag and Woody Debris Habitat:

Snags will be distributed across the landscape differently, due to geographic conditions, in Eastern and Western Washington to protect habitat for cavity-dependent wildlife species. It was recognized that these types of regulatory mechanisms need to be in place in order to ensure there is adequate distribution of this type of habitat in the majority of the landowners acreage.

### Timing, Size, Distribution of Harvest and Adjacency Requirements:

Under even-aged forest management, there will be restrictions on timing, size, and distribution of harvest. These requirements should provide a mix of early and mid-successional forest stages to compliment the 10 percent late successional stages that are described above. Development of templates will take a landscape management approach for the protection of wildlife habitat within each basin. This concept is a major shift in the current management system. Species-by-species protection at the individual or population level is being replaced with provisions that will provide key habitat components to support species throughout their natural distributions.

### Riparian Ecosystem Protection:

The legislative proposal intends to manage riparian ecosystems as the focal point for the development of the wildlife templates described above. There is a recognition that riparian areas provide probably the greatest benefit for all resources. Maintenance and preservation of riparian ecosystems will provide the core for the templates if there are no other set-asides required by the Endangered Species Act or other laws. The tribes will cooperatively design appropriate riparian landscapes with the Department of Wildlife.

### Funding for Restoration and Rehabilitation of Fish and Wildlife Resources:

One of the important issue that the legislative proposal addresses is the need for adequate funding from the State of Washington to restore and rehabilitate fish and wildlife habitat damaged by past forest practices. The restoration

fund is a continuation of pilot projects initiated under the TFW Agreement. The original pilot projects were successful to further justify development of this program. The proposal will provide capital costs to the tribes to develop these projects. However, the tribes will need finances for temporary staff during the field season to implement these projects with other TFW participants.

#### Cumulative Impacts:

One of the more significant and demanding issues proposed for new legislation is the development and implementation of mechanisms to evaluate cumulative impacts from all forest practices within a region or watershed, not just a single application.

The proposed system for evaluating cumulative impacts was designed by the tribes. The cumulative impact analysis mechanism is a two-tier process. At the first tier, if a threshold is achieved, it would trigger an intensive basin review and evaluation to determine potential impacts, as well as mitigation that can be imposed to avoid further degradation of the resources. The second tier would halt timber harvesting for up to three years if a threshold is exceeded. Various ecological parameters are potential thresholds for development of the cumulative analysis, including sediments, stream stability, pool riffle ratios, large organic debris and other appropriate factors. The system is currently being reviewed by the TFW Cooperative Monitoring, Evaluation and Research (CMER) Committee, which is proposing to implement this system on a regional basis.

The proposed threshold system is a major step toward protection of fish and wildlife habitat. Prior to this proposal, the burden was on the tribes to show actual harm to fish populations in order to get regulatory action by DNR. Under this system, the evaluation will shift from identifying actual impact to fish and wildlife populations to that of habitat degradation. For many years the tribes have emphasized that habitat instead of fish populations should be evaluated. This proposed system requires the tribes to take a lead role to ensure the process is fully and adequately developed and implemented. Obviously, prevention is more beneficial and cost-effective than remedial restoration.

#### Inventory of Forest Land Base:

The DNR has never developed an adequate inventory of the forested land base in Washington State. However, the legislation proposes to dedicate several million dollars for development of a useable database of state and private forest lands in the state. The process expects, and is dependent on, the cooperation, coordination, and participation of tribal support. The tribes will require financial assistance for information management and continued development of tribal capabilities to implement a coordinated geographic information system for the tribes and state.

#### Cultural/Archaeological Resources:

Another issue identified in the legislation was the need for regulatory protection of cultural resources. The current system is based on a voluntary process with no assurance from the state that these resources will actually be protected. The proposed legislation affords additional protection to cultural resources in several ways:

1. The Department of Natural Resources will develop cultural resource management plans on their 6 million acres of state owned forest lands.
2. The Forest Practices Board will work with the tribes, other participants, and the State Office of Archaeological and Historic Preservation in order to develop regulations to adequately protect cultural resources as defined under current law which includes archaeological and historic sites.
3. The TFW cultural resource committee will undertake the task of working with the appropriate state agencies in order to implement these proposals.

For this program to be successful, the tribes will need the financial resources to develop infrastructure to develop cultural resource management programs, conduct inventories, and provide cross-cultural training with the timber industry and the state agencies.

## APPENDIX A

### TFW PROCESS AND STRUCTURE

For TFW participants, the initial discussions and definition of goals at Port Ludlow were the cornerstone of the TFW Agreement. The foundation of the TFW Agreement was built over the next six months and 100 cooperative meetings that proposed overall changes of regulations and processes for conducting forest practices. From the TFW Agreement, finalized in February of 1987, new regulations were proposed. The public was provided the mandated review process, but this time there was a coalition of TFW participants present in support of regulation changes presented at the local hearings. Few comments were submitted because most had already been considered by the TFW Process and the Agreement. This time when the public review was concluded, all that was left was for the adoption of what had been proposed by the TFW Process.

It was at the Port Ludlow Retreat in July 1986 that the warring factions tested and adopted the TFW Process. The TFW Process is embodied in groundrules, a decision-making approach and accepting the concept of adaptive management developed and discussed at this retreat. The adopted groundrules include identifying the resource goals of all parties, using consensus-built solutions to problems, a commitment of all participants to work on solutions, and a commitment to support the resulting agreements to name a few. The complete set of TFW Ground Rules can be found in Appendix B. These ground rules are passed for every committee and activity related to forest practices and the TFW Process for the participants who are expected to adhere to them.

The new process of a cooperative "win-win" approach was utilized by the parties at the retreat. The participants met to determine whether they could communicate and find common ground on issues related to forest practices. All committees at the policy and technical level worked towards making consensus decisions on the issues before them. They also agreed to disagree. Some issues would require research and monitoring or further discussions, but this would not stall the process. This approach has been applicable at policy, technical and field level discussions. Once the recommendations or options are developed, they are sent up the TFW organizational chart to be adopted as policy, regulation or procedures applied to forest practices.

Adaptive Management is the process that views natural resource management as experimental. The underlying idea is that scientific knowledge and experience gained by agreed-upon monitoring and evaluation will lead to more responsive approaches for managing natural resources. Accepting the concept of adaptive management allows flexibility to test or change regulations and methods instead of giving the perception that they are "etched in stone".

These concepts and approaches aided the TFW participants in the development of an agreement and continue to be used in implementation of their findings. Implementation of the TFW program spelled out in the agreement required the continued participation and commitment of the tribes, state, timber industry and environmental groups. To this end the participants established the TFW decision-making structure. Each committee has a function designed to carry out the implementation of the TFW Agreement and address newly identified issues. Following is a detailed description of their function.

### TFW POLICY COMMITTEE

The Policy Committee is composed of policy representatives from each of the TFW participants. The group includes directors of state agencies and policy representatives from federal and tribal governments, and environmental groups. The Policy Committee is the TFW Board of Directors, responsible for strategic planning, setting TFW priorities, establishing funding levels and strategies, providing leadership and ensuring that their staffs are working consistently within the goals and ground rules of TFW. The Policy Group is also responsible for interpreting and modifying the TFW Agreement, if and when necessary. They are the TFW link between the State Legislature, the Forest Practices Board, various interest groups, and the public. They establish the TFW membership, define and direct support staff, such as the Administrative Committee, and respond to current as well as new issues facing TFW, such as cumulative effects and dispute resolution. The Policy Group meets every other month or on an emergency basis to discuss issue papers, receive recommendations from the Administrative Committee, and to provide final decisions on issues that may be submitted to the Forest Practice Board.



## ADMINISTRATIVE COMMITTEE

The Administrative Committee is a group of representatives from the TFW participants which coordinates and implements the TFW Agreement. The Administrative Committee provides the day-to-day management and implementation functions associated with the TFW Agreement. The Administrative Committee frames and recommends policy, Agreement changes, and work priority changes to the TFW Policy Committee. The committee provides completed staff work to the Policy Committee when requested, make operational decisions, set priorities for the standing committees, establish new committees, provide internal/external leadership and communications, and oversee the TFW budgets and staff. The Administrative Committee meets monthly to receive reports from various committees and task groups, as well as approve future operational plans.

## STANDING COMMITTEES

### TFW COOPERATIVE MONITORING, EVALUATION AND RESEARCH COMMITTEE

The TFW Cooperative Monitoring, Evaluation and Research Committee (CMER) was established to answer unresolved issues from the TFW Agreement. Policy representatives instructed this committee to develop a research and monitoring program to get them "wherever the truth leads us". CMER initially proposed 19 projects for this purpose. These projects are ongoing with the intent to develop interim recommendations, as well as to reach final solutions. With the implementation of these projects, CMER has expanded its role to be the "technical arm" of TFW, reviewing and considering the incorporation of other relevant research into TFW activities. A goal of this committee is to make research available and applicable to field managers through "technical transfer". To accomplish this major task, CMER has formed five steering committees to oversee the original 19 projects and evaluate additional research and monitoring activities. The steering committees include Fisheries; Wildlife; Sediment, Hydrology and Mass Wasting; Temperature and Water Quality; and Ambient Monitoring.

### TFW TRAINING, INFORMATION AND EDUCATION COMMITTEE

The TFW Training, Information and Education (TIE) Committee was established by the Policy Committee to identify, design and conduct training, information and education projects based on the needs of TFW participants with emphasis on insuring consistency. Following are the TIE Committee's Goals:

- \* Coordinate integrated media projects among the Policy Committee, Administrative Committee, CMER and regional representatives of each TFW participant groups to minimize duplication of efforts.
- \* Review and coordinate training programs for current TFW participants, as well as for new TFW participants entering the process.
- \* Develop a strategy for coordinating various public groups outside the TFW process to assist in supporting the TFW Process.

### FIELD IMPLEMENTATION COMMITTEE

The Field Implementation Committee (FIC) is a subcommittee of the TFW Administrative Committee and operates under the TFW groundrules. Its function is to facilitate the implementation of the TFW Agreement, the Forest Practices Act and regulations at the regional field level by:

- \* Defining implementation issues and proposing solutions;
- \* Evaluating and facilitating field implementation;
- \* Increasing efficiency of application review and approval;
- \* Improving cooperative compliance;
- \* Dealing with other issues of statewide significance;
- \* Working with other TFW committees.

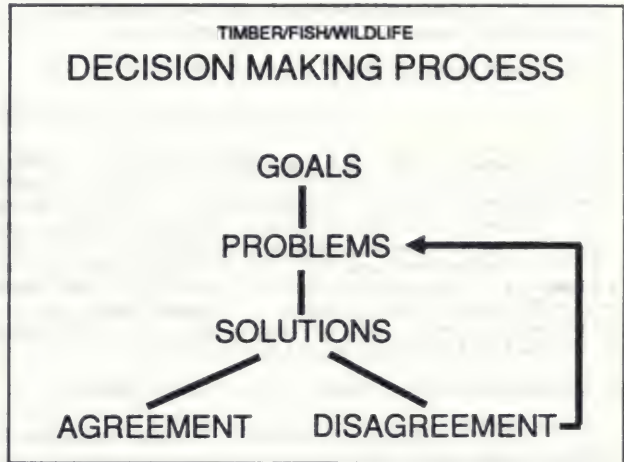
This group does not review individual situations or Forest Practice Applications.

## CULTURAL/ARCHAEOLOGICAL STEERING COMMITTEE

The Cultural/Archaeological (C/A) Steering Committee is composed of various participants in TFW and operates under the following summarized mission statement:

- \* Assist in the development of both a system and a process that will result in the protection of cultural resources under the TFW Agreement;
- \* Provide oversight and guidance to the Cultural Resource Specialist and the TFW Cultural Resource Program;
- \* Serve as both a forum for education and consultation and as a model approach for resolving cultural resource management conflicts;
- \* Advocate cultural resource protection in the Washington State Legislature and among potential funding agencies.

The C/A Steering Committee is intended to have open participation of all tribes with cultural resources in Washington State, as well as private timber landowners, timber industry representatives, and various state agencies. The committee operates under the TFW groundrules but also has adopted a code of ethics that applies to all participants.



## APPENDIX B

### Groundrules for TFW: A Better Future in Our Woods and Streams

Each of the participants to these discussions agree to these ground rules:

1. We will attempt to develop a system which provides:
  - \* Minimum guarantees for everyone;
  - \* Incentives which maintain and enhance timber, fisheries and wildlife resources;
  - \* Future flexibility, accountability, better management, compliance with regulations and resource goals.
2. All participants in the negotiation are to bring with them the legitimate purposes and goals of their organizations. All parties recognize the legitimacy of the goals of others and assume that their own goals will also be respected. These negotiations will try to maximize all the goals of all the parties as far as possible.
3. This effort will receive priority attention, staffing and time commitments.
4. Give the same priority to solving the problems of others as will your own.
5. Commitment to search for opportunities; without creativity there will be no plan or agreement.
6. Commitment to listen carefully; ask questions to understand and make statement to explain or educate.
7. All issues identified by any party must be addressed by the whole group.
8. State needs, problems and opportunities, not positions — positive candor is a little-used but effective tool.
9. Commitment to attempt to reach consensus on a plan.
10. Commitment to be an advocate for an agreed plan.
11. Attempt to protect each other and process politically with constituencies and general public.
12. Weapons of war are to be left at home (or at least at the door).
13. Anyone may leave the process and the above groundrules, but only after telling the entire group why and seeing if the problem(s) can be addressed by the group.
14. All communications with news media concerning these discussions will be by agreement of group. Everyone will be mindful of the impacts their public and private statements will have on the climate of this effort.
15. No participant will attribute suggestions, comments or ideas of another participant to the news media or non-participants.
16. All rights, remedies, positions and current prejudices are available to everyone if the effort is unsuccessful.
17. Participants are free to, and in fact are encouraged to, seek the best advice from their friends and associates informed of the progress of the discussions.
18. All of the individuals who are participants accept the responsibility to keep their friends and associates informed of the progress of the discussions.
19. If you hear a rumor, call facilitator before acting on it.



# APPENDIX C

## TFW COMMITTEES AND PARTICIPANTS

### POLICY COMMITTEE

#### TRIBES:

JOHN SMITH - COLVILLE CONFEDERATED TRIBES - NORTHEAST  
TED STRONO - COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION  
BILL CAGEY - LUMMI INDIAN BUSINESS COUNCIL  
LARRY KINLEY - LUMMI TRIBE  
JIM ANDERSON - NW INDIAN FISHERIES COMMISSION  
BILL FRANK, JR. - NW INDIAN FISHERIES COMMISSION  
JOE DELACRUZ - QUINAUTL TRIBE  
DAVE WHITENER - SQUAXIN ISLAND TRIBE  
TERRY WILLIAMS - TULALIP TRIBES  
DON FAHREAL - YAKIMA INDIAN NATION  
POINT NO POINT TREATY COUNCIL

#### TIMBER INDUSTRY:

DAVE CROOKER - PLUM CREEK TIMBER CO.  
NELS HANSON - WASHINGTON FARM FORESTRY ASSN  
BILL JACOBS - WASHINGTON FOREST PROTECTION ASSN  
DAVE MUMPER - WEYERHAEUSER CO.

#### STATE:

FRED OLSON - DEPARTMENT OF ECOLOGY  
DICK WALLACE - DEPARTMENT OF ECOLOGY  
GLENN McDONALD - DEPARTMENT OF ECOLOGY/USFS  
JOSEPH BLUM - DEPARTMENT OF FISHERIES  
JUDY MERCHANT - DEPARTMENT OF FISHERIES  
SAM CLARK - DEPARTMENT OF LABOR & INDUSTRIES  
CURT SMITH - DEPARTMENT OF WILDLIFE  
BRIAN BOYLE - DNR  
ART STEARNS - DNR  
KALEEN COTTINGHAM - OFFICE OF FINANCIAL MGMT  
CHRIS DRIVDAHL - WASH. DEPARTMENT OF WILDLIFE

#### ENVIRONMENTAL:

PAM CROCKER-DAVIS - NATIONAL AUDUBON SOCIETY  
TIM CULLINAN - NATIONAL AUDUBON SOCIETY  
DAVE BRICKLIN - WEC

### ADMINISTRATIVE COMMITTEE

#### TRIBES:

JIM WEBER - CRITFC  
JIM ANDERSON - NW INDIAN FISHERIES COMMISSION  
BRUCE JONES - QUINAUTL  
TERRY WILLIAMS - TULALIP TRIBES  
LARRY WASSERMAN - YAKIMA INDIAN NATION

#### TIMBER INDUSTRY:

BOB MORTON  
RIM HARBERT - BOISE CASCADE  
HARRY BELL - ITT KAYONSER  
NELS HANSON - WA FARM FORESTRY ASSN  
BOB GUSTAVSON - WA FOREST PROTECTION ASSN  
JEAN BOLTON - WASHINGTON FARM FORESTRY ASSN  
JERRY GUTZWILER - WEYERHAEUSER COMPANY

#### STATE:

GORDIE ZILLOES - DEPARTMENT OF FISHERIES  
DICK WALLACE - DEPARTMENT OF ECOLOGY  
GARY KESSLER - DEPARTMENT OF LABOR & INDUSTRIES  
ROLLE GEFFERT - DEPARTMENT OF WILDLIFE  
LAURA ECKERT - DNR  
ARDEN OLSON - DNR - FOREST REGULATION & ASSISTANCE  
JACK HUSLEY - DNR - TIMBER SALES  
KALEEN COTTINGHAM - OFFICE OF FINANCIAL MGMT  
NAKI STEVENS - PUGET SOUND WATER QUALITY AUTHORITY

#### ENVIRONMENTAL:

TIM CULLINAN - NATIONAL AUDUBON SOCIETY  
TOM SHOEMAKER - NATIONAL AUDUBON SOCIETY  
MARCY GOLDE - WEC  
JUDY TURPIN - WEC

### CULTURAL & ARCHEOLOGY COMMITTEE

#### TRIBES:

ANDELINE FREDIN - COLVILLE CONFEDERATED TRIBES  
KEIN COOPER - LUMMI  
VERN JOHNSON - LUMMI  
CURT RUSSO - LUMMI  
CHARLES SCOTT - LUMMI  
AL JOHNNIE - LUMMI  
ANN RENKER - MAKAH  
MARTIN FOX - MUCKLESHOOT  
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LUCY REID  
RICHARD KEEMAN



QUINAUT INDIAN NATION  
Department of Community Services  
Division of Community Development

Issues of Due Process, Equal Protection, and Fairness in the Application of Land Use  
Development Codes on the Quinault Indian Reservation.

By: Richard Wells,  
Community Development Manager  
February 25, 1998

Throughout American history, the various courts of the United States have determined that governments possess certain sovereign powers, namely: the power of taxation, the power of eminent domain, and the police power. Most laws of this Country are derived from the exercise of a government's police power - the restriction of individual rights for a valid public purpose. By applying laws of American jurisprudence to Indian tribal governments, laws and regulations are written, enacted, and enforced based on the exercise of that Indian Nation's sovereign police power, for valid public purposes.

Planning and zoning laws are fairly recent inventions of the American legal system, and even newer in Indian Country. And, although Indian tribes had their own traditional, but less defined, methods of planning and use zones, most tribal governments found it necessary to accept and adopt the American versions of planning and zoning in order to protect its citizens and remaining homelands.

Planning law has been extensively tested in the U.S. Court system, whereby three doctrines have consistently determined the Constitutionality of every conceivable use and misuse of planning and zoning laws. These three tenets are: the Equal Protection, Due Process, and Fairness. Any law that does not meet the court-determined tests of these doctrines are generally found to be unconstitutional. Planning and zoning laws, as applied by American Indian governments, are therefore, adjudicated based on historic case law, as developed since the first U.S. Court case on zoning in 1926.

The Quinault Indian Nation applies its planning and zoning laws equally to all people and lands within its defined jurisdictional boundaries, regardless of whether the applicant is Indian or non-Indian or whether the property is in trust or fee patent ownership. In fact, because of the checkerboard and complex ownership of trust and fee simple property and interests on the Quinault Indian Reservation, the Quinault Nation is the only governmental entity that can provide equal protection to all landowners on the Quinault Reservation. The County governments are specifically precluded from applying its laws on trust properties, and in the case of the Quinault Indian Reservation, this would include only about 22 percent of the area. The remaining fee simple properties are interspersed among the trust properties in a checkerboard fashion.

## COMMON PLANNING AND ZONING LAWS ADOPTED BY THE QUINULT INDIAN NATION

- **Comprehensive Land Use Plan.** The first Comprehensive Plan for the Quinault Indian Reservation was adopted by the Quinault Business Committee in 1976. The Comprehensive Plan was updated in 1997, but has not been formally approved by the Quinault Business Committee. The Plan was developed through a series of open public meetings. The Comprehensive Plan applies to all lands within the jurisdictional boundaries of the Quinault Indian Nation and is enforced equally on both Indian and non-Indian landowners.
- **Zoning Code.** The first Quinault Nation Zoning Code was adopted in 1967 with the help of the Grays Harbor Regional Planning Commission and modeled after the Grays Harbor County's Zoning Code. The Zoning Code was revised in 1976 to be in conformance with the Comprehensive Land Use Plan for the Quinault Indian Nation. There are only five zoning districts in the Quinault Nation Zoning Code: Residential, Commercial, Manufacturing, Natural Resource Management, and Coastal. Title 48 - the Quinault Nation Zoning Code is enforced equally for all applicants. The following remedies are available to all applicants: variances, conditional uses permits, re-zoning, and appeals.
- **Building Codes.** The Quinault Nation has adopted the following standard building development codes: 1994 Uniform Building Code, 1994 Uniform Fire Code, 1994 Uniform Mechanical Code, 1994 Uniform Plumbing Code, and the 1991 National Electric Code. These codes are enforced by the Quinault Nation's ICBO certified Building Inspector.
- **On-Site Sewage Disposal Ordinance.** The Quinault Nation's sewage disposal ordinance is modeled after the Washington State On-site Sewage Disposal Code and uses the same minimum performance standards as stated in the Revised Code of Washington (RCW).
- **Forest Practices Regulations.** Since about 95 percent of the Quinault Reservation is used for commercial forest production, many of the proposed developments will involve clearing some part of the forested lands. Whenever, a development requires the removal of trees, the Quinault Nation requires a Forest Practices Application.
- **Hydraulics Permit.** Any use or modification of a surface or groundwater resource on the Quinault Indian Reservation requires a hydraulics permit.

## DUE PROCESS

Each land use development applications received by the Quinault Nation are processed the same and in a timely manner. Building Permits can be approved by the Quinault Nation Building Official. Applicants have the right to appeal a decision of the Building Official to the Board of Appeals under Section 105 of the Uniform Building Code, as adopted by the Quinault Indian Nation. Other permits and approvals are processed through the Quinault Planning Commission with final approval or denial by the Quinault

Business Committee. Applicants may appeal the decision of the Quinault Business Committee to the Quinault Nation Court. The following table shows the standard process for conditional use permits, zone changes, and variances:

ACTION	Applicant	Planning Office	Planning Commission	Business Committee
Application	X			
Review		X		
Staff Report		X		
Advertise for Public Hearing (10 days)		X		
Public Hearing			X	
Recommendation			X	
Decision				X

The entire process takes a minimum of 30 days from the receipt of a complete application to the final decision. During the process, the applicant is allowed to provide documentation and oral presentation. The Quinault Planning Commission has the right to ask questions, request additional information, and continue the public hearing prior to making a recommendation on the application.

#### PLANNING STAFF CAPABILITIES

Presently, there are seven people working for the Quinault Nation Division of Community Development under the Department of Community Services. The Division Manager, Richard Wells, has a Masters of City and Regional Planning from the Ohio State University. The Land Use Planner, William Rychliwsky, has a Masters of Urban and Regional Planning from Queen's University in Kingston, Ontario. One of the Quinault Nation's Building Inspectors, Alicia Figg, is certified through the International Conference of Building Officials (ICBO). In addition, the Quinault Nation's Public Works Manager holds a Masters of Urban Planning from Eastern Washington University.

In 1997, the Quinault Nation issued 24 building permits. Of these permits, 20 were located on trust lands and four were located on fee simple property. In 1996, there were 23 building permits issued on trust property, and two on fee simple property.

#### COMMON DEVELOPMENT RESTRICTIONS

Whenever the Quinault Nation receives an application for a land use development on the Quinault Indian Reservation, it is processed the same regardless of whether the applicant is Indian or non-Indian, whether the land is in trust or fee simple. Therefore, any time that an application is not approved, it is based solely whether the application meets the laws and regulations of the Quinault Nation. Most of the development restrictions are the same types of restrictions that a landowner would face off-Reservation, but some are particular to Indian reservations:



- **Not Applying.** Anyone can request and submit an application for development, however, many people simply do not apply and wrongly assume that they will be denied.
- **Incomplete Application.** All of the application forms provided by the Quinault Indian Nation are relatively easy to fill out, and the Planning Staff can provide assistance to any applicant. If critical information is not provided with the application, then the Planning Staff cannot complete the process.
- **No Standing to Apply.** In order to prevent frivolous speculation and to protect landowners, the Quinault Nation requires that the applicant is the owner or has a legal interest in the property to be developed. In lieu of actual ownership, the applicant may provide a conditional sales agreement.
- **Poor Soils.** The Quinault Reservation is characterized by a large percent of poorly drained soils that cannot support on-site sewage disposal. This is especially true in the areas along the Pacific Ocean coastline of the Reservation.
- **Small Lot Size.** The minimum lot size permitted for on-site sewage disposal and on-site well is one acre according to the Quinault Nation's On-Site Sewage Disposal Ordinance which uses the performance standards of the Washington State Sewage Ordinance. In the past, land developers subdivided property down to less than 1/4 of an acre in areas that do not percolate, without going through the processes required by the Quinault Nation. The unsuspecting purchasers of those lots assumed that they could develop these lots. In one such subdivision, Santiago Estates, this would have caused over 600 failed sewage systems within a 1/2 mile radius of each other, if allowed to be fully developed. Presently, there are six documented failed sewage systems from developments that occurred 25 to 30 years ago.
- **Wetlands.** In addition to the abundance of poor soils, the Quinault Reservation contains many wetland areas.
- **Multiple Trust Ownership.** Some parcels on the Quinault Reservation have over 200 undivided ownership interests, being administered by the Bureau of Indian Affairs, Branch of Realty. In order to obtain a lease on such a property, Federal Regulations require consent from at least 51 percent of the owners and allow the BIA to sign for the remaining owners of undivided interest. A purchase of trust property requires 100 percent owner consent, as well as BIA approval.
- **Multiple Trust and Fee Simple Ownership.** Another situation that occurs on Indian reservations is partial non-Indian ownership in an undivided parcel. In the past, many non-Indians that purchased partial interests in Reservation lands did not understand the complexity of such ownership.
- **No Electrical Power Service.** Currently, most of the parcels on the Quinault Reservation do not have immediate access to electrical power. In order to provide drinking water and enough water to operate toilet flushing to meet health and safety requirements, most property owners need wells, which are powered by electricity.

## COORDINATION EFFORT WITH COUNTIES

The Federally-established boundaries of the Quinault Reservation overlap the political boundaries of both Grays Harbor and Jefferson Counties. In the past 150 year, the Quinault Nation has numerous incidents that demonstrate the Counties inability or unwillingness to protect the interests of the Quinault Nation. They also have continually failed to recognize that the people of the Quinault Nation have different "community values" than the adjacent non-Indian population.

More recently, there have been great strides in the efforts to coordinate activities of mutual benefit and interest between the Quinault Nation, Grays Harbor County, and Jefferson County. In 1989, the Quinault Nation began negotiating with the two Counties for a Memorandum of Understanding (MOU) regarding land use activities on the interspersed fee simples lands on the Quinault Reservation. This historic effort by an Indian tribe and a county government follows the recommendations in the U.S. Supreme Court Decision under Brendale v. Yakima Indian Nation. In addition, open communication has now been established between the respective planning offices when dealing with land use developments that may have an impact of the other political entity.

**TESTIMONY OF  
MICHAEL T. PABLO, CHAIRMAN  
CHAIRMAN OF THE CONFEDERATED  
SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD NATION**

**APRIL 7, 1998**

**HEARING ON TRIBAL  
SOVEREIGN IMMUNITY**

**S 1691**

**Double Tree Guest Suites  
16500 South Center Parkway  
Seattle, Washington**



Mr. Chairman, Vice-Chairman and Senators of the Committee. I thank you for the opportunity to testify before you today in regards to Tribal Sovereign Immunity and I understand the focus today is on civil and property rights.

Mr. Chairman, In 1942 the Ninth Circuit Court of Appeals in Montana Power Co. v. Rochester confirmed tribal ownership of the bed and banks on the south half of Flathead Lake up to the high water mark. In 1982 the Ninth Circuit court again confirmed ownership of the bed and banks when the tribes moved to regulate docks and structures being built on these tribal lands. The U.S. Supreme Court denied cert thus upholding the decision.

To regulate use of tribal property the council adopted the Shoreline Protection Ordinance (64-A revised). In that Ordinance the regulatory board was designed as a 7 member board with 4 members and 3 non-members. The 3 non-members designated were the then 3 Lake County Commissioners. The Council felt this would give non-members an elected voice when they requested permitting for construction on tribal property. Those county commissioners participated for only 1/2 day of the first Shoreline Protection Board meeting then walked out. The Council then advertised at large for 3 non-members to sit on the board and today this is a very successful program with total permits issued on 1707 docks and structures with 1601 of those permits issued to non-members for use of tribal property.

As we are a Steven's Treaty Tribe we have the exclusive right of taking fish on the reservation in order to protect the fishery habitat we also have an Aquatic Lands Conservation Ordinance 87A. The Shoreline Protection Board also regulates activities covered by this Ordinance. Since the implementation of Ordinance 87A there have been 891 permits issued, 267 to non-members, 156 to other tribal programs, 39 to State agencies, 48 to counties and towns and 286 to other government agencies. There is no charge for these permits.

We have a bird hunting and fishing cooperative agreement with the State of Montana which regulates all non-member bird hunting and fishing on the reservation. All non-member sportsman must buy the Tribal/State permit even if they are hunting on their private land. Tribal, State and Federal officers all enforce the regulations and the regulations are established by a joint committee consisting of 3 non-members, 3 members and a representative from the U.S. Fish and Wildlife Service. The recommendations from this committee are then approved by the State of Montana fish and game commission and the Tribal Council. Neither the Tribes nor

the State relinquished any jurisdiction claims by signing this agreement.

When we contracted under P.L. 93-638 the federal power utility which serves over 16,000 meters representing all reservation homes and businesses (and some off reservation) we established a Utility Board and a Consumer Council. Both of these entities have non-member and tribal member representatives. The Utility Board oversees management of the utility and the consumer council is the advocate for the consumer and has equal authority to the board in recommending rate changes in a public, federal rate making process.

We also have a cooperative law enforcement agreements between the Tribes, State of Montana, all cities on the reservation and within counties on the reservation except one Lake County, which refused to sign the agreement. This agreement went into effect in 1994 and provides for cross-citation authority, stop-and-detain provisions and emergency powers from law enforcement officials. Our Tribal officers are also cross-deputized with the Montana highway patrol. This agreement is working very well as evidenced by the enclosed article from the Missoulian of April 26, 1996. As stated by Captain Richard Chase of the Montana Highway Patrol's Missoula office "the program is working exceptionally well with us."

Mr. Chairman, knowing that government action will necessarily impact the activities permitted on the Reservation and in recognition of the fact that many non-tribal members live on our reservation we have taken steps to provide everyone the opportunity to play an active role in promulgation and implementation of our governmental regulations and ordinances.

Our Tribal Administrative Procedures Ordinance provides for direct public participation in the regulation process, access to governmental information similar to the Federal Administrative Procedures Act, and provides any one who believes an agency has caused them injury the right to appeal that action to an Administrative Law judge. We have repeatedly changed proposed tribal regulations because of the non-Indian input in the public review process.

We have utilized Tribal funds to greatly expand and improve our justice system by;

1. Development of an independent prosecutor's office. All prosecutors must be licensed by the Montana State Bar and currently all prosecutors are non-members.

2. We have established a separate Defenders office which includes both civil and criminal defense. This office

includes six attorneys all are non-members and all are members of the Montana State Bar. There are also two non-attorney advocates.

3. We have expanded our Tribal Appellate Court to which trial court decisions may be appealed. The full panel consists of three attorney justices, including the Chief Justice and two non lawyer justices. Currently all attorney justices are non-members licensed by the Montana Bar. Two attorney justices and one lay justice sit on each appeal. Reconsideration is heard en banc and each side in the appeal has the right to recuse one justice in each appeal without stating cause (this is also the case in our trial court). This provides additional opportunity for a fair and impartial decision. Should additional justices be needed we have an on call pool of attorney and lay justices. Further, our Tribal Judges all routinely attend judicial training at the National Judicial College, University of Nevada.

In 1995 we also adopted a Tribal Governmental Immunity Ordinance. This Ordinance provides limited waivers of immunity for injunctive, declaratory or mandamus relief for tribal government infringement of any civil or constitutional rights arising under the Tribal Constitution and By-laws or the Indian Civil Rights Act. It also provides for waiver of immunity when an officer, agents or employee of the Tribes, acting within the scope of authority allegedly causes serious personal injury or death through negligence. We also waive immunity up to the limits of our general liability insurance coverage. These limited waivers provide opportunity for individuals, governments, and other parties to obtain fair and impartial justice.

I also need to point out that any tribal governmental action that would infringe on a question of any civil rights or property rights under the Indian Civil Rights Act may be reviewable in the federal courts.

Mr. Chairman, we are all too familiar with the distrust, anger and fear associated with lost property or property rights. The Confederated Salish and Kootenai Tribes with the signing of the Hellgate Treaty ceded, relinquished and conveyed to the United States nearly 21 million acres that we know as western Montana. With that we reserved approximately 1.25 million acres for our exclusive use and homeland and the Treaty was properly ratified by the Senate. However, the promises made by the United States did not last long. With the western expansion the Reservation, over the strongest objections from the Tribes, was illegally US Court of Claims opened to non-Indian settlement. Since that illegal opening the Flathead allotment Act has been amended approximately 80 times, each time over the objections of the Tribes. Each time we lost, rights and property.



Now even today with the safeguards and protections that we have built into our governmental structure to protect all rights of all individuals, it does not seem to be enough. We are asked once again to give and get nothing in return.

To move to waive any government's sovereign immunity - be it tribal, state or federal would result in judicial chaos by authorizing any one person or entity to file frivolous lawsuits that would virtually bring justice to a standstill. No government could survive the slaughter of rediculus lawsuits this proposed move would bring.

I request the committee to carefully consider this issue and to strengthen tribal sovereignty by giving tribal government the resources necessary to build more protections into government and not to tear down tribal sovereignty by removing sovereign immunity.

Mr. Chairman, lets continue to follow President Ronald Reagan's Indian Policy Statement of 1983 to strengthen Tribes "by removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies. Tribal governments, the federal government and the private sector will all have a role... Our policy is to affirm dealing with Indian Tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination."

I have included for the record two letters of September of 1997, signed by 8 attorneys general from Western States that have Indian reservations within their States. The attorneys general opposed the waiver of sovereign immunity in the Interior Appropriation Bill at that time and state that "such action is a frontal assault on the court decisions and laws which since Chief Justice John Marshalls landmark opinion in Worcester v. Georgia 31 US (6Pet) 515 (1832) have governed relations between the national government and the nation's first citizens". They further state that "if successful this cladestine effort would drive a wedge into the heart of the doctrine of tribal sovereignty which has protected native cultures and native rights and has served as the foundation of Indian self-government in this country."

I have also included for the record a State of Montana Proclamation from Governor Marc Racicot recognizing Tribal sovereignty and the government-to-government relationship between the State and Tribes. I will close by reading the Proclamation.

Missoulian, April 26, 1996

MONTANA

# Reservation law, order

## Tribes, local peace officers work out enforcement details

By DON SCHWENNESEN  
of the Missoulian

PABLO — State, tribal and local officials told Attorney General Joe Mazurek on Wednesday that a retrocession agreement returning some law enforcement powers to the Flathead tribes is working well.

Mazurek met with elected officials, police chiefs and prosecutors from four counties and four cities that share jurisdiction with the Salish and Kootenai Tribes on the Flathead Indian Reservation, to air any problems that have surfaced.

Lake County Commissioners have not signed the pact, citing their longstanding differences with the tribes over jurisdiction, but "we're cooperating," said Commissioner Dave Stipe. County and tribal officers are not cross-deputized.

Poison signed a modified agreement that also did not cross-deputize tribal police officers, though Chief Ron Buzzard noted that the Montana Highway Patrol later cross-deputized tribal police so that they can make traffic stops.

"I think it's working," he said, adding that he will take up tribal police Chief Ron McCrea's offer to investigate city traffic accidents where a tribal member appears at fault.

"The program is working exceptionally well with us," said Capt. Richard Chase of the Montana Highway Patrol's Missoula office.

St. Ignatius Mayor Sam Rouiller had several questions about whether police could enter property owned by tribal members or tribal officers could enter property owned by nonmembers.

Mazurek said that if there's evidence that a crime is in progress, the first officers on the scene are responsible for protecting public safety and securing the scene, regardless of jurisdiction.

If there's a question about the tribal affiliation of a person being arrested, the arresting officers should initially cite the person into their jurisdiction, advised tribal attorney Dan Decker.

"If you can't find out, or if you have reason to believe it's your jurisdiction, cite

them into your jurisdiction," he said.

The arrested person can raise jurisdiction later as a defense issue and have the case transferred, he said.

Asked about bad-check problems, Decker noted that writing bad checks is a violation of tribal law. Merchants or others who have gotten bad checks from tribal members should contact tribal prosecutors.

Mazurek remarked that while political officials still have differences over jurisdiction, law enforcement agencies seem to be making the agreement work.

"Like everything else, I suspect if we leave it to the officers on the ground, everything will be just fine. They'll work it out," he said.

Later, he added that he was pleased to hear that even though Lake County had not signed the agreement, "the county attorney and the tribal attorneys are talking about cases and working them out."

The pact has been signed by the state, Missoula, Sanders and Flathead counties, and the cities of Ronan, Hot Springs and St. Ignatius.

## Attorney General of New Mexico



PO Drawer 1508  
Santa Fe, New Mexico 87504-1508

505/827-6000  
Fax 505/827-5846

TOM UDALL  
Attorney General

MANUEL TIERINA  
Deputy Attorney General

September 3, 1997

The Honorable Bill Clinton  
President of the United States  
1616 Pennsylvania Avenue  
Washington, DC 20530

Dear President Clinton:

In our capacity as the Attorneys General of several Indian states, we are writing to express our alarm concerning legislation pending in the Senate that constitutes a frontal assault on the court decisions and laws which, since Chief Justice John Marshall's landmark opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), have governed relations between the national government and the nation's first citizens. If successful, this clandestine effort, led by a Western Senator, would drive a wedge into the heart of the doctrine of tribal sovereignty which has protected native cultures and native rights and has served as the foundation of Indian self-government in this country.

Mr. President, what is most disturbing about these punitive amendments is that they amount to a repudiation of the bi-partisan efforts of recent decades that have enlarged and reaffirmed the nation's commitment to equal justice and equal opportunity for native peoples. We refer to legislation such as the Indian Civil Rights Act of 1968, the Education Act of 1975 (which has enabled half the tribes to take over and operate their own school systems) and the Indian Child Welfare Act of 1978. We fear the beneficial efforts of these, and other, laws would be emasculated if the radical, coercive changes in the Senate bill are approved, and we attempt to revive the failed policies of the 1950's termination era.

In addition, you should be aware that the extreme budget cuts proposed in these appropriation riders would harm many vital ongoing programs in Indian country. While tribal law enforcement officers do the best they can with the resources they have, Congressional funding for tribal law enforcement on the reservation is a national disgrace. Even though violent crime has continued to drop over the last five years nationwide, life has become more violent for the 1.2 million Native Americans living on or near Indian reservations. Likewise, since Indians are among the most impoverished Americans, it would be shameful if the contemplated cuts shortchange funding for education, health and the environment on many of the reservations.



President Clinton  
September 2, 1997  
Page 2

If these riders are adopted, we will be saying to Native American children that they are not going to have the opportunities of other American children. All indicators and studies show that Native American children are the poorest and have the least chance for success based on their circumstances. Denying tribes the revenue they need to provide economic opportunities for their members will severely impact the youngest and poorest citizens of this country.

These are outrageous, far-reaching amendments. Their powerful sponsor, Senator Gorton, has boasted publicly that he is "trying to break up the system". We urge you to do all in your power to block this legislation.

Sincerely yours,

  
Tom Usher  
Attorney General

TU/mm

The following Attorneys General have agreed to join me in signing this letter:

Frankie Sue Del Papa, Nevada  
James E. Doyle, Wisconsin  
Drew Edmondson, Oklahoma  
Hubert H. Humphrey III, Minnesota  
Hardy Myers, Oregon  
Grant Woods, Arizona  
Heidi Heitkamp, North Dakota

cc: Attorney General Janet Reno  
Secretary of Interior Bruce Babbitt  
Senators Lott and Daschle  
Senator Gorton  
Representatives Gingrich and Gephardt  
National Congress of American Indians

**ATTORNEY GENERAL  
STATE OF MONTANA**

FILE COPY

Joseph P. Mazzarak  
Attorney General



Department of Justice  
215 North Sanders  
PO Box 201-07  
Helena, MT 59620-1401

September 5, 1997

The Honorable Max Baucus  
United States Senate  
730 Hart Senate Office Building  
Washington, DC 20510

bell

Dear Senator Baucus:

I am writing to express my opposition to H.R. 2107, § 120, the Department of Interior appropriations bill. I urge you to strongly support efforts to remove this amendment prior to the passage of the bill.

Section 120 would automatically waive the sovereign immunity of any tribal government receiving tribal priority allocation funding from the United States Bureau of Indian Affairs. My objections to this amendment to Interior's appropriations bill are several.

First, it is contrary to democratic principle to allow such a substantive amendment to be attached at the eleventh hour, without notice, to a bill not specifically focused on the complex subject of federal Indian law. Second, it places the federal government, which has a fiduciary relationship with the tribes, in the position of forcing tribal governments to accept unconditional waivers of sovereign immunity or face the further impoverishment of their tribal members. Third, the language itself goes too far. This rider represents a far reaching change in Indian law and Congress should not consider such a dramatic change without benefit of further research and the opportunity for full Congressional hearings.

Passage of the appropriations bill with this language would frustrate ongoing activities of those in state, local, and tribal governments who are laboring cooperatively to improve the daily working relationships among these governments. It would drive a wedge between the local and state governments and the tribal governments with whom we must work, and would create devastating economic hardships to many Native Americans. I recognize that Congress has the full authority to step in and change matters of Indian law, and that this issue is an appropriate one for debate. Nonetheless, if the issue is so compelling, it ought to be resolved in a process which affords a fair opportunity for full discussion and debate.

LEGAL SERVICES DIVISION

Appellate Legal Services Bureau • Agency Legal Services Bureau • County Prosecutor Services Bureau  
Telephone: (406) 444-2026 FAX: (406) 444-3349 E-Mail: [attgen@cnusnet.com](mailto:attgen@cnusnet.com)


The Honorable Max Baucus

September 5, 1997

Page 2

While I strongly believe it is in the best interests of both tribal and nontribal citizens for tribal governments to follow the leads of states and enact limited waivers of sovereign immunity, this substantive amendment to the Interior appropriations bill and the process by which it has arisen, is unfair in both form and content. Passage of this rider will have a chilling effect on the recent progress the Montana Tribes and State have made by working together to overcome some of the illogical results of decades of the conflicting and shifting policies of the federal government. I urge you to vote against this amendment, and to support efforts to remove it prior to the appropriations bill passing from the Senate.

Sincerely,



JOSEPH P. MAZUREK  
Attorney General

jpm/sab/rb



# State of Montana

## Proclamation

WHEREAS, it is desirable to all of us who live in Montana to achieve mutual goals through an improved relationship between sovereign governments, namely the State of Montana and the Indian Nations located within its borders. The respective sovereignty of the state and each federally-recognized tribe provides authority for each to exist and to govern; and

WHEREAS, there are seven federally-recognized Indian tribes in the state. Each tribe has an independent relationship with each other and with the state and its political subdivisions; and

WHEREAS, these seven Indian Nations and the State of Montana have historical relationships and unique rights shaped by federal and state constitutions, statutes, and treaties with the United States government and Executive Orders of the President.

NOW, THEREFORE, I, MARC RACICOT, Governor of the State of Montana, do hereby affirm that the State of Montana recognizes the fundamental principle and integrity of the government-to-government relationship between the State and the Indian Nations located in Montana, and it is upon this principle that a mutually beneficial approach to conflict resolution must rest.



IN WITNESS WHEREOF, I have hereunto set my hand and caused the GREAT SEAL OF THE STATE OF MONTANA to be affixed. DONE at the City of Helena, the Capital, this seventh day of March, in the year of our LORD, one thousand nine hundred and ninety-three.

ATTEST:

Mike Cooney  
MIKE COONEY  
Secretary of State

Marc Racicot

MARC RACICOT  
Governor of Montana

THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD NATION

P.O. Box 276  
Pablo, Montana 59855  
(406) 675-2700  
FAX (406) 675-2806



March 12, 1998



Joseph E. Dupule - Executive Secretary  
Vern L. Calmont - Executive Treasurer  
Frederick Cordier - Sergeant-at-Arms

The Honorable Ben Nighthorse Campbell, Chairman  
Committee on Indian Affairs  
SH-838 Hart  
United States Senate  
Washington, D.C. 20510  
Attn: Paul Moorehead

TRIBAL COUNCIL MEMBERS:  
Michael T. Pablo - Chairman  
D. Fred Matt - Vice Chairman  
Cecilia J. Lanford - Secretary  
Wm. Joseph Moran - Treasurer  
Donald "Donny" Dupule  
Michael Durbin, Jr.  
Jam. Harrel  
Mary Laffand  
Elmer "Sonny" Mongeau  
Gary Stevens

Dear Chairman Campbell,

I understand that the Indian Affairs Committee has scheduled two field hearings on Tribal Sovereign Immunity. The first will be held on April 7, 1998 in Seattle, where the focus will be on civil and property rights. I understand a second field hearing will take place on April 9, 1998, in Minneapolis, where the focus will be tort claims. Clearly a major component of these hearing will be how tribal sovereign immunity affects the rights of non-Indians on allotted reservations.

For various reasons I would like to urge the Committee to consider an elected official of the Confederated Salish and Kootenai Tribes as a witness at this hearing. As you know, our reservation was severely allotted pursuant to the provisions of the Flathead Allotment Act and subsequent home-standing by non-Indians. As a result, we have a very large population of non-Indian reservation residents. While we have had disagreements with what is really a small group of vocal antagonists on our reservation over the years, we have also had a comparatively good rapport with the vast majority of the non-Indians who work and/or live on the Flathead Reservation.

Relative to the hearing, we believe our experience in dealing with the non-Indian community and how we offer legal protections may be instructive to Committee members and the public. The inner workings of the many institutionalized boards we have established to ensure the non-Indian community has input into tribal decision making could also be instructive. For instance, we have established the Shoreline Protection Board which deals with the issuance of permits for construction activities on Flathead Lake as well as permits under our Aquatic Lands Ordinance. This Board has issued thousands of permits to non-Indians as well as to state and local governments, with total cooperation. We have entered into a comprehensive Fish and Wildlife Agreement with the state of Montana involving licensing of non-Indians on the reservation. When we took over management of the large electric utility on our reservation under a "638" contract, we established both a Utility Board to directly oversee the management of the utility (now known as Mission Valley Power) and

*Honor us with your presence at the 100th Annual Arlee Celebration, July 1-5, 1998!*

a Consumer Council to represent the users of the utility. Both of these boards have had and always will have non-Indians serving on them. This has not been token representation either. Since its inception, the Consumer Council has generally had more non-Indian members than Indians.

In short, we have always pursued an inclusive, as opposed to an exclusive approach in dealing with our non-Indian neighbors and believe that full due process does exist for all persons on this reservation. In the area of contract dispute for instance, plaintiffs have full recourse here and we appoint lawyers and professional court advisors in many criminal and civil proceedings respectively. We have also negotiated a host of agreements with the state that further reflect the progressive attitude of our Tribal Council. We carry general liability insurance and routinely waive tribal immunity from suit up to the limits of that liability.

For these reasons, as well as the fact that we have highly regarded lawyers in our Legal Department who will be assisting me in drafting our testimony and will be able to anticipate and respond to the likely accusations by witnesses critical of tribal governments, we would respectfully request that we be allowed to present verbal testimony at either of the forthcoming hearings although our areas of expertise might be most appropriately addressed at the Seattle hearing. Please contact me to let me know your thoughts on this matter.

Thank you for your support. This is going to be tough year for Tribes but we are confident that you will continue to support the basic and fundamental rights of Indian tribes to continue in their roles as governing bodies.

Sincerely,



Michael T. Pablo  
Chairman



# COW CREEK BAND OF UMPQUA TRIBE OF INDIANS



TESTIMONY OF SUE M. SHAFFER, CHAIRMAN  
COW CREEK BAND OF UMPQUA TRIBE OF INDIANS  
Before the United States Senate Committee on Indian Affairs  
April 7, 1998

## Introduction

Mr. Chairman, I am Sue Shaffer, chairman of the Cow Creek Band of Umpqua Tribe of Indians. Thank you for inviting me to appear and testify in these proceedings.

While I am proud to appear here on behalf of our Tribe, I sincerely regret the necessity of appearing to defend our sovereignty in proceedings apparently generated from issues having little or nothing to do with the Cow Creek Tribe.

I hope that the persons and groups responsible for the necessity of these hearings will soon come out from behind technical arguments, isolated cases and media-friendly catchphrases to candidly state their apparent belief - that tribes have no right to exist if we might cut into a non-Indian constituent's profit margin. I pray that these modern day tribal terminators be released from action against tribes based on fear, greed or revenge.

Tribes do not exist to deprive anyone of rights or property as we struggle to reconstitute our shattered and dispersed people. We do not deserve scorn, insult or to be terminated yet again under the guise of "equal justice."

Mr. Chairman, I have 2 primary points that I would like to make today after providing a bit of important background information, these are: 1) Cow Creek Tribal sovereignty has and will continue to benefit our local non-Tribal community as well as the Tribe; 2) Cow Creek Tribal sovereignty has not been and will not be a barrier to good business and community relations. The corollary of these points is simple but profound: limitation on Cow Creek sovereignty are limitations not only upon our Tribe but also limitations on our ability to effectively work with and support the non-Tribal community.

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Roseburg, OR 97470  
(541) 672-9405

Testimony of Cow Creek Chairman Shaffer  
 April 7, 1998  
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### Tribal Sovereignty in the Context of Cow Creek History and Goals

The mission of the Cow Creek Tribe is to create an opportunity for our members to live well and raise their children in their ancestral homeland - the center of our world - in peaceful concert with our neighbors. Three elements absolutely essential to the fulfillment of this mission are Tribal sovereignty, Tribal membership support and the good will of our neighbors. These three elements are not incompatible. Each of these elements - especially Tribal sovereignty - is indispensable to the creation and protection of the social and economic foundations from which the Cow Creek Tribe is building toward its goals.

A summary of Cow Creek Tribal history is simple, tragic and necessary to an understanding of the importance of our sovereignty to us and our neighbors. Our homeland was opened to non-Indian settlement by the United States government before the U.S. legally owned the land. Noting this oversight, the U.S. sent its Indian Agent to negotiate a treaty with our Tribe - people who at the time had no clear understanding of the English language or anglo-American conceptions of property boundaries. Our 1853 treaty, ceding over 800 square miles of our homeland without anything resembling fair consideration, was executed, ratified by the U.S. Senate and then completely ignored for 128 years during which there were no promised treaty benefits or services provided. During the following generation, our people were systematically rounded up and removed or killed if they did not manage to hide far enough back in the hills or fully integrate into non-Indian society. The following two quotes provide a glimpse of the anti-Indian sentiment of that era:

"... outrages at variance with every principle of justice and revolting to humanity have been committed against the Indians in this district, and the perpetrators are running at large ... a few arrests would be a wholesome example ... How mortifying that we have so reckless a population as to demand the presence of troops to protect the natives against the barbarities of our own citizens. Scenes have been enacted by whites in this district against the Indians, that would disgrace the most barbarous nations of the world ..." [Indian Agent Joel Palmer, May 12, 1854, writing to Washington D.C. from Port Orford]

"General Palmer, Superintendent of Indian Affairs, has decided to take the Indians now collected on the Umpqua reserve, to the Willamette, and our people are much pleased with the prospect of deliverance from the nuisance of an Indian reserve in their neighborhood. These reserves afford protection to hostile Indians, as well as friendly, and our people are either in favor of extermination or colonization." [From "Volunteer" at Deer Creek, Oregon [Roseburg], December 28, 1855, printed in the Oregon Statesman of January 8, 1856] Because of this physical annihilation, the Cow Creek Tribe was not in a position to successfully assert its sovereignty for many years. However, despite being forcibly dispersed, the Cow Creeks continued to meet and provide for each other as much as possible and our Tribe did not die. Even legislative "termination" in 1954 did not shake us from our certainty in our Tribal sovereignty.

Testimony of Cow Creek Chairman Shaffer  
April 7, 1998  
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Most of our tribal families remained in or returned to our aboriginal homeland, even though the land reservation promised in our 1853 treaty (an area over 100,000 acres against which non-tribal governments have collected taxes ever since) never occurred. The Cow Creek Tribe has had to purchase every square foot of our present Tribal trust lands. As a result, unlike the majority of western tribes, we are not yet able to provide even basic residency to our membership. Because we have no residency reservation, Cow Creek families have always struggled to buy their own homes and have paid property taxes; there have been no tax exemptions available for Cow Creek Tribal members.

Despite our history, Tribal development efforts continue to focus on benefitting our surrounding communities as well as our Tribal membership, and we have not asked for any handouts or bailouts. All we have insisted upon is the recognition of our sovereignty; from which no one has been harmed and many people (Tribal and non-Tribal) have benefitted.

#### **Cow Creek Sovereignty Benefits the Non-Tribal Community**

Since the legal restoration of our sovereignty in 1982, the Cow Creek Tribe has created a Tribal economy from scratch. We have been fortunate enough to translate the combination of Tribal sovereignty, Tribal membership support and the good will of our neighbors into our present position as the second largest employer in our area, providing over 750 jobs (primarily for non-members, many of whom have never before had steady employment) in our timber depressed region. We are proud to provide Tribal employees fully paid health insurance (as well as heavily subsidized dependent coverage), to pay over fourteen million dollars (\$14,000,000) annually in wages, benefits and payroll taxes into our community and that Tribal jobs have allowed many families to wean themselves from reliance on state and federal welfare programs.

Over the last three years Tribal construction projects have added over thirty six million dollars (\$36,000,000) to the Oregon economy. Furthermore, the Cow Creek Tribe voluntarily donates six percent (6%) of its net gaming revenues to local governments and charities; an amount far in excess of any local taxes our Tribe would pay without sovereignty. These figures are just the tip of the iceberg and none of it would have been or will continue to be possible if Tribal sovereignty is diminished. Even as I testify here today, our Tribe is aggressively pursuing several economic diversification projects which should provide several hundred new jobs in our area; for Indians and non-Indians alike. All of these prospective jobs depend on Tribal sovereignty and are particularly important since yet another resource based business (Glenbrook Nickel) has recently closed in our area, putting another 300 persons in the unemployment lines.



Testimony of Cow Creek Chairman Shaffer  
 April 7, 1998  
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Our track record clearly reveals that the Cow Creeks are far from tax evaders and rights abusers. Being cast as such, as we along with other tribes have been in earlier tribal sovereignty hearings, is truly offensive. Despite and because of our sovereignty, the Cow Creek Tribe is generous with, protective of and concerned over our local non-Tribal community and our generally high level of community respect underscores this fact. Our sovereignty is apparently only offensive to those who have no firsthand knowledge of our Tribe.

**Cow Creek Sovereignty is not a Barrier to Good Business and Community Relations**

Our way of conducting Tribal business is non-confrontational and cooperative. The Cow Creek Tribe is not an angry or vengeful sovereign. We have no desire to take anything from anybody just because we may have the right to do so or because it might be to our short term political or economic advantage. While we have had every opportunity to do so, we have not beat the drum of sovereignty in protracted court battles or in an aggressive manner. Rather, we believe, and have experienced, that it is possible to conduct ourselves in a manner that is fair to our partners, as well as our detractors, without being destructive of Tribal sovereignty. As a result, despite our rapid growth over the last eight years, the Cow Creek Tribe has not raised sovereign immunity as a defense in legal proceedings either internally or externally, nor have we been accused by any of our neighbors or members of denying or restricting property rights or due process.

When law or common sense requires us to negotiate formal agreements with neighboring governments, organizations or business partners, we do so without hesitation and with every intention of carrying our full share of whatever burden such arrangements may impose. All we ask is that our negotiating partners accept and respect our sovereignty. As a result, despite being protective of our sovereignty, we have been able to preserve and promote our sovereignty in a manner beneficial to the Cow Creek Tribe as well as those with whom we do business. For example, when undertaking construction projects we have contracted with the county building department to undertake inspections and apply local building code standards as a matter of Tribal law, so long as the county agreed that it could not force us to obtain a non-Tribal building permit. Another example is our local fire service arrangement under which we pay the local fire district at the prevailing rate for local property owners, so long as the fire district accepts our Tribal property valuations. Yet another example is our agreement with the Oregon State Police (OSP) whereby the OSP is paid eighty dollars (\$80) per hour per officer for regulatory and oversight activities on certain Tribal lands. These arrangements have resulted in remuneration that all parties agree is cost effective and fair.

Testimony of Cow Creek Chairman Shaffer  
April 7, 1998  
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It has always been our Tribal philosophy and practice to build our communities (Tribal and non-Tribal) in a cooperative manner for the common good in furtherance of our desire to help build and support strong and independent families. As a result, our Tribe has enjoyed local support at a level almost unheard of in Indian Country. Examples of non-business community efforts with which our Tribe has been actively involved include our joint efforts with the local offices of the U.S. Forest Service and Bureau of Land Management on cultural resources matters and our strong interaction with the South Umpqua Historical Society and the Pioneer/Indian Museum in Canyonville, Oregon. Right now, our Tribe is working with the YMCA and the City of Canyonville to establish a Day Care/Learning Center in Canyonville through which needed services to Canyonville as well to the surrounding communities of Myrtle Creek, Riddle, Days Creek, Tiller, Azalea and Glendale.

### **Conclusion**

Any effort to limit tribal sovereignty as it currently exists would be a great injustice to the Cow Creek Band of Umpqua Tribe of Indians. To quote the honorable Senator Mark O. Hatfield at the dedication of Chief Miwaleta Park in the heart of our homeland in 1987:

"... there has been justice denied for many generations; stains on the history books of our nation which relate to the Cow Creek Band of the Umpqua Tribe . . . but the wonderful thing is, even though we cannot remove those stains on our history, we can rewrite history. And we have the freedom, and the privilege, and the responsibility to rewrite history to correct the wrongs of the past, to compensate through restitution and other methods that are open to us for things that have happened to our history for which we are not very proud."

The Cow Creek Tribe is not looking for any handouts from this Committee or any other group. We intend to use our own resources to the greatest extent possible to provide our people with the opportunity to live and raise their children peacefully and fruitfully in their ancestral homeland. Congressional limitation of tribal sovereignty is but another impending stain on the history and reputation of the United States. Restriction of Tribal sovereignty would expose and reduce our resources in a manner destined to return us to the brink of extinction as a people.

Testimony of Cow Creek Chairman Shaffer  
April 7, 1998  
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In closing, Mr. Chairman, let me state firmly that Cow Creek Tribal sovereignty is not for sale and we will not remain idle in the face of threats to strip away our sovereignty by a congressional act. Cow Creek sovereignty has survived the "exterminators" of the mid 1800's, bounty hunters who physically hunted us down, as well as the congressional terminators of the 1950's who sought to destroy us with legislation. Please do not allow our sovereignty to be stripped by modern tribal terminators; people we have never harmed and have no intention of harming. Please do not advance or endorse anti-tribal sovereignty legislation and allow the shameful repetition of a history we all should have learned so much from already.

Thank you very much, Mr. Chairman. I would be happy to answer any questions you or the members of the Committee may have.

Shirley M. Shaffer



# COW CREEK BAND OF UMPQUA TRIBE OF INDIANS

## Resolution No. 98-9

### RESOLUTION OF THE COW CREEK BAND OF UMPQUA TRIBE OF INDIANS OPPOSING S. 1691

**WHEREAS**, the Cow Creek Band of Umpqua Tribe of Indians (the "Tribe") is organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), the provisions of the Cow Creek Band of Umpqua Tribe of Indians Recognition Act of December 29, 1982 (P.L. 97-391), as amended by the Cow Creek Band of Umpqua Tribe of Indians Distribution of Judgment Funds Act of October 26, 1987 (P.L. 100-139), and the Cow Creek Tribal Constitution, duly adopted pursuant to a federally-supervised constitutional ballot, on July 8, 1991; and,

**WHEREAS**, pursuant to Article III, Section 1 of the Tribal Constitution the Cow Creek Tribal Board of Directors (the "Board") is the governing body of the Tribe; and,

**WHEREAS**, pursuant to Article VII, Section 1 (a) of the Tribal Constitution, the Board has the power to "negotiate with the Federal, state, and local governments on behalf of the Tribe and to advise and consult with representatives of the Department of the Interior or any other federal, state, or local department, agency, or office on all activities of those agencies or offices that may affect the Tribe"; and,

**WHEREAS**, pursuant to Article VII, Section 1 (b) of the Tribal Constitution, the Board has the power to "represent the Tribe before Federal, state, and local governments and their departments and agencies"; and,

**WHEREAS**, pursuant to Article VII, Section 1 (d) of the Tribal Constitution, the Board has the power to "administer the affairs and assets of the Tribe"; and,

**WHEREAS**, pursuant to Article VII, Section 1 (t) of the Tribal Constitution, the Board has the power to have such other powers and authority necessary to meet its obligations, responsibilities, objectives, and purposes as the governing body of the Tribe"; and,

**WHEREAS**, S. 1691, the "American Indian Equal Justice Act," has been submitted to the United States Senate for consideration; and,

**WHEREAS**, the Tribe finds that S. 1691 is a contemporary version of tribal termination because of the overbroad manner in which it would strip tribal sovereignty; and,

**WHEREAS**, the Tribe finds that S. 1691 is premised on inaccurate and derogatory findings; and,

**WHEREAS**, the Tribe finds that S. 1691 purports to resolve controversies not at issue with the Tribe yet would apply to the Tribe in a manner contrary to the best interests of the Tribe; and,

**WHEREAS**, the Tribe has previously enacted several Tribal laws to address issues raised by S. 1691 and these Tribal law solutions have successfully resolved any issues of the type raised by S. 1691 without federal legislative intervention; and,

**WHEREAS**, the Tribe finds that, despite the apparent misconceptions of sponsors and supporters of S. 1691, Tribal sovereignty has allowed the Tribe to be generous with, protective of, responsive to and concerned over our local non-Tribal community; and,

**WHEREAS**, the Tribe has several ongoing commercial and intergovernmental relationships with non-Tribal entities that have not been impaired in the manner that S. 1691 suggests such relationships are necessarily impaired by the fact of tribal sovereignty; and,

**WHEREAS**, the Tribe finds that S. 1691 would violate the federal/tribal trust relationship, Tribal treaty rights and generations of well-established federal Indian legal principles based, apparently, on premises and intentions having nothing to do with facts and circumstances related to the Tribe;

**WHEREAS**, the Tribe finds that passage of S. 1691 would result in the repetition of historical injustices to Tribes which have over and over again had to be overturned at great expense to both tribes and non-tribal people in the United States; and,

**WHEREAS**, the Tribe finds that S. 1691 would expose Tribal resources and assets in a manner detrimental to the Tribe as well as the local non-Tribal community; and,

**WHEREAS**, the Tribe finds that sponsors and supporters of S. 1691 have, by association, wrongfully maligned and accused the Tribe of misdeeds such as tax evasion as arguments in favor of S. 1691; and,

**WHEREAS**, the Tribe believes that S. 1691 has been introduced, among other things, to further personal, political and commercial agendas not expressed in the bill itself and that have nothing to do with the Tribe (e.g. disputes, old and new, with Tribes other than Cow Creek; active lobbying in favor of S. 1691 by the Petroleum Marketers Association when Cow Creek has no interests in petroleum industries); and,

**WHEREAS**, the Board has determined that it would be in the best interests of the Tribe to formally oppose S. 1691 by all reasonable means and to request that members of the Oregon federal congressional delegation also oppose S. 1691;

**THEREFORE BE IT RESOLVED** that the Tribe, by and through the unanimous vote of the Board, hereby expresses its official opposition to S. 1691; and,

**BE IT FURTHER RESOLVED**, that the Tribe hereby requests that members of the Oregon federal congressional delegation oppose S. 1691 by all reasonable means; and,

**BE IT FURTHER RESOLVED**, that the Tribe hereby commits itself to any and all reasonable measures to defeat S. 1691; and,

**BE IT FURTHER RESOLVED**, that any and all actions heretofore or hereafter taken by any authorized Tribal officer regarding the substance of the foregoing resolutions be, and hereby are, ratified and confirmed as the act and deed of the Tribe taken or made by such officer(s) within the scope of their duties to and/or employment by the Tribe; and,

**BE IT FURTHER RESOLVED**, that neither this Resolution nor or any document or representation related herewith or therewith shall constitute a waiver of the sovereign immunity of the Tribe or its officers acting in their official capacity beyond the scope of any such waiver properly and expressly granted in accordance with applicable Tribal law; and,

**BE IT FURTHER RESOLVED**, that the actions authorized and taken by this Resolution 98-9 are intended to advance the sovereign self governance of the Tribe, and to protect the political integrity, economic security and health and welfare of the Tribe; and,

**BE IT FURTHER RESOLVED**, any prior Tribal regulations, resolutions, orders, motions, legislation, codes or other Tribal law which are materially inconsistent with the purpose of this Resolution 98-9 are hereby repealed to the extent of any such inconsistency.

#### **CERTIFICATION**

It is hereby certified that the Cow Creek Tribal Board of Directors, governing body of the Cow Creek Band of Umpqua Tribe of Indians, composed of eleven (11) members of whom (11), constituting a quorum, were present at a meeting duly held on the 25th day of March, 1998, adopted the foregoing **RESOLUTION OF THE COW CREEK BAND OF UMPQUA TRIBE OF INDIANS OPPOSING TO S. 1691** by the affirmative vote of 11 for and 0 against.

  
Sue Shaffer, Tribal Chairperson

Attest:   
Tom W. Rondeau Sr., Tribal Secretary





**ALL INDIAN PUEBLO COUNCIL**

**STATEMENT ON TRIBAL SOVEREIGNTY  
Roy W. Bernal, Chairman  
All Indian Pueblo Council**

Chairman Campbell and Honorable Members of the Senate Committee on Indian Affairs, my name is Roy Bernal. I am the Chairman of the ALL INDIAN PUEBLO COUNCIL, the prehistoric alliance of the nineteen Pueblos located in what is now the state of New Mexico. I appreciate the opportunity to appear before the Committee to share some of the observations and concerns of the Pueblo tribes in New Mexico.

***Origins of Tribal Sovereignty.*** Tribal sovereignty, although some sources link it with the sovereignty of the United States, actually predates that of the United States. Organized tribes existed before the European incursions into North America. The Pueblo peoples have lived in the Southwest region of the North American continent for thousands upon thousands of years. Since time immemorial, our Peoples have lived in well-organized communities. When the Spanish colonizers entered the region in the 1500's there were well over 40 independent Pueblo nations living along the great Rio Grande River. Each Pueblo had a well-organized system of self-government with an efficient system of law and order that protected society as well as the rights of individuals.

Pueblo life was built upon a foundation of work, together with religious observances and practices. We had a highly developed agricultural economy that brought no man's labor and did not practice slavery or feudal labor. Each Pueblo family had its own land for purpose of cultivation. Each clan and

Pueblo gave aid to the others. Whole Pueblos banded together in hunting, food gathering, farming, irrigation and care of the land.

The significance of Indian self-government was acknowledged from the outset of European contact. The Pueblos hold as evidence of their sovereign powers, the Canes of Authority, presented to the autonomous Pueblos by the governments of Spain (1620), Mexico (1821), the United States of America (1863) and the State of New Mexico (1980). The Lincoln Cane, presented to the Pueblos in 1863 by the United States, symbolizes to all the world the perpetual acknowledgement and commitment of the United States to honor our sovereignty, protect our resources, and enhance our welfare - in the spirit of trusteeship, honesty and equality. Likewise, our Pueblo Canes are symbols to our peoples that all power and authority exists in their own form of government; that their government is responsible to the people; and that they own allegiance to the United States of America.

The existence, independence and sovereignty of Indian governments was recognized not only in the United States Constitution but also in various commonwealth documents predating the United States Constitution such as the Articles of Confederation. In the Wheeler case,<sup>1</sup> the United States Supreme Court observed that tribal sovereignty does not consist of delegated powers granted by express acts of Congress, but rather of "inherent powers of a ...sovereignty which has never been extinguished."<sup>2</sup> For Congress to contemplate interfering with these ancient doctrines, great caution should be employed.

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<sup>1</sup>United States v. Wheeler, 435 U.S. 313 (1978).

<sup>2</sup> Id. at p.322.

*The Significance of Sovereignty and Self-Government.* The United States and its Courts have recognized the significance of tribal sovereignty and self-government. Tribal powers of self-government and the inherent element of sovereignty are mutually dependent: one cannot exist without the other. A tribe should decide how its government is organized, how its sovereignty should be manifested, and the circumstances under which a tribe should honor claims. In 1946 the United States decided that claims could be made against it for certain civil cases. Just important as an act of the sovereign internal powers of the United States so must the tribes be accorded that same right. Individual tribes, not the heavy hand of a separate government, the United States, should make those decisions.

*Credentials of Complainers.* Doubtless certain persons have complained about being treated unfairly by tribes and have asked Congress to step forward and take drastic action. A few disgruntled persons should not carry the day. We submit that these complaints are unique and not the status quo. Let us remember, in any controversy or case there are at least two sides. Any non-prevailing party is usually angered, and sometimes embittered. He will continue to attack his opponent, his opponent's lawyer, and his own lawyer. He will attack the system as being unjust, immoral, and unconstitutional. He will allege unblushingly that the trier of facts has been bribed, is in league with the devil, or both. To heed a few disappointed persons such as these complaining to Congress and other authorities with their wrongful assertions or inevitable exaggerations, would Congress upset existing tribal sovereignty, the concept of self-governance, and the necessary independence that tribes enjoy? Are non-tribal courts better, fairer, more learned, better informed, more conversant with Indian tradition? The answers to these queries are, of course, a resounding "No!" It is a sad fact that the multitude of persons who



believe they have been treated fairly and even-handed by tribes do not feel compelled to come forward.

***Cultural Differences.*** Tribes have endured and prevailed because of our strong traditions of communality and consonance. These traditions are evident in issue resolution among tribal members and others, as well. This is in stark contrast with the peculiarity of the Anglo-Saxon, which has believed that Nature should not be accommodated but should be challenged and defeated. This notion of adversity is carried out in Anglo-Saxon justice: Truth and Justice will emerge if adversaries battle toe to toe until the survivor is declared the winner. The traditional tribal approach is based on finding points of agreement rather than emphasizing disagreements. The imposition of the Anglo-Saxon philosophy on tribes is completely inappropriate and high-handed. Congress should not do so.

***Civil Rights and Property Rights.*** Without any command from Congress, tribes already deal with issues of property rights and civil rights. Because of diminishing Federal dollars, the New Mexico Pueblos must pursue businesses aggressively to generate funds to provide services to their members and to protect tribal lands. Our businesses include gaming enterprises, Indian arts and crafts shops, tribally-owned truck farms with patrons harvesting for themselves, and other retail operations. Business judgements are exercised on the basis of practicality rather than Congressional mandate. A member of the public patronizing a tribally-owned business, who suffers an injury, typically a slip and fall instance, expects care, and we clearly understand the denial of responsibility involves the denial of a property right. Insurance companies providing liability coverage are instructed by tribes to deal with such cases and not raise any immunity defenses. If these cases are not settled amicably, and the

vast majority are. they are arbitrated and the arbitrations are enforced by tribes. We submit that Congress should acknowledge that tribes have a sense of priority which is at least equal to that of the United States.

**Removing Immunity - Disastrous Results.** One need not speculate as to the harmful effects of removing sovereign immunity which protects tribes in their acts of self-government. From 1968 to 1978, the United States Tenth Circuit Court of Appeals adopted the view that the 1968 Indian Civil Rights Act permitted suits against tribes by aggrieved plaintiffs alleging violations of civil or property rights. Lawyers artfully characterized many causes to fall into those categories. During this decade, brought to a close by the holding by the Supreme Court in Santa Clara Pueblo v. Martinez<sup>3</sup> case, there was a proliferation of cases in Federal Courts which assumed immediate jurisdiction (the plaintiff not having first to proceed through any other court system, including tribal court, the logical forum). These matters included contract disputes, routine personnel issues, brief incarcerations by police, and tribal membership questions. (Martinez involved a membership issue). Even tribal judges were sued, notwithstanding the doctrine protecting the judiciary dating from English common law. The proposed American Indian Equal Justice Act would open those doors again<sup>4</sup>

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3 Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), holding that the Indian Civil Rights Act did not generally waive tribal immunity.

4 As an example, non-tribal courts have dealt from time to time with membership issues. It is hard to imagine a forum less equipped to deal with such questions than the courts of the United States. Each tribe varies in its criteria for membership. Most are based largely on heritage; others on clan membership and moieties. Some questions turn on paternal ancestry, and others on maternal lineage. Tribal religious leaders are reluctant to share this culturally-based information with outsiders. Based on partial and inaccurate information, non-tribal courts make jarringly erroneous decisions, but ones with long-lasting, lingering effects.

During the last twenty years, tribal courts in New Mexico have resumed their rightful function of dealing with a myriad of proceedings. Tribal governments are freer to operate without the constant threat of frivolous lawsuits. Members of tribal governments must be free to use their best judgements in making governmental decisions without concern for petty lawsuits, the same as members of Congress and chief executives of the United States.

The forum proposed by S. 1691 would involve the condemnation of tribal properties by other governments, ranging from the United States to local communities. Moreover, tribal lands would be similarly exposed to actions by privately owned utilities. Not only would tribal lands be threatened, but also the integrity of boundaries would be ignored. A shameful chapter in American history permitted the condemnation of Pueblo lands; as a result, many unwanted facilities, including high speed freeways, high pressure pipelines, high voltage power lines and railroads abound in heavily populated segments of Pueblo lands.

It goes without saying, as well, that already overburdened non-Indian courts would suffer a significant increase in caseloads.<sup>5</sup>

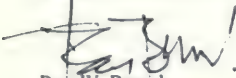
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5 In New Mexico tribal courts hear and decide thousands of cases each year. These involve tribal governments, either as plaintiffs or defendants; they also involve as parties automobile financing firms, department stores, construction contractors, gaming suppliers, disgruntled employees, oil companies, advertising agents, surveyors, and all manner of other persons, tribal and non tribal, of every description imaginable. The sheer volume of these cases is overwhelming. To permit or encourage these cases to go to other court systems would be most ill advised and understandably upsetting to neighboring judicial jurisdictions.



**Conclusion.** Congress must not strip tribes of tribal immunity. This would be the antithesis of the government-to-government relationship, the announced national policy of the United States and would be an exercise of unbridled power over reason.

Respectfully submitted,



Roy W. Bernal  
Chairman

**THE ALL INDIAN PUEBLO COUNCIL**



*Roy W. Bernal, Chairman  
J. Steve Juanico, Vice Chairman  
Amadeo Shije, Secretary-Treasurer*

**ALL INDIAN PUEBLO COUNCIL  
OFFICE OF THE CHAIRMAN**

3939 San Pedro NE, Suite E

Post Office Box 3256

Albuquerque, NM 87190-3256

(505) 881-1992

March 2, 1998

Honorable Ben Nighthorse Campbell  
Chairman, Senate Indian Affairs Committee  
838 Senate Hart Building  
Washington, DC 20510

Re: March 11<sup>th</sup> Oversight Hearing: Tribal Sovereign Immunity

Dear Senator Campbell,

The All Indian Pueblo Council is comprised of the nineteen federally recognized Pueblo Indian nations located in the state of New Mexico. First mentioned in written history in 1598, the All Indian Pueblo Council has represented the common goals of the nineteen Pueblos for a thousand years. In modern times, the Council operates under a written constitution and is mandated to preserve and protect the common goals of the nineteen Pueblo nations. Providing oral testimony to Congress regarding the governmental right of the Pueblos to waive or maintain their sovereign immunity from lawsuit is considered a constitutional duty of the All Indian Pueblo Council.

I write today to request that as Chairman of the All Indian Pueblo Council I be afforded the opportunity to present to the Senate Indian Affairs Committee testimony regarding the unique situation and status of the Pueblo nations. Considered the most traditional tribal governments remaining in America because our governments continue to incorporate traditional leaders, values, and customs the Pueblo Indian nations contribute a lasting tribute to tribal sovereignty. Our traditional governments operate in modern times with modern solutions.

If Congress desires a intelligent presentation on the strength, vitality, and ability of tribal governments to carry out their governmental responsibilities in America, I believe the Pueblo governments must be made a part of this exchange. Your granting of this request is of up most importance to the Pueblo leaders.

AIPC/ Testimony  
March 2, 1998  
Page 2

The All Indian Pueblo Council, on behalf of the nineteen Pueblo Indian governments located in the state of New Mexico stands ready to provide critical testimony to the Senate Indian Affairs Committee on the immunity of tribal governments from lawsuit on March 11, 1998. We look forward to hearing from you.

Very Truly,



Roy W. Bernal  
Chairman

cc: The nineteen Honorable Pueblo Governors  
The Honorable Pete V. Domenici  
The Honorable Jeff Bingaman  
The Honorable Bill Rodmond  
The Honorable John McCain  
The Honorable Daniel Inouye  
Mr. Gary Bohnce  
Ms. Patricia Zell  
Mr. Paul Moorehead





## MARY T. WYNNE, CHIEF JUDGE

Office of the Chief Judge • Judges Chambers  
Colville Tribal Court, P. O. Box 150, Nespelem, WA 99155  
(509)634-8880 or FAX (509)634-8566



Mr. Chairman, I am pleased today to be able to address the Senate Select Committee on Indian Affairs regarding property rights and civil rights in Indian country. I am limiting my comments and discussion of these rights in conjunction with the proposed legislation of Senator Gorton, S. 1691.

In my view, S. 1691 is bad law and should not be enacted. It should not be enacted for many reasons, but in the time allotted today, I can only touch on a few.

First, S. 1691 is premised on a false assumption. The proposed transfer of civil rights cases and all cases where a tribe is a defendant from tribal to state or federal court is premised on the false assumption that tribal courts are not capable of adjudicating and protecting civil rights, or rendering just and fair decisions when the tribe is a defendant. As Justice Pearson, retired Chief Justice of the Washington Supreme Court so aptly put it, "Anyone who would pass a law based on this belief simply has not done his or her homework."

Second, the proposed act constitutes invidious discrimination of the worst kind. If enacted, this law would put tribal governments in an utterly unique category: not only would the law reach into the tribes most valuable and needed asset, it's public funds, by allowing a foreign government to open the door to those funds, but it places adjudication of issues related to public funds in foreign forums, state and federal courts, and subjects those disputes to resolution under foreign law: state and federal law. Such an action is unprecedented. It singles out only tribal governments for such treatment. It is discrimination of the most destructive sort. Tribal Courts are where "the rubber meets the road" when it comes to the ability of a sovereign to regulate as a unique government, possessed of political integrity. The law of any society is the reflection of the composite of knowledge, memories, beliefs, mores and culture of the people who enact it. To remove issues that define civil rights, the most obvious area of the law where a society defines its perception of itself and its people, or cases involving the public treasury, subjects some of the

most jealously guarded areas of tribal life and society to the views and interpretation of a foreign nation, people who do not have the same history, beliefs or cultures. This bill singles out only tribes as governments deserving of such treatment.

The best way to meet false assumptions or discrimination is with the facts. Although I have practiced in courts from South Dakota to Washington State, I have chosen to provide the Committee with background information regarding operation of the Colville Tribal Court, as well as with statements made by persons intimately familiar with the development of tribal courts across the country. As a licensed attorney in the States of Washington, North Dakota, and South Dakota, the First Vice President of the National American Indian Court Judges Association, President of the Northwest Tribal Court Judges Association, and the Chief Judge of the Colville Tribal Court, I have chosen to put the Colville Tribal Court under a microscope not because of its uniqueness in Indian country, but because I believe it is representative of tribal courts in the United States. In addition to being a member of three state bar associations in the states previously mentioned, I am also licensed to practice in, or have sat on the bench of thirty three tribes spanning half a continent. Accordingly, I have had the unique opportunity to see first-hand the operation of numerous courts across the country.

#### **Attachments**

Included in the attachments with this written testimony are letters containing opinions on the fairness and equity of tribal courts, received from numerous attorneys, all of whom regularly practice in tribal court. In addition, I have included letters received by the Colville Tribal Court describing the professional forum it presents, from the perspective of sitting judges of jurisdictions surrounding the reservation, the attorneys who present case after case in this forum, as well as from the State of Washington- Office of Child Support Enforcement who regularly try child support cases in the Colville Tribal Court..

I have also included in the attachments the Constitution of the Colville Confederated Tribes and the Policies and Procedures of the Court which sever the administrative operations of the Court from the Council. The Colville Civil Rights Act is also attached, along with both civil and criminal cases interpreting and applying that document as a living, viable statement of rights. In adopting these statutes and constitutional amendments the Colville Business Council knew and intended that its actions be subject to judicial reviews. Under the law the Colville Reservation has

restrained the Council or ordered the Council to pay damages or reinstate employees. The system developed on the Colville Indian Reservation represents a deep respect for legislative process and judicial review. The result is a system that ensures fairness for all and protects tribal sovereignty and rights.

#### **A Comment From The United States Supreme Court**

Let me start with the United States Supreme Court. According to the Honorable Sandra Day O'Connor, "today in the United States, we have three types of sovereign entities - the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country. The part played by the tribal courts is expanding .... The tribal courts, while relatively young, are developing in leaps and bounds.... The role of tribal courts continues to expand, and these courts have an increasingly important role to play in the administration of the laws of our nation."

Modern day Tribal Courts are the cornerstones of civil and property rights protection in Indian Country. Their fairness and equity stand unquestioned by all who have completed objective reviews of the courts of tribes since the early days of the Reagan and Bush administrations in the 1980's. These reviews have been conducted by senior scholars and magistrates from the leading courts in the United States. Whenever tribal courts have been the subject of close scrutiny, they have not only survived the test of their detractors, but have been applauded for the level of justice administered on reservations. Even investigations which began with apparent hostile intent have ended by stressing the strengths of tribal courts and noting that their weaknesses stem from the lack of funding and not pervasive bias (American Indian Law Review, Volume 22, page 288).

#### **And From the United States Attorney General**

Attorney General Janet Reno has stated that "While the federal government has a significant responsibility for law enforcement in much of Indian country, tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities." She has gone on to say that, "With adequate resources and training, they (tribal courts) are the most capable of crime prevention and peace keeping. Fulfilling the federal government's trust responsibility to Indian nations means not only adequate federal law enforcement in Indian country, but enhancement of tribal justice systems as well." Attorney General Reno has also



stated that "Tribal courts are essential mechanisms for resolving civil disputes that arise on the reservation or otherwise affect the interests of the tribe or its members."

### **Objective Review & Financial Support**

Always looking to improve a tribal court system that is charged with protecting the civil rights of members and non-members under tribal law and applicable federal law the Colville Confederated Tribes commissioned an independent review by Retired Washington State Supreme Court Justice Vernon Pearson and the Office of the Administrator for the Courts for the state. The purpose of the study was to analyze the court's operations and functioning as a separate branch of government within the tribe. In 1991 the final report of Justice Pearson included the following statement:

"The Confederated Tribes have taken an important step in attaining credibility of its tribal court decisions. While no evidence was found that the tribal council had ever tried to unduly influence court decisions, the constitutional recognition of the judiciary as a 'separate branch of government' is an outward manifestation that the Confederated Tribes do have an independent judiciary."

In 1991, the Reagan-Bush Civil Rights Commission issued its final report following five (5) hearings held across the country on the enforcement of civil rights on reservations. The final report recommended no changes in federal law and rejected proposals to bring the tribal judiciary under the control of the federal courts. In its place, the Commission identified Congress as the greatest limitation on the efficiency of tribal courts, and reported that greater financial support should exist for the tribal court systems.

Financially, the Colville Tribal Court is funded by both the Department of the Interior, Bureau of Indian Affairs and the Colville Tribal Government. Combining all of these funding sources, the overall funding for the tribal court is generally less than one sixth of that received by courts in the surrounding jurisdictions. Based on this disparity in resources, a transfer of cases from the Colville Tribal Court to that of state and county courts, as required by the proposed legislation of Senator Gorton, would require significant budget increases for these state and county courts. At the federal level, a transfer of the same case load from the Colville Tribal Court, the federal court would require a budget increase far beyond that of even the state court system. During fiscal year 1997, the Colville Tribal Court heard 3,441 cases with a total court

budget of approximately \$290,000. This calculates to an average cost per case of \$85 in tribal court. In contrast, the Okanogan County Superior Court, with a budget of \$517,401, heard 996 cases, resulting in an average cost per case of \$519. In that same time period, the federal district court for Eastern Washington heard 967 cases with a budget of \$1,978,397, at an average cost of \$2,045 per case. In addition to the higher levels of funding, the county superior courts have access to a legal infrastructure maintained by the State of Washington Office of the Administrator of the Courts, that is not available to the Colville Confederated Tribes.

A sample of 520 civil cases randomly selected at the Colville Tribal Court produced the following results:

- ▶ 180 of the 520 civil cases had been adjudicated
- ▶ Of the 180 adjudicated cases, 59 cases involved non-tribal members (33%)
- ▶ Of the 59 civil cases involving non-tribal members, 32 cases were decided in favor of the non-member (54%)

#### **History of the Tribal Courts on the Colville Reservation**

The Colville Tribal Courts (including administration, trial, and appellate divisions) were organized under tribal statutes in 1952. In 1991 Amendment X to the Constitution of the Confederated Tribes established the judiciary as a "separate branch of government" (See Exhibit 1, Colville Confederate Tribes Organizational Chart). Jurisdiction and the qualifications of the judges are prescribed by tribal statute, with the constitutional provision creating a tribal and appellate system providing the term for judges and their compensation, the procedure to fill vacancies, and for removal and discipline of judges.

Currently, the courts handle a broad range of criminal, civil, administrative, and child welfare cases applying and interpreting tribal statutory and customary law, as well as federal and state law. In addition to clerks and judges, the justice system includes three licensed attorneys in the tribal prosecutor's office, two licensed attorneys in the public defenders office, a list of court appointed attorneys, all of who are licensed attorneys, a probation office with six probation officers, and a legal services office with three attorneys and two para-legals. All criminal defendants are afforded representation through court appointed attorneys, as are all parties on minor in need of care cases.

It should not escape notice that the Colville Tribe has provided greater legal protection than mandated by federal law. The Colville Tribe provides for a legal services program to provide assistance to members in civil matters. That program is often in court or representing members against the Tribes. Moreover, while the Indian Civil Rights Act provides that a criminal defendant may be assisted by counsel at his or her own expense, the Colville Tribe has funded an independent public defender program, who represents criminals defense at the Tribe's expense.

Encompassing over 1,300,000 acres, the Colville Reservation includes significant portions of the towns of Omak and Grand Coulee. Regular travel on and off the reservation is common for both Indian and non-Indian living in these communities. As such, cases coming before the Colville Tribal Court involving non-Indians are common, I estimate at 1/3 the total case load. In many instances the tribal court is called upon to enforce orders and decrees of state courts, and must issue for litigants, judgements and decrees that can be recognized in state and federal court. Therefore, to appropriately exercise tribal sovereignty, the court system must have judges who are adequately trained to decide complex and important legal issues, and they must operate in such a manner that the orders, judgements, and decrees issued will be credible and enforced by other courts. For the past fifteen years the Colville Tribal Court has had on staff two full-time, law-trained judges with the appropriate experience to hear complex cases involving jurisdictional issues. These judges have been licensed attorneys with extensive experience in private practice, as well as experience before the state and federal bench. It is not unusual for the judges of the Colville Tribal Court to be called upon to sit as pro tem judges for the courts of other tribes and state and local communities surrounding the reservation. In addition, the Colville Tribal Court also keeps on staff a magistrate who handles more routine matters such as criminal arraignments.

#### **Credibility & Partnerships**

A measure of the credibility of the tribal court of the Colville Confederated Tribes has been shown to be its ability to decide cases freely and without pressure or influence from the legislative branch of the tribe. Also of credit to the tribal court is the vigor in which it grants due process of law that is afforded under the Indian Civil Rights Act. To further insure and protect personal civil rights, the tribe has passed its own Colville Tribal Civil Rights Act, Colville Tribal Code 1.5. The Act is frequently litigated, with both member and non-members recovering against the Tribes consistent with its terms and with regular application as a living and viable set of rights



afforded to all members of the reservation community. See attachment VI, Colville Tribal Civil Rights Act and cases applying and interpreting that Act. Note that in several cases, as noted by the former law trained public defender whose letter is attached, the tribal court, in applying the unique culture, traditions and history has applied a more strict standard to the Tribes in prosecuting tribal members. ( i.e., high expectation of privacy must be expected when camps are searched since the history and culture establishes that persons who living in this community frequently maintain campsites as a home.)

#### **Solution Not Destruction**

Testimony to the Committee would be incomplete without a discussion of solutions that would have long-term positive impacts on the administration of justice in Indian Country for Indians and non-Indians alike. In contrast to the efforts of Senator Gorton in S.1691 to fix a problem that does not exist, there are areas of tribal court operations that could be positively assisted.

**Solution #1:** As is typical for Indian programs as a whole, tribal courts are sorely underfunded. A brief comparison detailed earlier in this testimony shows that the Colville Tribal court receives less than one-sixth (1/6) the funding of the closest state-funded superior court. The funding gap becomes even wider in a comparison with the federal district court, which receives over 24 times the funding per case than does the Colville Tribal Court. These facts must be viewed in light of the fact that tribal courts exercise far broader jurisdictional authority than either federal or state courts. Placed in this context, the compelling need for adequate funding for any court system is essential to its ability to provide judicial services to the citizens of its community.

**Solution #2:** With the coordination of the National Center for State Courts, state, federal and tribal judges and experts from throughout the nation worked for several years to formulate a series of recommendations designed to enhance justice in Indian country through the On Common Ground work group. These recommendations include Congressional action to repeal the sentencing limitations in tribal court contained in the Indian Civil Rights Act, repeal of the criminal jurisdictional restraints contained in the Oliphant decision, and the extension of full territorial jurisdiction to tribes and tribal courts. These recommendations will be supplemented into this record.

**Solutions #3 & 4:** With the growth of tribal courts, as they take their legitimate place as recognized forums for dispute resolution, and with the growth of tribes as governing bodies that interact more and more with the surrounding communities, leading scholars have begun to re-examine the ancient rulings of the Supreme Court which define federal plenary authority over tribes. More and more frequently, scholars and practitioners alike are propounding various methods to limit federal plenary authority over tribes by harmonizing that power with the federal trust responsibility the United States has towards tribes. I welcome and support this body, the United States Senate, in any effort to address tribal courts, and urge you to begin a national dialogue which addresses such solutions. (See attachment VIII, #3 & #4.)

### **Conclusion**

The Colville Tribal Court is only one of over 350 tribal courts in the United States. By examining this court's operations and caseload while viewing it as one of 350+ tribal courts, and by gaining an understanding of the current tribal court functions, the impact on state and federal courts of the redistribution of tribal court workloads and the impact on the development of property and civil rights such an intrusion presented by S.1691 becomes clear. Hopefully, as I conclude my testimony, Committee members will have a more thorough knowledge of tribal courts and the equitable forum they represent in Indian country. It is also my sincere hope that members of the Committee as well as Congress as a whole will see the superficial nature of arguments supporting passage of S.1691, as well as the misinformation contained therein.

Once again, thank you for this opportunity to present my personal views. I will gladly address any questions of the Committee.

**Mary T. Wynne**  
Vita

P. O. Box 3940 (509)634-8880  
Omak, WA 98841 (509)634-6907

**PERSONAL INFORMATION**

Children: Ryan, age 16  
Emily, age 14  
Chaz, age 11

**EMPLOYMENT HISTORY**

12/92 to Date	<b>Chief Judge, Colville Tribal Court (Nespelem, WA)</b> Trial court judge for Colville Confederated Tribes. Duties include supervision of a staff of 14, budget and administrative oversight, and hearing cases for a court of general jurisdiction. The Colville Tribe has a very active criminal, misdemeanor, administrative, juvenile, domestic and general civil court docket, so many cases involve complex litigation.
6/88 to 12/92	<b>Assistant United States Attorney, (District of South Dakota)</b> Trial attorney for the United States. Focused on financial crime and forfeiture as the Chief of the Financial Litigation and Unit Chief of the Forfeiture Unit for that District. Handles a broad variety of cases, ranging from RICO and Continuing Criminal Enterprise prosecutions to rape and drug cases.
3/82 to 6/89	<b>Private Practice of Law, Wynne &amp; Holm, PC (Rapid City, SD)</b> Focused initially on criminal representation, but practiced evolved exclusively civil with focuses on representation of Indian Housing Authorities for Sioux Tribes located in North and South Dakota, Indian contractors, racial discrimination and Indian trust land cases.
6/79 to 3/81	<b>Chief Judge/Administrator, Northwest Intertribal Court System (Edmonds, WA)</b> Trial Judge and chief administrative officer for a circuit court providing judicial services to fifteen different tribes located on the western coast of Washington. Duties included supervision of a staff of thirteen persons and administration of a budget exceeding \$300,000.00.
1/78 to 6/79	<b>Staff Attorney - Legal Services, Fort Berthold Reservation (North Dakota)</b> Representation of tribal members in federal, state and tribal court.



**Mary T. Wynne**  
**Vita 4/1/98**

**BAR ASSOCIATIONS: PAST AND PRESENT:**

**North Dakota State Bar Association**  
 P. O. Box 2136  
 Bismark, ND 58502

**Federal District Court**  
 District of North Dakota  
 Box 1193  
 Bismark, ND 58502

**South Dakota State Bar Association**  
 222 E. Capital Avenue  
 Pierre, SD 57501-2596

**Eighth Circuit Court of Appeals**  
 1114 Market Street - Room 511  
 St. Louis, Mo 63101

**Federal District Court**  
 District of South Dakota  
 400 S. Philips  
 Sioux Falls, SD 57104-6851

**Washington State Bar Association**  
 201 Fourth Avenue - Fourth Floor  
 Seattle, WA 98121 - 2330

**Cheyenne River Sioux Tribe**  
 Cheyenne River Sioux Tribal Court  
 P. O. Box 120  
 Eagle Butte, SD 87625

**Crow Creek Sioux Tribe**  
 Crow Creek Sioux Tribal Court  
 P. O. Box 247  
 Fort Thompson, SD 57339

**Lower Brule Sioux Tribe**  
 Lower Brule Sioux Tribal Court  
 P. O. Box 187  
 Lower Brule, SD 57548

**Oglala Sioux Tribe**  
 Oglala Sioux Tribal Court  
 P. O. Box 280  
 Pine Ridge, SD 57770

**Rosebud Sioux Tribe**  
 Rosebud Sioux Tribal Court  
 P. O. Box 129  
 Rosebud, SD 57570

**Sisseton Wahpeton Sioux Tribe**  
 Sisseton Wahpeton Sioux Tribal Court  
 P. O. Box 568  
 Agency Village, SD 57262

**Standing Rock Sioux Tribe**  
 Standing Rock Sioux Tribal Court  
 P. O. Box 363  
 Fort Yates, ND 58538

**Three Affiliated Tribes of the Fort Berthold**  
**Reservation / Fort Berthold District Court**  
 P. O. Box 969  
 New Town, ND 58763

**Turtle Mountain Band of Chippewa Indians**  
 Turtle Mountain Chippewa Tribal Court  
 P. O. Box 900 / Tribal Complex Bldg  
 Belcourt, ND 58316

**Yankton Sioux Tribe**  
 Yankton Tribal Court  
 P. O. Box 980  
 Wagner, SD 57380

**Mary T. Wynne**  
**Vita 4/1/98**

Swinomish Indians  
 Swinomish Tribal Court (NICS)  
 P. O. Box 277  
 LaConner, WA 98257

Quinault Indian Nation  
 Quinault Tribal Court  
 P. O. Box 99  
 Taholah, WA 98587

Skokomish Indian Tribe  
 Skokomish Tribal Court  
 N. 80 Tribal Center Road  
 Shelton, WA 98584

Squaxin Island Tribe  
 Squaxin Island Tribal Court (NICS)  
 SE 70 Squaxin Lane  
 Shelton, WA 98584

Lower Elwha Tribal Community  
 Lower Elwha Tribal Court (NICS)  
 1666 Lower Elwha Road  
 Port Angeles, WA 98362

Makah Indian Tribe  
 Makah Tribal Court  
 P. O. box 115  
 Neah Bay, WA 98357

Nez Perce Tribe  
 Nez Perce Tribal Court  
 P. O. Box 305  
 Lapwai, ID 83540

Nooksak Indian Tribe  
 Nooksak Tribal Court (NICS)  
 P. O. Box 157  
 Deming, WA 98244

Upper Skagit Indian Tribe  
 Upper Skagit Court System (NICS)  
 2284 Community Plaza  
 Sedro Woolley, WA 98284

Sauk-Suiattle Indian Tribe  
 Sauk-Suiattle Tribal Court (NICS)  
 5318 Chief Brown Land  
 Darrington, WA 98241

Spokane Tribe  
 Spokane Tribal Court  
 P. O. Box 225  
 Wellpinit, WA 99040

Suquamish Indian Tribe  
 Suquamish Tribal Court (NICS)  
 P. O. Box 1209  
 Suquamish, WA 98392

Lummi Tribe  
 Lummi Tribal Court (NICS)  
 2616 Kwina Road  
 Bellingham, WA 98226

Muckleshoot Indian Tribe  
 Muckleshoot Tribal Court (NICS)  
 39015 172nd Avenue, SE  
 Auburn, WA 98002

Nisqually Indian Community  
 Nisqually Tribal Court (NICS)  
 4820 She-Nah-Num Drive SE280  
 Olympia, WA 98513

Port Gamble Indian Community  
 Port Gamble S'Klallam Tribal Court  
 (NICS)  
 P. O. box 280  
 Deming, WA 98244

**Mary T. Wynne**  
 Vita 4/1/98

Puyallup Tribe  
 Puyallup Tribal Court  
 2002 E. 28<sup>th</sup> Street  
 Tacoma, WA 98404

Hoh Indian Tribe  
 Hoh Tribal Court (NICS)  
 HC 80, Box 917  
 Forks, WA 98831

Jamestown S'Klallam Tribe  
 Jamestown S'Klallam Tribal Court (NICS)  
 1033 Old Blyn Highway  
 Sequim, WA 98382

Confederated Tribes of the Chehalis  
 Reservation/ Chehalis Tribal Court (NICS)  
 P. O. box 536  
 Oakville, WA 98568

Coeur D'Alene Tribe  
 Coeur D'Alene Tribal Court  
 Coeur D'Alene Sub-Agency  
 Plummer, ID 83851

Confederated Tribes of the Coville Reservation  
 Colville Tribal Court  
 P. O. Box 150  
 Nespelem, WA 99155

#### RELATED MEMBERSHIPS AND EXPERIENCE

Rosebud Sioux Tribal Court of Appeals  
 Chief Judge from 1987 - 1989

Northwest Tribal Court Judges  
 Association President since 1993

Puyallup Tribal Court of Appeals  
 Associate Justice since 1993

National Judicial College  
 Faculty member since 1993. Instructor  
 for tribal, state and federal judges on  
 various course for judicial training and  
 education.

Spokane Tribal Court of Appeals  
 Associate Justice and Judge Pro Tem Since  
 1995

Northwest Tribal Court System  
 Appellate Court Justice for eight Tribes as  
 appointed.

Indian Law Committee, South Dakota  
 Bar Association  
 Worked with tribal courts throughout  
 South Dakota on opinion writing,  
 publication and distribution.

Native American Rights Fund  
 Board of Directors member since 1997  
 appointed

National American Indian Court Judge's  
 Association  
 First Vice President & Board of Directors  
 Member since 1993

Indian Law Reporter  
 Numerous opinions were issued and  
 published as Chief Judge of the Rosebud  
 Sioux Tribal Court of Appeals and as a  
 trial judge for the fifteen tribes  
 participating in NICS



## NORTHWEST TRIBAL COURT JUDGES ASSOCIATION

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(509) 985-5528 Fax

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KIDNEY, Board Member  
Confederated Salish & Kootenai  
Tribal Court - P O Box 278  
Pablo, MT 59665-0278  
(406) 675-2700, ext. 599  
(406) 675-4704 Fax

### NORTHWEST TRIBAL COURT JUDGES ASSOCIATION RESOLUTION 98-01

WHEREAS, the Northwest Tribal Court Judges Association ("Association") is the oldest and established association of tribal court judges in the Northwest.

WHEREAS, the objectives and purposes of the Association include; (a.) to foster the continued development, enrichment and funding of tribal justice systems as a visible exercise of tribal sovereignty and self-government, (b.) to provide continuing education for tribal judges and tribal justice staff members in order to promote and enhance the operation of the tribal judiciary, (c.) to further the public knowledge and understanding of tribal justice systems, and

WHEREAS, the Association's Board of Directors are delegated with responsibility to carry out the objectives and purposes of the Association; and

WHEREAS, Senator Slade Gorton (R-WA) has introduced S. 1692 entitled the "American Indian Equal Justice Act" which would require Indian tribes, tribal corporations and tribal members to collect excise and sales taxes on sales to non-members of the Indian tribe, would waive tribal immunity of Indian tribes and subject the tribes to suit in the district courts of the United States and state courts, and which would waive tribal immunity for civil rights actions alleging a violation of the Indian Civil Rights Act; and

WHEREAS, Senator Ben Nighthorse-Campbell, Chairman of the U.S. Senate Committee on Indian Affairs has requested "[i]n furtherance of the Committee's resolution to fully air the issues implicated by this legislation...the formal views of the Association on [the legislation]"; and

WHEREAS, this legislation if approved would effectuate an abrogation of treaty rights, the federal government's trust responsibility to Indian tribes and nations, two hundred years of federal Indian law and policy, and international human rights, and

WHEREAS, the sovereignty of Indian Tribes proceeds the U.S. and is recognized by the U.S. Supreme Court in such cases as *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) in which Chief Justice Marshall stated that Indian nations were: "Distinct political communities having territorial boundaries, within which their authority is exclusive, and having a right to all lands within those boundaries, which is not only acknowledged, but guaranteed by the United States"; and

WHEREAS, this legislation would clearly infringe on the inherent sovereignty authority of an Indian tribal to make its own laws and be ruled by them. *Williams v. Lee*, 358 U.S. 217 (1959);

## NWTCA Resolution 98-

## "American Indian Equal Justice Act

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WHEREAS, tribal authority over the activities of non-Indians on reservation lands is an important aspect of tribal sovereignty, *Montana v. United States*, 450 U.S. 544 (1981), *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), *Fisher v. District Court*, 424 U.S. 382 (1976); and

WHEREAS, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 889-893 (1986), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), *Puyallup Tribe v. Washington Dept of Game*, 433 U.S. 165 (1977); and

WHEREAS, the United States Government and the governments of its 50 states as sovereigns were entitled to elect or not elect to waive sovereign immunity and to set limitations on such waivers as they found appropriate and likewise, tribal governments possess the same right of election; and

WHEREAS, the findings of S. 1691 fail to recognize the fact that many tribal governments having exercised the power of self-government have already waived immunity from suit for a wide range of actions where the tribes found such waivers to be appropriate; and

WHEREAS, the U.S. Supreme Court held in *Santa Clara Pueblo v. Martinez*, that suits against an Indian tribe under the Indian Civil Rights Act ("ICRA") are barred by tribal sovereign immunity from suite and the "providing a federal forum for issues arising under [ICRA] constitutes an interference with tribal autonomy and self government..."; and

WHEREAS, "[t]ribal forums are available to vindicate rights created by the ICRA...[and] [t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. "Santa Clara Pueblo": and

WHEREAS, this bill if adopted, would be a clear abrogation of Section 402 of the ICRA which provides that any further grants of Indian country jurisdiction to states could only be accomplished "with the consent of the tribe occupying the Indian country"; and

WHEREAS, civil jurisdiction over the activities of non-Indians on reservation lands "presumptively lies in the tribal courts" *Iowa Mutual Insurance Co. V. LaPlante*, 4890 U.S. 9 (1987); and

WHEREAS, this bill would be in direct contravention of Congressional finding (6) of the Indian Tribal Justice Act (25 U.S.C. 3601) which articulated that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights"; and

WHEREAS, Indian Tribal justice systems are committed to providing fair and just proceedings meeting the guarantees of due process and equal protection, and have consistently demonstrated their ability to conduct such proceedings; and


WHEREAS, the Northwest Tribal Court Judges Association has devoted the past four decades to providing continuing judicial education in order to promote and enhance the operation of tribal justice systems;

NWTCJA Resolution 98-  
"American Indian Equal Justice Act"  
Page 3 of 3

NOW THEREFORE, BE IT HEREBY RESOLVED, that the Northwest Tribal Court Judges Association opposes the adoption of S. 1691, "American Indian Equal Justice Act," as an unwarranted and egregious infringement on tribal sovereignty, self-government and jurisdiction in direct contravention of tribal treaty rights, the federal trust responsibility and federal law.

\*\*\*CERTIFICATION\*\*\*

The foregoing resolution was considered and adopted by the Board of Directors of the Northwest Tribal Court Judges Association on the 3 day of April 1998 and the vote was 3 in favor, and 0 opposed, and 0 abstaining.



JUDGE MARY T. WYNNE, PRESIDENT  
Northwest Tribal Court Judges Association



JUDGE MICHELLE DEMMERT, SECRETARY  
Northwest Tribal Court Judges Association



# NORTHWEST TRIBAL COURT JUDGES ASSOCIATION

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(509) 222-4528 Fax

**HONORABLE CHARLIE VILLAGE**  
ADJUTANT, Board Member  
Confederated Tribes & Portland  
Tribal Court - P O Box 270  
Paine, MT 59653-2700  
(406) 478-6760, ext. 200  
(406) 478-6764 Fax

## RESOLUTION 98-02

**WHEREAS**, a meeting of the Northwest Tribal Court Judges Association ("Association") was called and duly convened in Bonners Ferry, Idaho, on February 27, 1998; and

**WHEREAS**, a notice of the elections for the three vacancies in the At-large Member, Delegate to the National Tribal Court Judges Association and Secretary/Treasurer positions was sent in a timely fashion to the Membership of the Association; and

**WHEREAS**, election of these vacancies of the Board, did take place at the Kootenai River Inn, in Bonners Ferry, Idaho;


**THEREFORE, BE IT RESOLVED**, that the following were elected to the Board of Directors for the vacancies named above, as follows:

National Delegate:	<b>James Steele;</b>	Chief Judge of Coeur d'Alene Tribal Court; Plummer, Idaho;
At-Large Director:	<b>Bertha Miller;</b>	Judge of Yakama Tribal Court; Toppenish, WA;
Secretary/Treasurer:	<b>Michelle Demmert;</b>	Associate Judge, Northwest Intertribal Court System, Edmonds, WA.

**FURTHER, BE IT RESOLVED** that the above-elected Board of Directors and delegate shall serve the remainder of the term, which is to November 1998.

## CERTIFICATION

I HEREBY CERTIFY that the foregoing Resolution reflects the election results of February 27, 1998, by the Association, with a quorum present and voting.

  
MARY WYNNE  
President

  
MICHELLE DEMMERT  
Recording Secretary

APR 8 98 WTS 10:16 AM

206 778 2704

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ATTACHMENT I.

COLVILLE TRIBAL CONSTITUTION

PROVIDES FOR TRIBAL COURT  
AS A SEPARATE BRANCH OF GOVERNMENT

**CONSTITUTION AND BY-LAWS OF THE CONFEDERATED TRIBES  
OF THE COLVILLE RESERVATION**

**PREAMBLE**

We, the people of the Colville Reservation in the State of Washington, in order to form a recognized representative council to handle our Reservation affairs, and in order to improve the economic condition of ourselves and our posterity, do hereby establish this Constitution and By-Laws.

**ARTICLE I - PURPOSE**

The object and purpose shall be to promote and protect the interests of the Colville Indians and to preserve peaceful and cooperative relations with the Office of Indian Affairs, its officers and appointees.

**ARTICLE II - GOVERNING BODY**

Section 1. The governing body of the Confederated Tribes of the Colville Reservation shall be a council known as the Colville Business Council.

Section 2. The Business Council shall consist of fourteen (14) Councilmen to be elected from the district as set forth hereafter.

Section 3. The representation from the districts hereby designated shall be as follows: Inchelium district, four councilmen; Nespelem district, four councilmen; Omak district, four councilmen; Keller district, two councilmen.

Section 4. The Business Council shall have the power to change the districts and the representation from each district based upon community organization or otherwise, as deemed advisable, such change to be made by ordinance, but the total number of councilmen shall not be changed, as provided for in Section 2 of Article II of this Constitution.

Section 5. The Business Council so organized shall elect from within its own number (1) a chairman; (2) a vice-chairman; and from within or without its own membership (3) a secretary; and may appoint such other officers and committees as may be deemed necessary.

Section 6. No person shall be a candidate for membership in the Business Council unless he shall be a member of the Confederated Tribes of the Colville Reservation and shall have resided in the district of his candidacy for a period of one year next preceding the election, and be at least twenty-five (25) years of age.

Section 7. The Business Council of the Confederated Tribes of the Colville Reservation shall be the sole judge of the qualifications of its members.

**ARTICLE III - NOMINATIONS AND ELECTIONS**

Section 1. The first election of the Business Council under this Constitution shall be called, held and supervised by the Superintendent of the Reservation and the delegates who were selected by the Districts and who prepared this constitution, within sixty days after its ratification and approval.

At the first election, the two candidates receiving the highest number of votes in the Inchelium, Nespelem, and Omak districts shall serve two years; the candidate receiving the highest number of votes in the Keller district shall serve two years.

The two candidates receiving the next highest number of votes in the Inchelium, Nespelem, and Omak districts shall serve one year; and the candidate receiving the next highest number of votes in the Keller district shall serve one year. Thereafter, elections for the Business Council shall be held every year and shall be called at least sixty days before expiration of the terms of office.

The terms of office of a councilman shall be for a period of two years, unless otherwise provided herein. *(This section amended, SEE Amendment VI).*

Section 2. The Business Council, or an election board appointed by the Council, shall determine rules and regulations governing all elections.

Section 3. Any qualified member of the Confederated Tribes may announce his candidacy for the Business Council within the district of his residence, in accordance with Section 6 of Article II.

Section 4. The Business Council, or a board appointed by the Business Council, assisted by the Superintendent of the Reservation, shall certify to the election of the Business Council members within five days after election returns.



Section 5. Any enrolled member of the Confederated Tribes of the Colville Reservation who is eighteen (18) years of age or over shall be entitled to vote. *(This section amended, SEE Amendment VII).*

#### ARTICLE IV - VACANCIES AND REMOVAL FROM OFFICE

Section 1. If a councilman or official shall die, resign, be removed or recalled from office, permanently leave the Reservation, or shall be found guilty of a felony or misdemeanor involving dishonesty in any Indian, State, or Federal Court, the Business Council shall declare the position vacant and the district affected shall elect to fill the unexpired term. *(This section amended, SEE Amendment II).*

Section 2. The Business Council may by majority vote expel any member for neglect of duty or gross misconduct. Before any vote for expulsion is taken in the matter, such member or official shall be given a written statement of the charges against him at least five days before the meeting of the Business Council before which he is to appear, and he shall be given an opportunity to answer any and all charges at the designated Council meeting. The decisions of the Business Council shall be final.

Section 3. Upon receipt of a petition signed by one-third (1/3) of the eligible voters in any district calling for the recall of any member of the Council representing said district, it shall be the duty of the Council to call an election on such recall petition.

No members may be recalled in any such election unless at least 40% of the legal voters of the district shall vote in such election. *(This section amended. See Amendment IV).*

#### ARTICLE V - POWERS AND DUTIES OF THE COUNCIL

Section 1. The Business Council shall have the following powers, subject to any limitations imposed by the Statutes or the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached By-Laws:

(a) To confer with the Commissioner of Indian Affairs or his representatives and recommend regarding the uses and disposition of tribal property; to protect and preserve the Tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian Arts, crafts, and culture; to administer charity, to protect ah health, security, and general welfare of the Confederated Tribes.

(b) To exclude from the restricted lands of the Reservation persons not legally entitled to reside thereon, under ordinances which may also be subject to review by the Secretary of the Interior.

(c) To recommend and help to regulate the inheritance of real and personal property, other than allotted lands, within the Colville Reservation.

(d) To regulate the domestic relations of members of the Confederated Tribes.

(e) To promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would provide for assessments or license fees upon non-members doing business within the Reservation, or obtaining special rights or privileges, and the same may be applied to members of the Tribes provided such ordinances have been approved by a referendum of the Confederated Tribes.

#### ARTICLE VI - AMENDMENTS

This Constitution and By-Laws may be amended by a majority of the qualified voters of the Confederated Tribes voting at an election called for that purpose. Provided, that the Tribal Council shall have adopted the amendment by a two-thirds (2/3) vote, but no amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs.

#### CONSTITUTIONAL AMENDMENTS

##### AMENDMENT I

Article II Section 1, By-Law: Time and Place of Meetings and Procedure - Regular Meetings of the Business Council shall be held on the second Thursday of July, October, January and April, at Nespelem, Washington, at a designated building or hall. *(Adopted by Confederated Tribes June 15, 1946. Approved by Acting Commissioner of Indian Affairs May 8, 1947.)*

## AMENDMENT II

Article IV, Section 1. Vacancies and Removal From Office. - If a councilman or official shall die, resign, be removed from office, permanently leave the reservation, or shall be found guilty of a felony or misdemeanor involving dishonesty in any Indian, State or Federal court, the Business Council shall declare the position vacant and appoint a member from the district affected to fill the unexpired term. *(Adopted by Confederated Tribes June 15, 1946. Approved by Acting Commissioner of Indian Affairs May 8, 1947.)*

## AMENDMENT III

Article VII, Membership of the Confederated Tribes of the Colville Reservation. - There shall be added a new provision governing membership of the Confederated Tribes of the Colville Reservation which shall read as follows:

Section 1. - The membership of the Confederated Tribes of the Colville Reservation shall consist of the following:

(a) All persons of Indian blood whose names appear as members of the Confederated Tribes on the official census of the Indians of the Colville Reservation as of January 1, 1937, provided that, subject to the approval of the Secretary of the Interior corrections may be made in said roll within two years from the adoption and approval of this amendment.

(b) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining a permanent residence on the Colville Indian Reservation.

(c) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining residence elsewhere in the continental United States, provided that the parent or guardian of the child indicate a willingness to maintain tribal relations and to participate in tribal affairs. To indicate such willingness to maintain tribal affiliation, the parent or guardian shall, within six months after the birth of the child submit a written application to have the child enrolled. The application shall be accompanied by the child's birth certificate together with any other evidence as to the eligibility of the child for enrollment in the Confederated Tribes of the Colville Reservation. If the certificate and application are not filed within the designated time, the child will not be enrolled.

Section 2. The Business Council of the Confederated Tribes shall have power to prescribe rules and regulations governing future membership in the tribes, including the adoption of members and loss of membership, provided:

(a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior.

(b) That no person shall be adopted who possesses less than one-fourth degree Indian blood.

(c) That any member who takes up permanent residence or is enrolled with a tribe, band or community of foreign Indians shall lose his membership in the Colville Tribes.

Alien Indians may be deleted from the rolls after they have been given an opportunity to be heard in their own behalf. The tribe shall also take appropriate action to correct the existing tribal roll and, if necessary, delete from the rolls alien Indians whose names appear on the rolls of the Confederated Tribes and who have abandoned tribal relations. The Colville Confederated Tribes shall not deprive anyone of vested property rights, such as allotments or inherited interests. *(Adopted by Confederated Tribes May 20, 1949. Approved by Commissioner of Indian Affairs April 14, 1950.)*

## AMENDMENT IV

That Section 3, of Article IV, Vacancies and Removal From Office, is hereby amended to read:

Section 3. By the eligible voters of any district filing with the Colville Business Council a typewritten or printed petition, signed by at least one-third (1/3) the number of those who were eligible to vote in the last preceding election, charging that a council member representing such district has violated his oath of office or committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, a demand may be made for a recall of such council member provided the act or acts complained of are set forth in concise language and the signature of each petitioner has alongside it those of two witnesses thereto and the petitioner's post office address.

The Council shall, at its next meeting after the filing of such petition, determine whether the petition as filed meets the requirements of this section of the Constitution and if it finds that such requirements have been complied with, shall call a special election on such recall petition, said election to be held not sooner than 30 days after the date of such Council action.

The ballot to be voted on at such special election shall contain the charging part of the petition hereinabove referred to.

No member may be recalled at any such election unless at least forty percent (40%) of the eligible voters of the district shall have voted at such election and unless a majority of those voting vote in favor of recall. *(Adopted by Confederated Tribes May 9, 1959. Approved by Acting Commissioner of Indian Affairs July 2, 1959.)*

#### AMENDMENT V

There shall be added to Amendment II, Membership of the Confederated Tribes of the Colville Reservation, a new provision governing membership of the said tribes which shall read as follows:

Section 3. After July 1, 1959, no person shall be admitted to membership in the Confederated Tribes of the Colville Reservation unless such person possesses at least one-fourth (1/4) degree blood of the tribes which constitute the Confederated Tribes of the Colville Reservation. *(Adopted by the Colville Confederated Tribes on May 9, 1959. Approved by the Acting Commissioner of Indian Affairs July 2, 1959.)*

#### AMENDMENT VI

Section 1 of Article III, Nominations and Elections shall be amended to read as follows:

Section 1. The first election of the Business Council under this Constitution shall be called, and held and supervised by the Superintendent of the Reservation and the delegates who were selected by the Districts and who prepared this Constitution, within sixty (60) days after its ratification and approval.

At the first election, the two (2) candidates receiving the highest number of votes in the Inchelium, Nespelem, and Omak Districts shall serve two (2) years; the candidate receiving the highest number of votes in the Keller District shall serve two (2) years. The two (2) candidates receiving the next highest number of votes in the Inchelium, Nespelem, and Omak Districts shall serve one (1) year; and the candidate receiving the next highest number of votes in the Keller District shall serve one (1) year. Thereafter, elections for the Business Council shall be held every year and shall be called at least fifteen (15) days before expiration of the term of office.

The term of office of a councilman shall be for a period of two (2) years or until his successor is elected and installed. *(Adopted by the Confederated Tribes March 4, 1972. Approved by the Deputy Commissioner of Indian Affairs April 3, 1972.)*

#### AMENDMENT VII

Section 5 of Article III, Nominations and Elections, shall be amended to read as follows:

Section 5. Any enrolled member of the Confederated Tribes of the Colville Indian Reservation who is eighteen (18) years of age or over shall be entitled to vote in all tribal elections. *(Adopted by the Confederated Tribes March 4, 1972. Approved by the Deputy Commissioner of Indian Affairs April 3, 1972.)*

#### AMENDMENT VIII

Article VI Petition for Amendment.

Section 2. The Tribal membership is granted the power to cause to be placed upon the General Election ballot for a vote of the membership amendments to the Tribal Constitution and By-Laws by filing exact wording of the proposed amendment, signed with valid signature and enrollment number and date of signature by at least one-third (1/3) of the enrolled tribal members who were 18 years or older at the last past General Election. The proposed amendment as contained in the petition shall be placed on the ballot at the next General Election if the Business Council finds that there are sufficient verified signatures on the petition as provided in this section.

The petition shall be received by the Business Council at least 90 days prior to the next scheduled General Election. Any petition submitted less than 90 days before the next General Election shall be void for all purposes. Delivery shall be made within normal business hours to the tribal Chairman at Nespelem, or in the absence of the Chairman to any other business council member or business council staff at Nespelem. Provided, that no signature shall be valid which is dated more than 180 days prior to the submission to the Business Council of a valid petition containing all signatures.



Within 60 days of the adoption and approval of this amendment, the Business Council shall adopt by ordinance procedures necessary for implementation of this amendment, including procedures for verification of signatures and petitions. *(Approved by the Confederated Tribes July 3, 1984. Approved by the Secretary of the Interior August 8, 1984.)*

#### AMENDMENT IX

##### Article VII Membership of the Confederated Tribes of the Colville Reservation.

Section 4. All Indian blood identified and stated as being possessed by all persons whose names appear as members of the Confederated Tribes of the Colville Reservation on the official census of the Indians of the Colville Reservation of January 1, 1937, shall be considered Indian blood of the Tribes which constitute the Confederated Tribes of the Colville Reservation:

(1) Provided, that no tribal members' blood degree will be decreased as a result of this amendment.

(2) Further provided, that pursuant to procedures which shall be adopted by the Colville Business Council, any

(a) applicant for membership, or

(b) Tribal member who is listed on the official Census of the Indians of the Colville Reservation of January 1, 1937, or

(c) Tribal member descended from a tribal member whose name appears on the official census of the Indians of the Colville Reservation of January 1, 1937; may petition the Tribes, to officially recognize for enrollment purposes that a tribal member whose name appears on the official census of the Indians of the Colville Reservation of January 1, 1937, possesses Indian blood that is not listed on the official census of the Indians of the Colville Reservation of January 1, 1937, and such Indian blood, when properly authenticated by clear and convincing proof, shall be recognized as blood of the Colville Tribes. *(Approved by Confederated Tribes March 22, 1988. Approved by Secretary of the Interior May 19, 1988.)*

#### AMENDMENT X - JUDICIARY

##### Article VIII Judiciary.

Section 1. There shall be established by the Business Council of the Confederated Tribes of the Colville Reservation a separate branch of government consisting of the Colville Tribal Court of Appeals, the Colville Tribal Court, and such additional Courts as the Business Council may determine appropriate. It shall be the duty of all Courts established under this section to interpret and enforce the laws of the Confederated Tribes of the Colville Reservation as adopted by the governing body of the Tribes.

The Business Council shall determine the scope of the jurisdiction of these courts and the qualifications of the judges of these courts by statute.

Section 2. Court of Appeals. The Colville Tribal Court of Appeals shall consist of a panel of individual justices appointed by the Business Council, with the recommendation of the Chief Judge, to terms of six years.

Section 3. Tribal Court. The Colville Tribal Court shall consist of a Chief Judge who shall be appointed by the Business Council for a term of six years, subject to a vote of confidence every three years in conjunction with that year's general election by a majority of the qualified voters of the Confederated Tribes participating in the vote of confidence.

Section 4. Compensation and Term. Except for the terms of the Justices of the Tribal Court of Appeals and the Chief Judge of the Tribal Court, the term of any appointed judge shall be determined by the Business Council. The compensation for the services provided shall be determined by the Business Council and such compensation shall not be diminished during the respective terms of the Justices and Judges unless removed from office as provided in this Article.

##### Section 5. Vacancies and Removal from Office.

a. If a Judge or Justice shall die, resign, be removed under subsection b or recalled from office under subsection c, the Business Council shall appoint a replacement to fill the unexpired term.

b. A Judge may be removed from office prior to the expiration of a term for good cause pursuant to a Bill of Impeachment filed with the Business Council and approved by a 2/3 majority of all of the members of the Business Council. The Business Council shall convene a Special Session to vote on the Bill of Impeachment after allowing the Judge an opportunity to present a defense to the Bill of Impeachment. The decision of the Business Council shall be final.

c. A Judge may be removed from office for good cause prior to the expiration of a term by a majority of the voters of the Confederated Tribes of the Colville Reservation at a special election called for that purpose. A special election under this subsection shall be called by the Colville Business Council within 10 days after a Petition for Recall naming the specific Judge, setting forth the specific charge or charges and signed by at least 1/3 the number of those eligible to vote in the last preceding election is filed with the Business Council. The results of any election under this subsection shall be final.

Section 6. Discipline. Upon petition of any Colville Tribal Judge or Justice, or by a majority of the Business Council, presenting specific reasons for imposing discipline on any Justice or Judge of any Court established pursuant to this Article, the Colville Tribal Court of Appeals shall be convened to consider, and where necessary, impose discipline upon the Justice or Judge according to Rules of Judicial Conduct to be adopted by the Tribal Court of Appeals that are not inconsistent with the Constitution of the Confederated Tribes of the Colville Reservation.

Section 7. Implementation. This Article shall take effect upon the appointment of the Chief Judge by the Business Council after ratification of this Article by the electorate and its approval by the Department of Interior as provided in Article VI. *(Approved by the Confederated Tribes October 20, 1990. Approved by the Secretary of the Interior April 17, 1991.)*

#### BY-LAWS OF THE CONFEDERATED TRIBES

##### ARTICLE I - THE BUSINESS COUNCIL

Section 1. Chairman of the Business Council. The Chairman of the Business Council shall preside over all meetings of the Business Council. He shall perform all duties of the Chairman and exercise authority delegated to him by the Business Council. He shall vote only in the case of a tie.

Section 2. Vice-Chairman of the Business Council. The Vice-Chairman of the Business Council shall assist the Chairman when called upon to do so. In the absence of the Chairman, he shall preside. When so presiding, he shall have the rights, privileges and duties as well as the responsibilities of the Chairman.

Section 3. Secretary of the Business Council. The Secretary of the Business Council shall conduct all correspondence and keep a complete and accurate record of all matters transacted at Council Meetings. It shall be his duty to submit promptly to the Superintendent of the jurisdiction copies of all minutes of regular and special meetings of the Business Council and the Tribes.

Section 4. Appointive Officers. The duties of all appointive committees and officers appointed by the Colville Business Council shall be clearly defined by resolution of the Business Council at the time of their creation or appointment. Such committees and officers shall report from time to time as required, to the Business Council and their activities and decisions shall be subject to review by the Business Council upon petition of any person aggrieved.

##### ARTICLE II - TIME AND PLACE OF MEETINGS AND PROCEDURE

Section 1. Regular meetings of the Business Council shall be held on the second Friday of July, October, January and April, at Nespelem, Washington, at a designated building or hall. *(This section amended. See Amendment L.)*

Special meetings may be called by written notice signed by the Chairman or by a majority of the Business Council members, and when so called the Business Council shall have power to transact business as in regular meetings.

Section 2. - Quorum. No business shall be transacted unless a quorum is present. A quorum shall consist of eight (8) councilmen.

Section 3. - Order of Business. The following order of business is established for all meetings:

1. Call to order by the Chairman.
2. Roll call.
3. Ascertainment of a Quorum.
4. Reading of the minutes of the last meeting.

5. Adoption of the minutes by a vote or common consent.
6. Unfinished business.
7. New business.
8. Adjournment.

Section 4. - Report of Meetings. It shall be the duty of each member of the Business Council to make reports concerning the proceedings of the Business Council to the members of the district from which he is elected.

#### ARTICLE III - RATIFICATION OF CONSTITUTION AND BY-LAWS

This Constitution and By-Laws shall be in full force and effect whenever a majority of the adult voters of the Confederated Tribes voting at an election called by the Commissioner of Indian Affairs, in which at least thirty percent (30%) of the eligible voters vote, shall have ratified such Constitution and By-Laws and the Commissioner of Indian Affairs shall have approved same.

#### CERTIFICATION OF ADOPTION

Pursuant to the request of a majority of the Indians of the Colville Reservation to obtain for themselves a representative organization, this Constitution and By-Laws was duly submitted by the Commissioner of Indian Affairs for ratification and was on February 26, 1938, duly ratified by a vote of 503 for, and 76 against in an election in which over 30 percent of those entitled to vote cast their ballots.

Signed: Harvey K. Meyer, Superintendent, Colville Agency

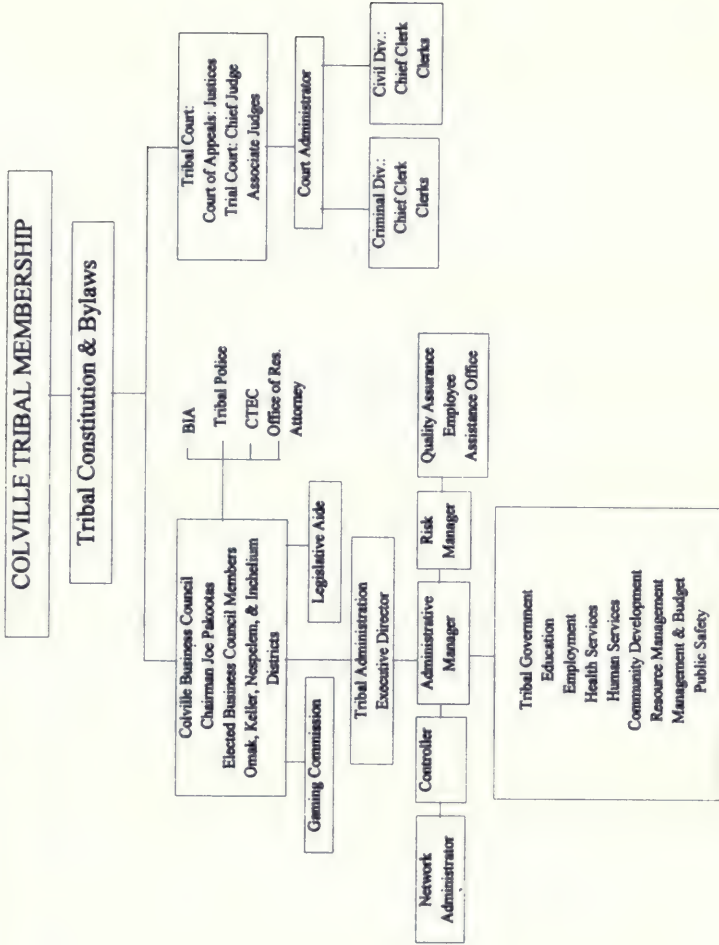
Signed: Gus Whitelaw, Chairman, Constitutional Committee

APPROVAL Signed: John Collier, Commissioner of Indian Affairs

*Revised 4/23/91 by Office of Reservation Attorney  
Confederated Tribes of the Colville Indian Reservation*



# Colville Confederated Tribes: Government Chart



ATTACHMENT II.

**COLVILLE TRIBAL COURT  
POLICIES AND PROCEDURES MANUAL**

**ENSURES DAY TO DAY ADMINISTRATION OF THE COURT  
REMAINS SEPARATE AND INDEPENDENT OF COUNCIL INTERFERENCE**

## INTRODUCTION

### PURPOSE

Amendment X of the Colville Confederated Tribes Constitution designates the Colville Tribal Judiciary as a separate branch of government. As a separate branch of government, the Colville Tribal Court is independent and not subject to any outside influence which might appear to detract from its impartiality and quality of justice. To fully implement the Court as a separate branch of government, the Court has developed a policy and procedures manual that covers administrative organization of the Court. This manual outlines the policy toward the various phases of the administrative structure of the Court and how those policies are to be administered. Consequently, each staff member will be able to use this manual as a guidebook when he/she needs to apply policy in a given situation. These written policies and procedures should increase understanding, eliminate the need for personal decisions, and help to assure uniformity throughout the organizational structure of the Court.

### AUTHORITY/REVISION

The authority to develop this manual is established by Amendment X of the Constitution of Confederated Tribes of the Colville Indian Reservation. This manual will supersede any prior manuals, resolutions, or written policies unless expressly incorporated by reference herein.

Any revisions to this Policy and Procedures Manual must be submitted in writing to the Chief Judge. The Chief Judge will distribute proposed changes to Court staff, allow 15 days for comments and then either implement or deny the changes.

### CONSTRUCTION

This manual is designed to give guidance to employees and supervisors of the Court to handle all administrative actions. All terms are to be given their common meaning unless a specific definition has been given. All gender designations will mean both male and female, unless specifically indicated otherwise. If any part of this manual is determined to be invalid, the remainder shall be deemed valid and shall not be affected by the decision.

### COURT STAFF

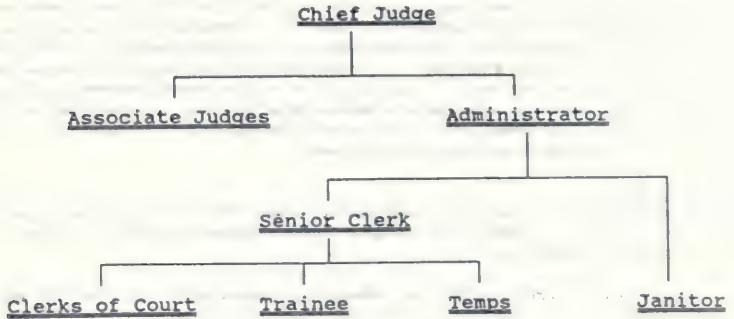
All members of the Court staff and support staff are covered by this Colville Tribal Court Policy and Procedures Manual. Those employees are the judges, clerks of court, administrator and any temporary employees or trainees who are under the supervision of the Chief Judge, clerks of court or administrator. No action will be taken to remove any staff members from the administration of the Court without notification to, discussion with, and concurrence of the Chief Judge or his designate.

### CHAIN OF COMMAND

If an individual has a concern or problem with a Court employee, that concern should initially be discussed with the employee. If unable to resolve the problem satisfactorily, the concern should then be directed to the employee through the Chain of Command by contacting his supervisor (SEE Administrative Organization Chart on page 2). Conversely, if an employee has a concern or problem, that concern should be directed to his immediate supervisor or if the supervisor is the problem, to the next level supervisor. The Chain of Command should always be adhered to, both upward and downward. Any deviation from this procedure should be brought to the attention of the Chief Judge as administrative head of the Court.



ADMINISTRATIVE ORGANIZATION CHART  
COLVILLE TRIBAL COURT



C:\WP60\MANUAL\ORGAN.CHART, Revised April 15, 1995

ATTACHMENT III.

COLVILLE TRIBAL CIVIL RULES

PROVIDES ALL PERSONS A RIGHT TO A JURY  
COMPRISED OF ALL MEMBERS OF THE TRIBAL COMMUNITY  
BOTH MEMBERS AND NON-MEMBERS

## SCOPE AND PURPOSE OF RULES AND DEFINITIONS

### **Rule 1. Purpose and Scope of Rule**

The Colville Tribal Rules of Civil Procedure shall consist of this Chapter, which shall determine their application. These rules shall govern all aspects of procedure in civil matters in the Colville Tribal Court, except as otherwise provided by tribal law.

All chapters of the court rules shall be interpreted in such a manner as to be consistent with each other and consistent with achieving a just and timely resolution of the pending case. However, should any part of this chapter expressly conflict with another part of the Code, the rules shall be followed unless otherwise legislated by the Colville Business Council after the adoption of these rules. In the event that no rule of court appears within this chapter or Code: (1) parties may submit a stipulated order setting forth a procedure which shall, if accepted by the trial court, govern the conduct of the case; or (2) the court may order a specific procedure or procedures be adopted in order to bring the case to an orderly conclusion.

### **Rule 2. Definitions and Terms**

(A) Spokesman. "Spokesman" shall include all persons admitted to practice before the Court.

(B) Judgment. "Entry of judgment" occurs on the date the signed order is file stamped by the court.

(C) Order. "Order" shall mean every document in any proceeding signed by the judge including proposed orders prepared by the parties, their representatives, or the court.

(D) Tribes. "Tribes" shall mean the government of the Confederated Tribes of the Colville Reservation.

(E) Tribal. "Tribal" shall refer to matters pertaining to the Tribes.

(F) File Stamp. "File Stamp" shall mean the stamp placed on a document by the court to indicate when the document was received by the court. It shall indicate the date/time received and the court which received it.

(G) Motion to Reconsider. (Language to be submitted by ELM).

(H) Service. Delivery to spokesman is delivery to party except for initial documents.

(I) Judgments. A judgment is a final order of the court, which disposes of a claim in whole or in part and becomes final when the signed order is file stamped by the court.



may, in addition, order that the witness be paid reasonable and necessary travel and living expenses incurred in responding to the subpoena.

**RULE 19. Jury Trials**

**(A) Jury trial request; fee.**

A jury trial shall be held if requested by either party to the case at least fourteen (14) days before the trial. The party who requests a jury trial shall pay to the court a jury fee established by Rule of Court. Payment of the jury fee may be waived by the chief judge upon the request of a party if payment of the fee would result in severe hardship to the party.

**(B) Jury trial continuance; fee.**

The party who requests a jury trial and fails to provide at least five days notice by a written motion to continue the trial shall be liable for the payment of jury fees. In addition, fees and costs may be assessed for a pro tem judge, at his discretion.

**(C) Jury lists; eligibility; non-members.**

- 1) To be eligible to serve as a juror on a civil case a person must:
  - a. be a resident of the reservation for at least one year;
  - b. be eighteen years of age or older,
  - c. not have been convicted in any court of a felony, within the past five (5) years prior to date of being summoned;
  - d. must not at the time the list is made, or at the time of the trial, be holding the office of tribal police officer or tribal council member, nor be employed by the Court or Court of Appeals.
- 2) Any non-tribal member who is a resident of the reservation may register for jury duty by supplying a statement of his qualifications for such status under this section to the tribal council's secretary. The secretary shall provide this list to the court each year.
- 3) Each year the Tribal Council shall authorize the Enrollment Department to provide a list of eligible tribal members to the court for selection as jurors.
- 4) The clerk shall request from the counties voter registration lists for eligible non-tribal members to be called in for jury duty.

**(D) Selection of panel; jury summons; failure to appear; excuse from jury**

**duty.**

1) The court clerk shall randomly select a specified number of names from the jury list quarterly. Those names shall be placed on a master list. This master list shall be sent to the Tribal Tribune for publication in the month prior to the beginning of the jury duty term. The clerk shall also send a jury summons to each person on the list advising them that they are subject to jury duty for a three month period. The summons shall be sent by certified mail. Along with the summons will be a questionnaire that is to be completed and returned to the court.

2) When a jury trial has been confirmed, the clerk shall send notice to each juror when to appear. The notice shall be sent by postcard and must be mailed no later than seven (7) days prior to the jury trial. If more than one trial is scheduled for the month, all the dates may be included on the postcard.

3) Potential jurors may request to be excused from jury duty when it would work an undue hardship on the juror. If a juror is requesting to be excused, he must send a written request to the court when he receives his jury summons. The court will review the requests on a case-by-case basis and determine if there is adequate cause to excuse the juror. The court may excuse jurors indefinitely or may only excuse for a limited period of time. When jurors are requesting to be excused because of severe medical problems, a doctor's slip must be submitted with the request. If the court does not feel that adequate reasons are provided for excuse from jury duty, notice shall be sent to the juror advising him that his request was denied and he will have to appear when required.

4) If a potential juror is unable to appear and is not eligible to be excused, he may send a substitute juror in his place. The substitute juror must meet the requirements for jury duty. It is the responsibility of the called juror to notify his substitute when he is to appear for jury duty. If the substitute fails to appear, the called juror will be responsible and may be held in contempt of court for failing to appear. When the substitute juror appears, he will be required to fill out the questionnaire and must indicate on the fee form which juror he is appearing for.

**(E) Jury selection.**

On the day of the trial, the clerk shall put all the jurors' names into a container.

Those persons whose names are in the container shall be known as the jury panel. After the judge calls the court to order, the judge shall direct the clerk to draw from the jury panel container, at random, the names of seven (7) members of the jury panel. Those members shall then be seated in the jury box. The clerk shall make a list of the names in the order in which they were called.

**(F) Oath to panel.**

The court shall administer an oath or affirmation to all prospective jurors of the entire jury panel, that each of them will truthfully answer all questions propounded to them as to their qualifications to sit as jurors in the action.

**(G) Removal for cause; examination by Court, parties.**

1) After the first seven (7) members of the jury panel have been seated in the jury box, the judge shall examine each of them as to their qualifications, and excuse any who appear to the judge to be biased, prejudiced, unable to fairly and effectively perform the duties of a juror or otherwise not qualified to serve as a juror. The judge shall permit the parties or their spokesman to similarly examine and ask for the removal of persons for cause, without any limit to the number of persons so challenged or removed, except that all such challenges must be made in good faith.

2) After all disqualified persons have been excused from the jury box, enough additional names will be drawn by the clerk to replace the disqualified persons. The clerk shall add their names to the list in the order in which they were called. The procedure for challenges for cause shall continue until seven (7) qualified persons are seated in the jury box.

**(H) Peremptory Challenges.**

After the seven (7) qualified persons have been seated in the jury box, each party shall have the right to remove any three persons from the jury without cause or stating any reason. The parties shall alternately remove persons, or waive their turn to do so, until they have exhausted their peremptory challenges.

**(I) Trial jury; alternate.**

After all the challenges have been made, the remaining seven (7) jurors shall be the jurors for the trial. At the conclusion of the trial, when the case will go to the panel for deliberation, the court shall select one of the jurors as an alternate. That



juror will be excused and the remaining six will deliberate and render a verdict.

**(J) Oath of jurors.**

Prior to the presentation of the case at trial, the court shall administer the jury oath or affirmation to the trial jury as prescribed by law.

**Rule 20. Jury Instructions**

**(A) Instructions to jury - Requests.**

No later than three (3) days before the start of a jury trial, any party may submit proposed jury instructions on the law. Copies of the proposed instructions must be served upon and received by all parties to the action at least three (3) days before the commencement of the trial.

**(B) Written Instructions - jury questions.**

The court may give instructions to the jury during the trial. These instructions shall be written and constitute part of the record. The court shall make all rulings on requested instructions and objections, advise the parties of the final instructions to be given, and read to the jury the written instructions before the final arguments. The written instructions shall be given to the jury when they retire for deliberation. Any request by the jury to be further informed of any point concerning the action shall be communicated to the judge in writing and signed by the jury foreman. The spokesmen for the parties shall be given the opportunity to be present if they are available and can be present within a reasonable period of time. The judge may instruct the jury in writing or explain the instructions in open court which shall be made part of the record.

**Rule 21. Order of Trial**

(A) Motions. Any requests for an order from the Court regarding legal questions, procedures or the rights of parties and which cannot be settled by the parties may be presented to the judge in a motion.

(B) Opening Statements. At the trial, opening statements shall be made in the following order:

- 1) The plaintiff shall make his opening statement setting forth the charge or claim for relief against the defendant.
- 2) The defendant shall have an opportunity to state his position before or at the conclusion of the plaintiff's case presentation.

ATTACHMENT IV.

**COLVILLE TRIBAL CIVIL RIGHTS ACT  
AND TRIBAL COURT CASES INTERPRETING**

**PROVIDES A SYNOPSIS OF TRIBAL CIVIL RIGHTS  
AND THEIR INTERPRETATION AND ENFORCEMENT  
IN TRIBAL CIVIL AND CRIMINAL CASES**

## CHAPTER 1-5 COLVILLE TRIBAL CIVIL RIGHTS ACT

1-5-1 Title

This Chapter shall be known as the Civil Rights Act of the Confederated Tribes of the Colville Reservation.

1-5-2 Civil Rights of Persons Within Tribal Jurisdiction

The Confederated Tribes of the Colville Reservation in exercising powers of self-government shall not:

- (a) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (b) violate the right of people within its jurisdiction to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (c) subject any person for the same Tribal offense to be twice put in jeopardy;
- (d) compel any person in any criminal case to be a witness against himself;
- (e) take any private property for a public use without just compensation;
- (f) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
- (g) require excessive bail, impose excessive fines, inflict cruel and unusual punishments;
- (h) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (i) pass any bill of attainder or ex post facto law; or
- (j) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a Tribal jury of not less than six persons.

1-5-3 Right of Action

Any person may bring an action for declaratory and/or injunctive relief only, against any executive officer or employee of the Confederated Tribes, or any employee or officer of any governmental agency acting within the jurisdiction of the Colville Tribal Court, to protect the rights set out in §1-5-2 of this Chapter.

1-5-4 Colville Tribal Court

Actions brought under §1-5-3 shall be brought only in the Courts of the Confederated Tribes of the Colville Reservation; notwithstanding the fact that a court of another jurisdiction may have concurrent jurisdiction.

1-5-5 Sovereign Immunity

When suit is brought in the Colville Tribal Court under §1-5-4 to protect rights set out in §1-5-2, the sovereign immunity of the Colville Tribes is hereby waived in the Courts or the Tribes for the limited purpose of providing declaratory and injunctive relief, where appropriate under the law and facts asserted to protect those rights; provided, the immunity of the Tribes is not waived with regard to damages, court costs, or attorneys fees.

1-5-6 Other Law Unaffected

The laws of the Confederated Tribes, insofar as they do not violate the rights set out in §1-5-2 of this Chapter, shall be unaffected by this Chapter. The Tribal Rules of Civil Procedure, the Tribal Statutes of Limitations, and all other rules of practice and procedure shall apply to suits brought under this Chapter.

1-5-7 Custom And Tradition To Be Respected

In construing this Chapter, the Tribal Court shall consider, when properly presented to the Court, the history, customs, and traditions of the tribes and bands which make up the Confederated Tribes.



1-5-8

Insurance

Notwithstanding any other provision of this Chapter or the Colville Tribal Code; with respect to any claim made under this Chapter, in the Courts of the Confederated Tribes, for which the Tribes carries an active and enforceable policy of liability insurance, suit may be brought for damages up to the full available amount of the coverage provided in the insurance policy; provided, no judgment on any such claim may be for more than the amount of insurance carried by the Tribes; and further provided, any such judgment against the Tribes may only be satisfied pursuant to the provisions of the policy or policies of insurance then in effect.

Chapter 1-5, Adopted 02/04/88, Certified 02/16/88, Res. 1988-76

**S vs. CTEC CONSTRUCTION**

21 Indian Law Rptr. 6027 (Colville Tribe. Crt, Feb 1994)

**FACTS:**

Appellant, S, a non-Indian, was hired as a mechanic by Defendant, Coville Confederated Enterprise Corporation-Construction (CTEC), on to work on the Silver Creek Road Project (Silver Creek), a project located within the boundaries of the Colville Reservation. Pursuant to the Tribal Employment Rights Ordinance (TERO), S completed a form when he was first hired, but was uninformed of the functions of this office. CTEC submitted a compliance plan to TERO for Silver Creek designating S as a key employee for the mechanic position. TERO certified that at this time no qualified tribal member was available for this position. S was thereafter placed on the payroll and worked on Silver Creek for approximately two years until its completion, including the winter months when he continued work as a mechanic at Post and Pole.

Thereafter, S began working on CTEC's new project, the Cash Creek Project (Cash Creek), also located within the boundaries of the Reservation. TERO sent verbal and written notice to CTEC that S had not been certified as a key employee for Cash Creek and that qualified tribal members were available for the position and must be employed in place of S. S then received verbal notice of his immediate lay-off which was followed by S's receipt of written notice in the form of final paycheck which stated "FINAL CHECK."

**ISSUE:**

Did the action of CTEC terminating S, a non-Indian tribal employee, solely for the purpose of replacing him with a qualified Indian employee violate the non-Indian employee's due process rights?

**HOLDING:**

Yes. Evidence found that S was wrongfully terminated as a result of his Anglo Saxon heritage. The termination was REVERSED and S is to be reinstated with full back pay in the amount of \$9,945.82, plus statutory interest.

**REASONING:**

At the hearing in this matter CTEC testified that S was terminated because TERO ordered that he be terminated. TERO stated that S is not a member of any Indian Tribe and qualified Indian tribal members were available to perform S's current position. TERO objected to S's continued employment with CTEC and recommended that S be displaced. The Court found that S's termination solely for the purpose of replacing him with a qualified Indian employee does not constitute "good cause" to terminate and violates public policy which in this tribal community prohibits invidious racial discrimination. The Tribal Bill of Rights is supportive of this proposition stating that a termination of an employee for the effect of replacing him with a qualified Indian employee would be racially based.

**CLASS ACTION vs. COLVILLE INDIAN HOUSING AUTHORITY**

Class action suit against Coville Indian Hosing Authority (CIHA) brought by tribal members (plaintiffs) for specific performance and breach of contract. Plaintiffs filed a Motion for a Preliminary Injunction and the Tribal Court issued an Order restraining the tribe from raising the tribal members' monthly rent until disposition of this case.

**FACTS:**

Plaintiffs consist of at least 41 people who have entered into contracts with the CIHA. CIHA is established by the tribal government as an agency of the Colville Tribe to provide access to low-income housing on the Colville Indian Reservation. Said contracts were entered into about 12 years prior to this action. CIHA had made determination to raise the rents which ranged from an increase of 11% to 450% more than what the participants were currently paying. CIHA proposed rent increase was based on regulations of the Department of Housing and Urban Development (HUD) which primarily financed the project. CIHA sent written notification of monthly rent increases to plaintiffs. Plaintiffs argued that pursuant to their negotiations they were lead by CIHA to believe that their monthly payments would never exceed \$105/month. CIHA denies plaintiffs' allegations and contends that the written contract expressly provides for rent increases. In addition, CIHA alleges they are bound by HUD regulations. Plaintiffs request relief from the Court by reforming the contract to eliminate disputed sections and insert sections which are consistent with their understanding of the contract; that the demand by CIHA for plaintiffs to pay a rent increase be declared a breach of the reformed contract; that CIHA be restrained from raising the monthly rent; or in the alternative, find that the new payments, as determined by CIHA, breach the contract.

**ISSUE:**

The relevant issue is whether the contract, as negotiated and intended by the parties, provides, in part, for rental increases, and in determining same, can the court issue a temporary order restraining the tribe from raising the rent?

**HOLDING:**

The tribe was enjoined from raising tribal members' rent pending resolution.



IN THE COURT OF THE

FILED

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

COLVILLE TRIBAL COURT

COLVILLE CONFEDERATED TRIBES,  
Plaintiff,

vs.

NOREENE LEZARD,  
Defendant.Case Nos. 94-17105; 94-  
17106; 94-17107; 94-17108;  
94-17109ORDER GRANTING MOTION TO  
SUPPRESS EVIDENCE

This matter came before the Court for hearing on the Defendant's Motion For An Order To Suppress Evidence on the 25th day of May, 1994. The Defendant appeared through counsel, Jeffrey Rasmussen, Public Defender. The Tribes were represented by Wayne Rasmussen, Deputy Tribal Prosecutor. Officer William C. Evans of the Colville Tribal Police Department presented testimony as to the facts in the case and was the only witness called. From the file, the record, and sworn testimony adduced at hearing the Court the facts in this case are as follows:

I.  
FINDINGS

There is no dispute concerning the facts in this matter. On April 2, 1994 at about 5:10 a.m., Sgt. William Evans of the Colville Tribal Police was dispatched to Mid Valley Hospital in Omak, Washington concerning an alleged assault which had occurred at HUD Residence No. 4104 in the Albert Orr housing complex in Omak. The housing complex is located on the Colville Indian Reservation. After arriving at the hospital, Sgt. Evans

ORDER GRANTING MOTION  
TO SUPPRESS EVIDENCE - 1

When Citing this case use:

1 CTrR 11

1 interviewed Ramona Sanchez, victim of an alleged assault, who  
2 identified the assailant as one Juan Carson. Carson is 16 years of  
3 age and member of the Confederated Tribes of the Colville Indian  
4 Reservation. During his interview with the alleged assault victim,  
5 Sgt. Evans was provided information that Carson might have gone to  
6 HUD Residence No. 4108, which is also located in the Albert Orr  
7 Housing complex.

8 Sgt. Evans called for and received backup assistance from  
9 Officer J. Storey and Reserve Officer J. Goss. Together they went  
10 the Ramona Sanchez residence then to HUD No. 4108. The officers  
11 did not obtain an arrest warrant for Juan Carson nor a search  
12 warrant for HUD No. 4108, which is owned by the Defendant, Noreen  
13 Lezard. According to Sgt. Evans' testimony, the police were aware  
14 that the HUD Residence No. 4108 is owned by Noreen Lezard.

15 When the police officers approached the Lezard residence, Sgt.  
16 Evans knocked on the front door and a partially clothed young male  
17 answered. The young male identified himself as Juan Carson and,  
18 according to the testimony of Sgt. Evans, acted as though he might  
19 attempt to flee; however, Sgt. Evans did not testify that Juan  
20 Carson actually attempted to flee. Consequently, the police  
21 entered the Lezard home and placed Juan Carson under arrest. The  
22 record indicates that Juan Carson does not reside at the Lezard  
23 residence and that the police did not request or obtain consent to  
24 enter the home. Sgt. Evans also testified that through the open  
25 door he observed a female cross the hallway in the interior of the  
26 Lezard home and he thought the person might have been a juvenile.

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28 TO SUPPRESS EVIDENCE - 2

1 After placing Juan Carson under arrest, the police made a  
2 protective sweep of the immediate area around Carson. The sweep  
3 did not extend beyond the room occupied by Carson when the arrest  
4 was made. Carson was clothed only in shorts and asked the officers  
5 whether he could retrieve his clothing from a bedroom in the Lezard  
6 home before leaving the residence. The police agreed and followed  
7 Carson to the bedroom. Sgt. Evans testified that he observed  
8 Noreen Lezard, whom he recognized, sleeping in a bed through an  
9 open bedroom door while accompanying Carson to retrieve his  
10 clothing, but he did not attempt to wake her or obtain her consent  
11 to proceed further into her home.

12 Instead, Sgt. Evans accompanied and entered the southeast  
13 bedroom with Carson where he discovered two juveniles upon whom he  
14 detected the odor of alcohol. The juveniles, which included the  
15 Defendant's son, were then placed under arrest.

16 Sgt. Evans also testified that after he had entered the Lezard  
17 home and was in transit to the bedroom to along with Carson, he  
18 heard the sound of voices coming from another bedroom with a closed  
19 door. Sgt. Evans testified that he ascertained the voices were  
20 those of juveniles; however, he did not state any reasons why he  
21 believed the persons in the closed bedroom were juveniles.

22 After Sgt. Evans arrested the first two juveniles, he asked  
23 Carson if he know who was in the bedroom from which Evans heard  
24 voices. Carson identified the occupants of the bedroom and told  
25 the Sgt. Evans they were juveniles. Evans then entered the second  
26 bedroom where he found two additional juveniles who were partially

7  
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1 or completely unclothed. Evans detected that both juveniles had  
2 been consuming alcohol and placed them under arrest.

3 According to Sgt. Evans' testimony, it was only after the  
4 above-described events, including the arrest of Carson and four  
5 juveniles from two closed bedrooms that Sgt. Evans went to and  
6 entered the southwest bedroom to wake the Defendant. Evans  
7 testified that he detected the odor of alcohol coming from the  
8 sleeping defendant and called out to awaken her. The record  
9 indicates that Evans did not detect the odor of alcohol wafting  
10 from the Defendant's body until after he entered her bedroom. He  
11 managed, with some difficulty, to awaken Lezard, advised her of  
12 the situation.

13 Without administering the Miranda warning, Evans began  
14 questioning Lezard. Evans asked Lezard whether she was aware there  
15 were intoxicated juveniles in her home. Lezard replied that she  
16 was aware of it, that they had gotten drunk together, and she  
17 wanted a lawyer. Subsequently, the Defendant was taken into  
18 custody for Contributing to the Delinquency of a Child. A criminal  
19 complaint charging Lezard with five counts of Contributing to the  
20 Delinquency of a Child, CTC 5.3.02, was filed on April 4, 1994.

21 II.  
22 ISSUES

23 The Defendant contends that the incriminating evidence against  
24 her which was obtained by the police after entering her home and  
25 effecting a warrantless arrest of Juan Carson should be suppressed.

26 The Defendant asserts that the evidence was obtained through a  
27 violation of her right to be free from unreasonable search and

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1 seizure under the Indian Civil Rights Act (ICRA), 25 U.S.C. Sec.  
2 1302(2), the corresponding provision of the Colville Tribal Civil  
3 Rights Act (CTCRA), CTC 56.02(b), and CTC 2.2.07.

4 The Defendant also contends that her involuntary confession  
5 after being awakened by Sgt. Evans should be suppressed. Lezard  
6 contends that she was in custody when Evans proceeded with  
7 questioning her and should have been given the Miranda warning  
8 before Evans proceeded with questioning which amounted to a  
9 custodial interrogation.

10 III.  
11 APPLICABLE LAW

12 Both the Tribes and the Defendant have cited state and federal  
13 authority to support their respective arguments concerning  
14 suppression of evidence obtained through a warrantless arrest, and  
15 the events that followed. It is apparent that some discussion is  
16 needed as to what standards should apply to admissibility of  
17 evidence obtained through a warrantless searches. This discussion  
18 is undertaken in light of the alleged violation of the Defendant's  
19 guarantee against unreasonable search and seizure under ICRA and  
20 CTCRA, and CTC 2.2.07.

21 A. Warrantless Searches

22 The tribal standard applicable to the seizure of evidence  
23 obtained through a warrantless searches is as follows:

24 An officer may search or seize property without a warrant  
25 in circumstances under which warrantless searches are  
26 permitted under federal criminal law.

27 CTC 2.2.07. The meaning of the statute is clear. Evidence of a  
28 crime during a warrantless search may be seized only under

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circumstances permitted under federal criminal law. It would appear that evidence seized under such circumstances should be admissible at trial. A corollary to those principles is that a police officer may not seize property during warrantless search in circumstances not allowed under federal criminal law. Further, such property may not be used as evidence of the defendant's guilt.

The clear directive from CTC 2.2.07 is that the Court will look to federal common law to determine whether evidence was properly obtained through warrantless search and seizure. State common law standards for warrantless searches under the Washington Constitution are not in accord with CTC 2.2.07. Moreover, Washington State Supreme Court interpretations of Federal constitutional standards applied to warrantless searches, while instructive, are not binding on the Tribal Court.

Although CTC 2.6.09 instructs the Court as to the priority of applicable law it should follow, that section does not apply when it has been superseded by a specific section elsewhere in Code. Section 2.2.07 supersedes Section 2.6.09 by specifically directing the Court to apply the federal law with regard to evidence obtained by the police during warrantless search and seizures.

#### B. Civil Rights Guarantees

The Indian Civil Rights Act prohibits the tribal police from violating "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure." 25 U.S.C. Sect. 1302(2). Although the prohibition sounds very much like that of Amendment IV of the United States

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1 Constitution, the legislative history of the Act makes it clear  
2 that the Congress enacted ICRA with a dual purpose. The first is  
3 to provide litigants coming before the Tribal Court with protection  
4 similar to, but not coextensive with, the constitutionally-based  
5 guarantees arising from the Bill of Rights. The second purpose for  
6 the enacting ICRA was the furtherance of tribal self-government and  
7 cultural autonomy in tribal systems and law. For that reason, the  
8 Court of Appeals has looked to federal common law interpreting the  
9 constitutional protection arising from the Bill Of Rights as  
10 advisory in applying the corresponding provisions enumerated in  
11 ICRA. Colville Confederated Tribes v. St. Peter, Case Nos. AP92-  
12 15400, AP92-15507-15510, 20 Ind.L.Rep. 6108 (1993).

13 For the reasons stated above, the Court rejects the Deputy  
14 Prosecutor's strenuous assertion that ICRA requires that the  
15 relevant provisions of the Bill of Rights, along with federal case  
16 law interpreting its protection, be automatically adopted as Tribal  
17 Law. It appears to the Court that the Deputy Prosecutor, in  
18 advocating the position of his Office, and in an attempt to defeat  
19 the Defendant's Motion to Suppress, made that assertion in lieu of  
20 applying Washington case law. The Court does not read CTC 2.2.07  
21 so broadly as to require the Tribal Court to adopt, without careful  
22 examination, federal case law interpreting a defendant's Fourth  
23 Amendment rights with regard to warrantless search and seizures.

24 The Defendant does not offer evidence that a reasonable  
25 expectation of privacy under Tribal Law is greater than under  
26 federal law. Rather, she asserts that the more protective state

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1 law standard should be applied by the Tribal Court. Based upon the  
2 discussion supra, the Court is precluded from applying principles  
3 of state law by CTC 2.2.07 when engaging in a warrantless search  
4 and seizure analysis under 25 U.S.C. Sect. 1302(2).

5 Absent a showing that the right to be free from unreasonable  
6 search and seizures under Tribal Law is more protective than that  
7 provided under federal law, the Court will look to principles of  
8 federal case law when deciding whether evidence obtained through  
9 warrantless search and seizures is admissible.

10 The civil rights guarantees under CTCRA, CTC 56.02, and  
11 specifically under CTC 56.02(b), mirror the corresponding  
12 protection under the Indian Civil Rights Act. Because of the  
13 similarities between CTCRA and ICRA, the Court recognizes CTCRA as  
14 a statement of tribal policy similar to that shown in the  
15 legislative history of ICRA. Thus, the Court interprets CTCRA as  
16 a statement of tribal policy that litigants are afforded the  
17 protection enumerated in the statute and the Act was adopted in  
18 accordance with principles of tribal self governance, self  
19 determination, and preservation cultural autonomy in tribal systems  
20 and law

21 Further support for this view is apparent from CTC 1.1.07(d),  
22 which requires that the various provisions of the Tribal Law and  
23 Order Code, including CTCRA, "be construed as a whole, to give  
24 effect to all of its parts in a logical, consistent manner." In  
25 reading CTC 56.02(b) in pari materia with CTC 2.2.07, it appears to  
26 the Court that the Tribal Business Council intended that federal

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1 criminal law concerning warrantless search and seizures should be  
2 considered a statement of tribal civil rights. However, the Court  
3 has found no statute or tribal case law which requires the Court to  
4 strictly adhere to federal court interpretation of Article IV of  
5 the United States Constitution. Rather, the general principles set  
6 out in CTCRA strongly suggest that the Business Council intended  
7 that the standards flowing from its principles be developed through  
8 a growing body of tribal common law.

9 IV.  
10 DISCUSSION

11 From the events described above, it can fairly be said that  
12 the tribal police obtained a windfall of evidence against Noreen  
13 Lezard's after entering her home. The Defendant does not challenge  
14 the authority of the police to arrest Juan Carson; however, she  
15 argues that the evidence obtained upon further intrusion into her  
16 home was the subject of an illegal search.

17 Plain View Doctrine

18 The Tribes argue there was no search of Lezard's home and that  
19 all evidence obtained from the interior of the residence, following  
20 Juan Carson's arrest, was inadvertently discovered and should be  
21 admissible under the plain view doctrine. The Tribes argue that  
22 the tribal police had a duty to remain with and accompany Carson  
23 while he retrieved his clothing from a closed bedroom in Lezard's  
24 home. Therefore, their presence in the interior of the home, it is  
25 reasoned, was legitimate, and allowed them to freely exercise their  
26 innate sensory abilities to detect the fruits of criminal activity.

27 There is a well-developed body of federal case law concerning

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1 exclusion of evidence obtained through illegal search and seizure.  
2 In the seminal case of Weeks v. United States, the United States  
3 Supreme Court adopted the exclusionary rule as a remedy for  
4 violations of the Fourth Amendment to the United States  
5 Constitution. The Supreme Court held, as a matter of federal  
6 constitutional law, that the Court does not have the right to  
7 retain for evidence materials seized in violation of one's Fourth  
8 Amendment rights. In another case which forms the foundation for  
9 application of the exclusionary rule, the court held that all  
10 evidentiary fruits of the initial illegality must be excluded.  
11 Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). See  
12 also, Mapp v. Ohio, 394 U.S. 721 (1969), Davis v. Mississippi, 394  
13 U.S. 721 (1969).

14 For the exclusionary rule to be applied to suppress evidence,  
15 there must be a search or seizure to obtain property, an object, or  
16 information and the search or seizure must violate the right to  
17 privacy under the Constitution. The Supreme Court has held that a  
18 search, within the meaning of the Constitution, involves a  
19 trespassory invasion into a constitutionally protected area,  
20 involving physical entry. Lee v. United States, 274 U.S. 559  
21 (1927). The court has also held that a person's home is the  
22 quintessential private zone for Fourth Amendment protection.  
23 Payton v. New York, 445 U.S. 573 (1980). Moreover, the simple  
24 language of the Amendment applies equally to seizures of persons  
25 and to seizures of property. Id at 585.

26 It is a basic principle under federal law that nonconsensual

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1 physical entry of a person's home by the police, without a warrant,  
 2 absent one of the limited warrant exceptions, is considered an  
 3 unreasonable search. Katz v. United States, 389 U.S. 347. See  
 4 also, United States v. Chadwick, 433 U.S. 16 (1977); United States  
 5 v. Karo, 468 U.S. 705 (1984). Three of the warrant exceptions  
 6 pertinent to this case, discussed Infra., are the plain view  
 7 doctrine, consent, and entry due to exigent circumstances.

8 The premise for the Court's inquiry is that when the police  
 9 first entered Lezard's home, it was an unconsented invasion of a  
 10 constitutionally protected area. Katz, supra. However, when Carson  
 11 opened the door to Lezard's home and identified himself, under the  
 12 plain view doctrine, the Defendant concedes that the subsequent  
 13 entry of her home by the police to arrest Carson falls within one  
 14 of the warrantless exceptions. That interpretation is well-  
 15 supported by the law. See, Coolidge v. New Hampshire, 403 U.S. 448  
 16 (1971). See also, United States v. Winsor, 846 F.2d 1569 (9th Cir.  
 17 1988); United States v. Peters, 912 F.2d 208 (8th Cir. 1990). The  
 18 Defendant does not challenge the warrantless entry of her home on  
 19 the theory that police lacked probable cause to place Carson under  
 20 arrest. Payton, supra.

21 The Defendant also concedes that following Carson's arrest,  
 22 the police were justified in making a protective sweep of the  
 23 immediate area near Carson. Maryland vs Buie, 494 U.S. 325, \_\_\_,  
 24 \_\_\_, 110 S.Ct. 1093, 1099-1100 (1990); Chimel v. California, 395  
 25 U.S. 752, reh'g denied, 396 U.S. 869 (1969). However, following  
 26 Carson's arrest and securing the immediate area to ensure officer

7  
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1 safety, the Defendant argues that further intrusion into her home  
2 amounted to an unreasonable search. Moreover, under Chimel, there  
3 is no comparable justification for their protective sweep to extend  
4 to any room other than that in which the arrest occurred. Id., at  
5 762-63.

6 The federal courts have held that once the police have made a  
7 warrantless entry of a residence, placed the suspect under arrest,  
8 and completed their protective sweep, the dangers they sought to  
9 avoid are eliminated. Thus, barring other exigencies, the police  
10 are then obliged to leave the residence. United States v. Oguns,  
11 921 F.2d 442 (2d Cir. 1990). See also, Scheneckloth v. Bustamonte,  
12 412 U.S. 218 (1973); Maryland v. Buie, 494 U.S. 325, 335-36; Chimel  
13 v. California, supra. The Court concurs with this reasoning based  
14 upon the facts of this case.

15 The Tribes argue that the police had a duty to accompany  
16 Carson to a bedroom within the interior of Lezard's house so that  
17 the arrestee could retrieve his clothes. It reasons that the zone  
18 of danger which justifies the search incident to arrest, including  
19 the justification for making a protective sweep, traveled with  
20 Carson. The Tribes also argue that because the police had a duty  
21 to remain with the arrestee, the plain view doctrine continued to  
22 operate such that they were able to repeatedly make evidentiary  
23 windfalls which the Defendant now strives to exclude from evidence.

#### 24 The Plain View Doctrine

25 The Court is aware of authority for operation of the plain  
26 view doctrine during a protective sweep of the premises, assuming



1 the police officer is engaged in lawful activity. United States v.  
2 Tisdale, 921 F.2d 1095 (10th Cir. 1990, cert. denied, 112 S.Ct.  
3 596; United States v. Delgado, 903 F.2d 1495, (11th Cir. 1990),  
4 cert. denied, 498 U.S. 1028. However, for the doctrine to apply,  
5 the officer engaged in a search or seizure must be legally in a  
6 position to seize the item. Washington v. Chrisman, 455 U.S. 1  
7 (1982).

8 When one with authority consents to warrantless entry of a  
9 home, the Supreme Court has held that the privacy exception no  
10 longer exists. Illinois v. Rodriguez, 497 U.S. 177 (1990).  
11 Accordingly, the police may use their innate visual, olfactory and  
12 auditory senses, under the plain view doctrine, to seize evidence  
13 which is immediately recognizable as fruit of a crime. There is  
14 also authority to support the view that one with a common right to  
15 occupy the premises can consent to warrantless entry by the police.  
16 United States v. Matlock, 415 U.S. 164 (1974). The court has held  
17 that such consent is effective consent for the absent,  
18 nonconsenting cotenant. Id. See also, United States v. Mejia, 953  
19 F.2d 461 (9th Cir. 1991), cert. denied, 112 U.S. 1983. Under the  
20 reasoning of Rodriguez, supra, once a cotenant has consented to  
21 warrantless entry, operation of the plain view doctrine would not  
22 be considered an intrusion upon the other occupant's reasonable  
23 expectation of privacy.

24 The facts of this case show that Carson, a juvenile, did not  
25 reside in the Lezard home. The police did not request, nor was  
26 Carson capable of giving consent to enter the house. Therefore,

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1 Lezard's privacy expectations were very much in place when the  
2 police accompanied Carson into the interior of her home. The  
3 Tribes seem to characterize their duty to accompany Carson into a  
4 closed bedroom within Lezard's home, in light of the fact that  
5 Carson was dressed only in shorts, as exigent circumstances which  
6 would justify that the police remain in the residence, United  
7 States v. Oguns, supra, much less further intrusion.

8 The Court is far from persuaded that in balancing Carson's  
9 need to retrieve his pants against Lezard's privacy rights under 25  
10 U.S.C. Sec. 1302(2) and CTC 56.02(b) the scale tips in the Tribes'  
11 favor. This is consistent with the general principle that while an  
12 arrest warrant gives authority to enter a person's home to execute  
13 the warrant, Payton, supra, an arrest warrant is not enough when  
14 police enter the home of a third person to serve the arrest  
15 warrant. The rationale for this rule is that an arrest warrant  
16 does not protect the rights of the third party in whose house the  
17 arrest was made. Steagald v. United States, 451 U.S. 204  
18 (1981).

19 The facts in this case differ significantly from those upon  
20 which the Tribes rely to extend application of the plain view  
21 doctrine. In Washington v. Chrisman, 455 U.S. 1 (1982), a police  
22 officer accompanied a suspect to his dormitory room and stood in a  
23 hallway open to the public while the student opened the door to  
24 retrieve his identification from the room. Through the open  
25 doorway the officer observed evidence of criminal activity. The  
26 court held that the plain view doctrine prevented the observation

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1 and subsequent intrusion into the room from being denominated a  
2 search. The rationale is that the officer was not in a  
3 constitutionally protected area when the observation was made.

4 If the same reasoning were applied to the seizure of Carson  
5 based upon observations made through the doorway of Lezard's home  
6 application of the plain view doctrine might give rise to the same  
7 result. However, that question is not before the Court because, at  
8 oral argument, the counsel advised the Court the Defendant is not  
9 challenging Carson's arrest.

10 It is quite another matter when applying the reasoning of  
11 Chrisman to Sgt. Evans' observations and the seizures which  
12 followed when he entered deep into the interior of Lezard's home  
13 and closed bedrooms. The space outside of the bedroom was within  
14 a constitutionally protected area. Moreover, when Evans initially  
15 observed the Defendant lying in her bed through an open bedroom  
16 doorway he did not testify she was doing anything more than  
17 sleeping. What Sgt. Evans' testimony clearly shows is that it was  
18 only after he had entered the Defendant's bedroom, tested odors  
19 coming from her body for the smell of alcohol, roused her out of  
20 her sleep and interrogated her, that he obtained evidence that  
21 implicated her in criminal activity. The rationale followed by the  
22 court in Chrisman simply does not apply in this case.

23 Consent

24 In Illinois v. Rodriguez, supra, the court held that the  
25 consent given to the police to enter a constitutionally protected  
26 area by a previous tenant was effective against a current tenant.

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1 In that case the former tenant was an adult who had moved away a  
2 short time before and entered her former residence to collect her  
3 belongings. The salient facts in the instant case are that Carson  
4 is 16 years of age and did not reside at the Lezard residence at  
5 the time of his arrest. No evidence was offered to show that  
6 Carson ever lived at the Lezard residence, but was only in the  
7 house. Moreover, the police knew that the home was owned by Lezard  
8 and should have known that Carson had absolutely no authority to  
9 consent to entry by the police, or their further intrusion into the  
10 interior of Lezard's home, or into the bedrooms. If the Court  
11 would follow the reasoning of Rodriguez in this case, a juvenile  
12 visitor could, at any time of the day or night, effectively consent  
13 to police entry of virtually any private area within the owner's  
14 home.

15  
16 The Miranda Rule

17 The Defendant also asserts that because Sgt. Evans did not  
18 advise Lezard of her rights, and she did not waive the same, the  
19 incriminating testimonial evidence she gave should be excluded  
20 under the reasoning of Miranda v. Arizona, 384 U.S.436 (1966). In  
21 that case the court held that after the police have taken a suspect  
22 into custody, the suspect must be advised of and waive his or her  
23 rights before the testimonial evidence given may be used in a  
24 criminal prosecution. The remedy for failure to comply with that  
25 practice is exclusion of the illegally seized evidence.

26 The Defendant's contention that she should have been given the

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1 Miranda warning before Evans' interrogation commenced turns on  
2 whether she was in custody. Under Miranda and its progeny, the  
3 question of whether a suspect is in custody depends upon whether  
4 the suspect feels free to break off the conversation with the  
5 police officer and terminate the encounter. Michigan v. Chestnut,  
6 486 U.S. 567 (1988); United States v. Mendenhall, 446 U.S. 544  
7 (580). That determination is to be made from the totality of the  
8 circumstances.

9 At least part of the very statement that the Tribes wish to  
10 use against Lezard clearly show she believe she was not free to  
11 terminate the conversation with Evans. Her statement, "I want a  
12 lawyer", is difficult to construe any other way. Moreover, the  
13 highly coercive circumstances which surrounded the interrogation  
14 lead to a similar conclusion. Lezard was wrested out of a dark  
15 pool of sleep by a police officer standing in her bedroom during  
16 the early morning hours, who then began asking questions which  
17 obviously were focused on her suspected involvement with the  
18 criminal activity in her home.

19 From the totality of the circumstances described above, Lezard  
20 must have believed she was in custody when Evans' interrogation  
21 began. Accordingly, Sgt. Evans should have given Lezard the  
22 Miranda warning prior to beginning his interrogation concerning her  
23 knowledge of the criminal activity he had discovered in her home.

24 Fruit of the Poisonous Tree Doctrine

25 The principles first established in Silverthorn Lumber Co. v.  
26 United States, supra, gave rise to the doctrine that all

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evidentiary fruits which were discovered as the result of an illegality must be excluded. However, for the "fruit of the poisonous tree" doctrine to operate, there must be some causal connection between the illegality and evidence obtained through the following search and seizure. Davis v. Mississippi, *supra*. See also, Wong Sun v. United States, 371 U.S. 471 (1963).

In this case the initial illegality was Sgt. Evans' intrusion into the constitutionally protected interior of Lezard's home following Carson's arrest. When Evans beyond the area reasonably necessary for the protective sweep and into the interior of Lezard's home, he engaged in a warrantless invasion of the Defendant's constitutionally protected space. Because Evans had no right to be there, what followed was a search. The windfall of incriminating evidence which Evans seized, including testimonial evidence from Lezard, is causally connected to the initial intrusion into the Defendant's constitutionally protected area of privacy. *Id.* at 485-86 (citations omitted). Accordingly, all of the evidence seized following the initial illegality is fruit of the poisonous tree which may not be used against Lezard.

V.  
CONCLUSION

Application of the above principles of federal criminal law to the facts of this case, as required by CTC 2.2.07, leads to the conclusion that all incriminating evidence which was obtained by the police from the interior of Noreen Lezard's home, following the arrest of Juan Carson, was obtained through an illegal search and

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1 arrest of Juan Carson, was obtained through an illegal search and  
2 seizure. Because such illegal search and seizures are prohibited  
3 under the Indian Civil Rights Act, 25 U.S.C. Sec. 1302(2) and the  
4 Colville Tribal Civil Rights Act, CTC 56.02(b), such evidence may  
5 not be used against Noreen Lezard in the present criminal matter  
6 and should be excluded.

7 While there were alternative means which could have been taken  
8 to obtain some or all of the above evidence which would not have  
9 violated the Defendant's statutory privacy rights, the Court has  
10 not been apprised of any attempt by the police to follow any of  
11 those alternatives. Although the criminal activity which occurred  
12 within the Defendant's home was a serious matter involving  
13 juveniles, and successfully prosecuting persons who contribute to  
14 such harm is of great importance to the Tribes, successful  
15 prosecution is not a justifiable end when the means involve  
16 violation of the Defendant's privacy rights. Accordingly;

17 It is ORDERED, ADJUDGED and DECREED that the Defendant's  
18 Motion To Suppress is GRANTED.

19 Dated this 9<sup>th</sup> day of September, 1994.

20  
21   
22 Brian H. Collins, Associate Judge  
23  
24  
25  
26  
27

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IN THE TRIBAL COURT OF THE

COLVILLE CONFEDERATED TRIBES INDIAN RESERVATION

COLVILLE CONFEDERATED TRIBES,  
Plaintiff,

Case No. 93-16445;  
93-16449;  
93-16450

vs.

GREGG S. PAVEL,  
Defendant.

ORDER OF MOTIONS HEARING

COLVILLE CONFEDERATED TRIBES,  
Plaintiff,

Case No. 93-16444;  
93-16451;  
93-16452

vs.

JOSEPH PAVEL,  
Defendant.

THIS MATTER came regularly before this court for a Motions Hearing scheduled on November 2, 1993. The following persons were present: Frank LaFountaine, Tribal Prosecutor; John Sloan, Attorney At Law; Gregg S. Pavel, the Defendant; and Joseph Pavel, the Defendant.

The court, having reviewed the records and files herein, and being fully advised in the premises, finds this court has jurisdiction over criminal acts committed by any enrolled Indian when such act is committed within the boundaries of the Colville Indian Reservation. The Court further finds that no exigent circumstances existed that merit a warrantless search of the area of the pickup closed off by the camper (that is, the box of the pickup), nor did they exist to justify searching the snuff box in the cab of this pickup. The snuff box was too small to contain a weapon and the testimony of the officer did not support a conclusion that he was looking for a weapon. No inventory search was being conducted. The objects seized were not in plain view and the area was either secure or readily capable of being secured. Therefore, no reason existed not to get a warrant and no legal exception allowed breach of the defendant's right not to be searched without a warrant, now, therefore,

When Citing this case use:

1 CTrR 6

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. The motion to dismiss for lack of jurisdiction is DENIED.
2. The contents of the snuff box found in the pickup cab are suppressed.
3. The evidence taken from the covered the box or back of the truck is suppressed.

DONE IN OPEN COURT this 2nd day of November, 1993 and signed this 21<sup>st</sup> day of January, 1994.

  
Judge Mary T. Wynne

I certify that I served this document on the following parties on 1-21, 1994 by R (regular mail), C (certified mail, return receipt requested), at his/her last known address (LKA); I (interoffice mail); P (personal service); or O (other, specify):

Defendant's Prosecutor  
Bobby Defendes - J. Sloan  
file  
Signed Jessica



IN THE COURT OF THE  
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

COLVILLE CONFEDERATED TRIBES	)	NO. 93-16048
Plaintiff,	)	
	)	
v.	)	ORDER REGARDING
	)	ELEMENTS OF ASSAULT
FRED CLARK,	)	
Defendant.	)	

FILED  
 13 JUL 94 17 20  
 COLVILLE TRIBAL COURT

THIS MATTER came before the Court for oral argument of the parties on July 6, 1994. The facts of the matter are simply stated: The prosecution charged the defendant with assault. The Defendant proffered a standard jury instruction stating words alone are not sufficient to sustain a conviction for the crime of assault. The Plaintiff objected to the proffered instruction on the grounds that words alone are sufficient to sustain a conviction under 5.1.03 of the Colville Tribal Law and Order Code. The question then in a simple one: in order to obtain a conviction in the Colville Tribal Court for assault under the laws of the Colville Tribes, must the Tribes show that the Defendant committed an action in addition to mere words? The Court finds in the affirmative.

The Court finds that more than mere words are required for a conviction of assault based upon two separate and independent grounds. First the wording of the statute itself, upon close examination, compels the conclusion that an act by the perpetrator is required. Second, the assault section of the criminal code must be read in harmony with the other sections of the Code, notably Title 56 of the CCT, which protects the rights of the citizens of this community to freedom of speech. Each of these grounds will be examined in turn.

First, CCT 5.1.03 states: "Any person who shall threaten bodily injury to another person through unlawful force or violence shall be guilty of assault." This section appears to the Court to be stating that in order to convict, the prosecution must show that the defendant threatened bodily injury and that the threat was conveyed either through unlawful force or through unlawful violence. Black's Law Dictionary defines "force" as power in motion or in action. It defines the word "violence" unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury. Both definitions capsule the common meaning of each term and each definition contains action or movement as a pivotal component. Therefore, the Court is compelled to the conclusion that the plain meaning of the terms contained in this statute require that the words be accompanied in some way with an action as a critical element of this statutory definition of a crime.

Second, the Court notes that Title 56 of the CCT protects the rights of all members of this community to freedom of speech and was enacted subsequent to the

*When Citing this case use:*

1 CTrR 27


assault statute. Accordingly, to any extent that Title 56 conflicts with the earlier provisions of the Colville Tribal Law and Order Code, Title 56 should be read as controlling on the specific issue in conflict. This is precisely such an issue if the statute were interpreted consistent with the position of the prosecution. Accordingly, to the extent that the prosecution's position is correct, Title 56 would still mandate that the jury be instructed that more than mere words are required to convict under the assault statute. The sole exception to this finding would be if the Tribe were to proffer sufficient evidence to show that the speech at issue constituted "fighting words" and was therefore not protected speech. However, the Court does not at this time have sufficient evidence to make a ruling on this issue.

For all of the reasons above stated, the Court finds in favor of the Defendant and concludes that mere words alone are not sufficient to sustain a conviction of assault under CCT Section 5.1.03.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT PLAINTIFF'S OBJECTION IS OVERRULED.

IT IS FURTHER ORDERED THAT DEFENDANT WILL DRAFT A JURY INSTRUCTION CONSISTENT WITH THIS OPINION, FILE THE SAME AND SERVE IT UPON OPPOSING COUNSEL A MINIMUM OF SEVEN DAYS PRIOR TO THE TRIAL IN THIS CASE.

Dated this 13th day of July, 1994.

  
Mary T. Wynne, Chief Judge

I certify that I served this document on the following parties on 7/26/94 by B (regular mail), C (registered mail, return receipt requested), or by other last known address (DAD): I (handwritten mail), F (personal contact), or G (other, specify)

PROSECUTOR - J. Public Defender - J.  
 Defendant - DVA  
 from: Bruce L. Wynn

FILED  
COLVILLE TRIBAL COURT  
JAN 31 1996  
COLVILLE INDIAN RESERVATION  
*gmr*

IN THE TRIBAL COURT OF THE

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

COLVILLE CONFEDERATED TRIBES,	)	
	)	NO. 94-17260
Plaintiff,	)	
	)	MEMORANDUM OPINION
vs.	)	
	)	
RONALD B. WILEY,	)	
	)	
Defendant.	)	

SUMMARY

The Colville Tribal Court grants Defendant's Motion to Dismiss without prejudice because the citation fails to state the essential elements of the charge in violation of his due process rights.

FULL TEXT

BEFORE WYNNE, Chief Judge

WYNNE, Chief Judge

Before this Court is Defendant's Motion to Dismiss the charge of Possession of Alcohol in the Nespelem Celebration Circle Grounds.

On July 4, 1994, the Defendant was arrested for possessing alcohol in Nespelem Circle Celebration Grounds, Nespelem, WA. The citation specifically charged the Defendant with "Alcohol Circle Grounds," in violation of Colville Tribal Code

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MEMORANDUM OPINION  
PAGE 1

When Citing this case use:

1 CTrR 21  
23 Indianlaw Rptr 4037



(hereinafter "CTC") 5.6.01.

On January 25, 1996 a Motions Hearing was held, Chief Judge Mary T. Wynne presiding. Present at the hearing was Wayne Svaren, Tribal Deputy Prosecuting Attorney, and Jeff Rasmussen, Defendant's Attorney.

Defendant argued that the charge should be dismissed because the citation is insufficient to give the Defendant adequate notice of the offense. The Tribes, on the other hand, argued that the citation was sufficient to give the Defendant adequate notice.

On January 25, 1996 the Court issued a written Order dismissing the charge, without prejudice, for failure to state a claim.

The Court has reviewed the file and applicable tribal law, and hereby enters this Memorandum Opinion consistent with the Court's January 25, 1996 Order.

#### GENERAL DISCUSSION

Due process under CTC § 56.02(h)<sup>1</sup> is "that process which is

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<sup>1</sup> CTC § 56.04(h) states:

The Confederated Tribes of the Colville Reservation in exercising powers of self-government shall not:

...  
(b) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. (Emphasis added.)

due": notice and opportunity to be heard. *Swan v. CBC*, CV92-12121 [19 Indian L. Rep. 6113, 6114] (Colv.Tr.Ct. 1992). Under the Indian Civil Rights Act, 25 U.S.C. § 1302(8),<sup>2</sup> adequate process is: (1) person must receive notice within a prescribed time; and (2) person must be made aware of the nature of the hearing by the clear and plain words of the notice. *Stone v. Swan*, CV90-1087 [19 Indian L. Rep. 6093, 6095] (Colv.Tr.Ct. 1992).<sup>3</sup>

Factors to consider in determining whether the timeliness of notice is sufficient: (1) sufficient time to contact attorney; (2) sufficient time to prepare case. *Sisseton-Wahpeton Sioux Tribe v. Seaboy*, 17 Indian L. Rep. 6027, 6028 (Intertr.Ct.App. 1989).<sup>4</sup>

<sup>2</sup> Section 1302(8) of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1302 read:  
No Indian in exercising powers of self government shall:

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. (Emphasis added.)

<sup>3</sup> See also *Pavito v. Fort McDermitt Tribal Council*, 20 Indian L. Rep. 6020, 6021 (W.Nev.BIA Ct.App. 1993)(due process mandates reasonable advance notice of hearing, the nature of the charges and an opportunity to be heard); *In Re Certified Question II: Navajo Nation*, 16 Indian L. Rep. 6086, 6092 (Nav.Sup. Ct. 1989)(procedural due process under the Indian Civil Rights Act requires notice, an opportunity to be heard and to defend before a tribunal with jurisdiction to hear the matter).

<sup>4</sup> Under the Indian Civil Rights Act, parties to this action should be cautious in evaluating due process in Anglo terms. As the court stated in *Ponca Tribal Election Board v. Snake*, 17 Indian L. Rep. 6085 (Cl.Ind.App., Ponca 1988):

When analyzing due process claims, it is important to note that the Indian nations have formulated their own notions of due process and equal protection in compliance with both aboriginal and modern tribal law. Indian Tribes, whose legal traditions are rooted in more informal traditions and customs, are markedly different from English common law, upon which the United States' notions of due process are founded. *Kinslow v. Business Committee of the Citizen Band Potawatomi Tribe of Oklahoma*, No. App. 87-01 (C.B. Potawatomi Sup. Ct., Feb. 17, 1988), 15 Indian L. Rep. at 6007 (Apr. 1988).

When entering the arena of due process in the context of an Indian tribe, courts should not simply rely on ideas of due process rooted in the Anglo-American system and then attempt to apply these concepts to tribal governments as if they were states or the federal government. That is not to say that the general concepts of due process analysis with regard to state and federal governments are wholly inapplicable to Indian governments, but these precedents are certainly not dispositive nor controlling in the tribal context. One should tread lightly when analyzing the scope and nature of tribal sovereignty and not make assumptions based upon a history and legal tradition

I. THE CHARGE AGAINST THE DEFENDANT IS  
DISMISSED WITHOUT PREJUDICE BECAUSE THE  
CITATION IS INSUFFICIENT.

The Defendant argues that the charge should be dismissed because the citation fails to provide adequate notice of the offense charge. The Court agrees.

A citation issued to a defendant must include "the name of the person [charged], his address, that date of birth and sex, the date, time, and place and description of the offense charged, the date on which the citation was issued, and the name of the citing officer." CTC § 2.3.02.

Specifically, and in order to comport with the above due process standard, a charging document, whether citation or complaint, must contain: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constitute the offense. *CCT v. Stensgar*, 92-15437, 6 (Colv.Ct.App. 1992); *CCT v. James*, 94-17157/17158, 6-7 (Colv.Tr.Ct. 1994).

In *James* this Court held that a citation issued to the defendant was sufficient. Explaining the standard the Court

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that might be entirely foreign to an Indian nation.

*Ponca Tribal Election Board*, 17 Indian L. Rep. at 6083.

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MEMORANDUM OPINION  
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looks to in evaluating a citation, Judge Wynne Stated:

Under the Indian Civil Rights Act, as adopted in CTC 56, a defendant must be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted the crime. *CCT v. Stensgar*, 92-15437, page 6 (1992). A complaint which omits a statutory element of the charged offense, the document is constitutionally [statutorily] defective document for failure to state a claim and is subject to dismissal. *Id.* In *Stensgar*, this Court adopted the Washington state two-prong test for testing the sufficiency of a complaint stated in *Auburne v. Brooke*, 119 Wn.2d 623 (1992):<sup>5</sup> (1) do the necessary facts

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<sup>5</sup> In *City of Auburn v. Brooke*, 119 Wn.2d 623, 836 P.2d 212 (1992) the court stated:

Relying on *Leach*, the respondent cities argue that while misdemeanor complaints have to satisfy the essential elements rule, misdemeanor and gross misdemeanor citations do not have to state the essential elements of the crime charged. This appears to be a misunderstanding of a distinction drawn in *Leach*. *Leach*, 113 Wn.2d at 697-98, 782 P.2d 552 states as follows:

Although the constitutional requirement for adequate notice is the same whether that notice is given by complaint or by citation and notice, there is a logical basis for reasonably distinguishing between misdemeanor defendants issued citations and those served with complaints. Complaints must be more detailed since they are issued by a prosecutor who was not present at the scene of the crime. Defining the crime with more specificity in a complaint assists a defendant in determining the particular incident to which the complaint refers. Citations, however, are generally issued by law enforcement officers who have personal contact with defendants at the scene. Defendants charged by citation are necessarily aware of the particular incidents for which officers are charging them. They presumably know the facts underlying their charges. Further, the citation charging procedure permits officers to initiate prosecutions without unjustifiable expense and delay. In addition, the procedure under CrRLJ 2.1(h) facilitates an officer's ability to charge defendants at the scene and then to release those persons for whom jailing is unnecessary. Differing procedures and requirements for charging by complaint and by citation and notice do not violate due process and equal protection rights. (Footnotes & citations omitted.)

The cities conclude from this that the elements of the crime need not be stated in a citation even when it is used as the final charging document in a criminal prosecution. If we accepted this contention, the effect would be that one defendant charged by complaint would be afforded a statement of the essential elements of the crime charged while another defendant charged with the identical crime by citation used as a final charging document would not have to be given a statement of the essential elements of the crime charged. *Leach* does not lead to such an anomalous result.

To understand the distinction in *Leach*, it is helpful to look to the purpose and function of charging documents. The primary purpose is to give notice to an accused so a defense can be prepared. [*Kjorsvik*, 117 Wn.2d at 101, 812 P.2d 86]. There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. As we recently made clear in *Kjorsvik*, [*Kjorsvik*, 117 Wn.2d at 98, 812 P.2d 86] the "core holding of *Leach* requires that the defendant be apprised of the elements of the

appear in any form, or by fair construction can they be found, in the charging document; and if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the unartful language which caused a lack of notice. *Id.* at 7.

*James*, 94-17157/17158 at 6-7.

Applying the above standard to the facts at bar, the first question the Court must address is whether the citation issued to the Defendant contains all necessary facts sufficiently describing all elements of the crime charged and a describing the specific conduct of the defendant which allegedly constitute the offense. The Court believes not.

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crime charged and the conduct of the defendant which is alleged to have constituted that crime." *Leach* noted that often charging documents are written by alleging specific facts which support each element of the crime charged. [*Leach*, 113 Wa.2d at 688, 782 P.2d 552]

Although *Leach* stated that the facts need not be as detailed in a citation because it is issued at the scene of the alleged crime, it did not say that a citation need not set out the essential elements of the crime charged. In fact, *Leach* specifically held that a citation describing an offense as DWI (the well known acronym for Driving While Intoxicated) was sufficient because it was "a complete statement of the statutory elements constituting the offense charged". [*Leach*, 113 Wa.2d at 695, 782 P.2d 552] Any misapprehension in this regard engendered by *Leach* should have been put to rest by *Seattle v. Hein*, 115 Wa.2d 555, 799 P.2d 734 (1990).

Since we reaffirm *Leach* and *Hein*, as further explained herein, the proper analysis by which to consider the sufficiency of these charging documents is that found in our recent opinion in *State v. Kjerfveit*, 117 Wa.2d 93, 812 P.2d 86 (1991). *Kjerfveit* held that all elements of a crime must be included in the charging document. (Footnote omitted.) It also held that the constitutionality of a charging document can be first raised on appeal but will be more liberally construed in favor of validity if not challenged until after verdict. *Kjerfveit*, 117 Wa.2d at 102, 812 P.2d 86. We also held that if such issue is raised for the first time on appeal, the 2-prong *Kjerfveit* test asks: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice. The first prong of the test looks to the face of the charging document itself and there must be some language in the document giving at least some indication of the missing element. [*Kjerfveit*, 117 Wa.2d at 106, 812 P.2d 86] One does not reach the second or prejudice prong unless there is some language relating to the element—however inartful—in the document. In the cases before us, the citations make no attempt to state the elements or the facts supporting the elements; they merely state the numerical code sections defining the offenses and the titles of the offenses alleged.

*Brooks*, 119 Wa.2d at 628-36.

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The citation issued to the Defendant charged him with violating CTC § 5.6.01, "Alcohol Circle Grounds." CTC § 5.6.01, *Violation of Tribal Ordinances*, states:

Any person who shall violate any Tribal Ordinance or any other Council enactment designed to preserve the peace, health, safety, welfare and morals of the Reservation, for which violation a punishment is not prescribed under any provision of this Code or the Ordinance or enactment itself, shall be guilty of Violation of Tribal Ordinance. Violation of Tribal Ordinance is a Class B offense.

CTC § 5.6.01 is an enabling statute allowing an officer or prosecutor to charge a defendant for violating an ordinance or Business Council enactment which is not enumerated in the Colville Tribal Code. By itself, CTC § 5.6.01 is not a valid statute to charge a defendant. If an officer or prosecutor is charging a defendant under CTC § 5.6.02, a reference must also be made to the appropriate ordinance or enactment in which the defendant is to have alleged to have violated.

In the present case, there are two possible resolutions in which the officer could have charged the Defendant under.<sup>6</sup>

Resolution 1982-333 states in pertinent part:

Colville Confederated Tribes Annual 4th of

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<sup>6</sup> Two other resolutions cited by both parties, Resolution 1992-230 and Resolution 1993-320, are specific, dated prohibitions which do not apply under the facts of this case.



July Celebration Grounds Regulations:

1. The use and possession of alcoholic beverages, drugs, and/or controlled shall not be allowed.

The foregoing regulations have been approved by the Colville Business Council, and any person who violates regulations 1 through 4 shall be guilty of an offense and upon conviction shall be punished as provided in Section 5.6.01 of the Tribal Law and Order Code.

Resolution 1987-404 states:

It shall be a Class D offense under the Colville Tribal Law and Order Code for any person to possess and/or consume alcohol within the Nespelem Circle Grounds until further notice. Signs shall be posted in the area advising of said prohibition.

Because the citation issued to the Defendant did not contain an addition reference to one of the above resolutions, the citation failed to give the Defendant notice of the specific offense which he was charged.

In addition, the mere wording of the citation, "Alcohol Circle Grounds," fails to list the essential elements of the offense. That is, in order for the Defendant to be cited for violating the above resolutions, the Defendant would have had to either possess or consume alcohol. Neither possession or consumption is alleged in the citation. Thus, the citation failed to give an adequate description (elements) of the offense

charged and failed to describe the specific conduct of the defendant which allegedly constituted the offense.

As to the second prong, whether the defendant was prejudiced do to the insufficiency of the citation, the Court believes so:

(1) Defendant has not had the opportunity to adequately prepare his defense; and (2) arguing this matter at trial would be impossible without knowing the specific offense charged.<sup>7</sup>

ACCORDINGLY, it is ORDERED, ADJUDGED and DECREED:

1. This matter is dismissed without prejudice because the citation fails to state the essential elements of the offense and fails to properly cite the violation; and
2. The Clerk of the Court is to serve a copy of the Memorandum Opinion on all parties.

DATED THIS 30<sup>th</sup> day of January, 1996.

  
MARY T. WYNNE, Chief Judge

I hereby certify that I served a copy of this document on:

PI-1 AG-I

A-321045 NISPRUM WA 99133

On:

R-Regular Mail; C-Certified; LKA-Last Known Address;

I-Interoffice Mail; P-Personal Service; O-Other(Specify)

Since the Court is dismissing this matter without prejudice, and because neither of the parties raised the issues of vagueness, inconsistency in the penalties, or whether the latter resolutions superseded the earlier resolutions, the Court need not address these issues.

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MEMORANDUM OPINION  
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13 APR 95 14 50  
COLVILLE TRIBAL COURT

IN THE TRIBAL COURT OF THE

COLVILLE CONFEDERATED TRIBES INDIAN RESERVATION

COLVILLE CONFEDERATED TRIBES, )

Plaintiff, )

vs. )

LONNIE R. ABRAHAMSON, )

Defendant. )

No. 95-18021

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

I. HEARING

1.1 An evidentiary suppression hearing was held on March 27, 1995 on Defense counsel's motion to suppress evidence obtained in the arrest of the Defendant for Driving While Under the Influence of Intoxicating Liquor or Drug (DWI).

1.2 Present at the hearing were:

Wayne Svaren, Deputy Prosecuting Attorney  
Jeff Rasmussen, Public Defender  
Lonnie R. Abrahamson, Defendant

1.3 Oral arguments were heard by Chief Judge Mary T. Wynne.

II. FINDINGS OF FACT

Based on the March 27, 1995 hearing, and a thorough review of the file, the Court finds the following:

2.1 On January 17, 1995, at approximately 9:30 p.m.,

Corporeal (Cpl.) Evans, Tribal Police, was dispatched

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
PAGE 1

1  
2  
3 to a one car accident on SR 155 near mile post 53,  
4 within the exterior boundaries of the Colville  
5 Confederated Tribes Reservation.

6  
7 2.2 When Cpl. Evans arrived at the scene of a one car  
8 accident he observed a single car, license plate number  
9 WA KJH 427, that appeared from the tire tracks to have  
10 slid off Highway 155 into a snow bank.

11 2.3 Cpl. Evans noticed an individual, later identified as  
12 the Defendant, standing behind the driver's side door  
13 of the vehicle and no other possible individuals at the  
14 scene.

15 2.4 At the suppression hearing, Cpl. Evans testified that  
16 the Defendant stated the following unsolicited  
17 statements:

18 2.4a "I was driving and just slid off the road."

19 2.4b "I only had a six beers."

20 2.4c "Can you pull me out? I want to go home."

21 2.5 At the suppression hearing, Defendant testified:

22 2.5a That he did not own, or ever own, the vehicle  
23 but, rather, the vehicle was owned by his  
24 sister, Pamela Abrahamson.

25 2.5b That Darrel Nanpuya was in the vehicle with



1  
2  
3 him when the vehicle slid off the road.

4 2.5c That he stood outside the vehicle  
5 approximately 30-40 minutes prior to Cpl.  
6 Evans arriving at the scene.

7 2.5d When asked by Mr. Svaren, "Do you recall your  
8 contact with Cpl. Evans?," Defendant  
9 responded, "Yes."

10 2.5e When asked by Mr. Svaren, "Did he [Cpl.  
11 Evans] ask you any questions?," Defendant  
12 responded, "No. I can't recall."

13 2.5f When asked by Mr. Svaren, "But you spoke to  
14 him [Cpl. Evans]?," Defendant responded, "I  
15 guess not."

16 2.5g When asked by Mr. Svaren, "Did he [Cpl.  
17 Evans] ask who was driving the car?,"  
18 Defendant responded, "Yes."

19 2.5h When asked by Mr. Svaren, "What did you tell  
20 him [Cpl. Evans after he asked you if you had  
21 been driving]?," Defendant responded, "I told  
22 him that I was driving."

23 2.5i When asked by Mr. Rasmussen, "Did you say  
24 what Officer Evans said you said?," Defendant  
25

responded, "No."

2.5f When asked by Mr. Rasmussen, "Had you been drinking?," Defendant responded, "Yes. Can't recall how much."

2.6 At the scene, Cpl. Evans noticed the following:

2.6a Strong odor of intoxicants on the Defendant's breath;

2.6b Defendant's speech was thick and slurred;

2.6c While standing, the Defendant was weaving from side to side; and

2.6d Defendant was disorientated.

2.7 Cpl. Evans also requested a registration check from Tribal Police Dispatch and was informed that the vehicle was registered to the Defendant.'

2.8 Having determined that field sobriety tests would be dangerous to the Defendant because of a slippery road, no field sobriety test were done at the scene.

2.9 Based on Cpl. Evans' investigation at the scene, Cpl. Evans placed the Defendant under arrest, handcuffed the Defendant and placed Defendant in his patrol car. Cpl.

1. At the suppression hearing, Defendant produced the registration for the vehicle he allegedly drove. The car was actually registered to Pamela Abrahamson, Defendant's sister.

1  
2  
3 Evans did not read the Defendant his *Miranda* rights  
4 when he placed him under arrest. Defendant was  
5 transported by Cpl. Evans to the Tribal Police  
6 Department.

7  
8 2.10 Upon arrival at the Tribal Police Department, Cpl.

9 Evans administered three (3) field sobriety tests:

10 2.10a Nostagmus Stagmus Gaze Test: Defendant  
11 failed.

12 2.10b Walk and Turn Test: Defendant failed  
13 because he weaved from side to side; had  
14 to grab onto something two times;  
15 stepped off the line three times; and  
16 had to use his arms to balance himself.

17 2.10c On Leg Stand Test: Defendant failed  
18 because he swayed from side to side;  
19 grabbed a corner of a desk three times;  
20 kept foot off the floor only for four  
21 counts; weaved from side to side; and  
22 had to use his arms to balance.

23 2.11 Defendant was advised by Cpl. Evans of his *Miranda*  
24 rights at 10:18 p.m.. Defendant refused to sign  
25 "Statement of Constitutional Rights" for until he

1 talked to an attorney. Defendant talked to an attorney  
2 and then signed the form.

3 2.12 Defendant was advised by Cpl. Evans his "Implied  
4 Consent Warning for Breath" at 22.21 p.m. and Defendant  
5 signed this form.

6 2.13 After the Defendant was read both rights, Cpl. Evans  
7 checked Defendant's mouth and waited the fifteen  
8 minutes before administering the actual BAC test.

9 2.14 BAC test was administered and completed at 22:55 p.m..

### 10 III. CONCLUSIONS OF LAW

11 3.1 In criminal cases, Rules of Court, CTC § 4.1.11,  
12 mandate this Court to following the following  
13 applicable law:

14 In all the Court shall apply, in the  
15 following order of priority unless  
16 superseded by a specific section of the  
17 Law and Order Code, any applicable laws  
18 of the Colville Confederated Tribes,  
19 tribal case law, state common law,  
20 federal statutes, and federal common law  
21 and international law. (Emphasis added.)

22 In other words, this Court shall look sequentially to  
23 laws and powers of the Colville Tribe, to the law of  
24 other tribes, and then to other sources of law such as  
25 state, federal and international. Only when prior  
Colville Court decisions, Colville ordinances, and



other tribal case law, are silent on issues before this Court, will this Court look to state and federal law. Extrinsic case law is advisory only. *CTC v. St. Peter*, AP92-15400, AP92-15507-15510 (1993); *Pouley v. CCT*, CV94-14286 (Colv.Tr.Ct. 1994); *Harris v. Vargas*, CV94-14539, 3 (Colv.Tr.Ct. 1994); see also *CCT v. Wiley*, AP93-16237, 15 (Colv.Ct.App. 1995) (United States Constitution not binding on Tribal Court); *CCT v. Stensgar*, 92-15437, 6 (Colv.Tr.Ct. 1993) (Washington State and United States Constitutions not binding on Tribal Court); *CCT v. Stensgar*, AP92-15068 (1993) (Court not bound by Washington Court Rules); *CCT v. Condon*, AP92-15313 (1993) (Court not bound by Federal Rules of Evidence); *CCT v. Sam*, Nos. AP92-15379/80, AP92-15414/15 (1992) (Washington laws regarding sentencing not binding on Court).

3.2 "No police officer may arrest any person for any offense defined by this Code . . . except . . . he shall have probable cause to believe that the person arrested committed the crime." CTC § 2.2.04.<sup>2</sup>

2. Under CTC § 2.2.04, two other exceptions exist for an officer to make an arrest: (1) offense occurred in the presence of the officer; and (2) issuance of an arrest warrant. Neither exception are applicable to the facts of this case.

3.3 To make an arrest, an officer must have probable cause that a violation of a law has occurred. *Southern Ute Tribe v. Williams*, 18 Indian L. Rep. 6049, 6050 (S.Ute Tr.Ct. 1990). In defining probable cause, the *Williams* court stated:

[W]hether probable cause exists is an objective test, there must be facts which would lead a reasonable person to determine that the officer had grounds to believe that a violation of law has occurred [and in the case of a vehicle stop] and the individual being stopped has committed the violation. Although probable cause requires more than a mere hunch, suspicion or speculation, it does not require that the officer have proof of guilt beyond a reasonable doubt. Whether the officer subjectively believed probable cause did or did not exist is not a factor when making an objective determination in regards to probable cause. See 1 W. LaFave and J. Israel, *Criminal Procedure* § 3.3(b) (1984).

*Williams*, 18 Indian L. Rep. at 6050. See also *CCT v. Adolph*, 80-3354, 7 (Colv.Tr.Ct. 1981) (probable cause exists on less evidence that is required to convict an individual); *Southern Ute Tribe v. Price*, 18 Indian L. Rep. 6117, 6118 (establishing probable cause by information given by informant).

3.4 Cpl. Evans testified that when he arrived at the scene of a one car accident he observed a single car that appeared from the tire tracks to have slid off Highway

155 into a snow bank. He also noticed an individual, later identified as the Defendant, standing by the driver's side door of the vehicle and no other possible individuals at the scene. The Defendant told Cpl. Evans that he had been driving and had consumed alcohol. At the scene, Cpl. Evans noticed the following: (1) strong odor of intoxicants on the Defendant's breath; (2) Defendant's speech was thick and slurred; (3) while standing, the Defendant was weaving from side to side; and (4) Defendant was disorientated. Cpl. Evans also requested a registration check from Tribal Police Dispatch and was informed that the vehicle was registered to the Defendant. Based on all of this information, Cpl. Evans placed Defendant under arrest for DWI. From these facts, the Court concludes that a reasonable person would have concluded, based upon those things the officer observed, that an offense, DWI, had been committed and the Defendant had committed the offense. Therefore, the arrest was legal because it was supported by probable cause and the Defendant's motion to suppress evidence based on an invalid arrest is

denied.

3.5 The corpus delicti rule is rooted in early Anglo jurisprudence.<sup>3</sup> The rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone.<sup>4</sup> The requirement of independent proof of the corpus delicti before a confession is admissible was influenced somewhat by those widely reported cases in which the "victim" returned alive after his supposed murderer had been tried and convicted, and in some instances executed.<sup>5</sup> It arose from judicial distrust of confessions generally, coupled with recognition that juries are likely to accept confessions uncritically<sup>6</sup> and often give more deference to the testimony of police officers who may of been the only other witness to the admissions.<sup>7</sup> This distrust stems from the

3. *Bromerian v. Corbett*, 106 Wn.2d 569, 575-76 (1986); see also *People v. Hennessy*, 15 Wend. 147 (N.Y. 1836); *People v. Jones*, 31 Cal. 566 (1867); *State v. Marseille*, 43 Wn. 273, 86 P. 586 (1906); Note, *Proof of the Corpus Delicti Alimide the Defendant's Confession*, 103 U.Pa.L.Rev. 638 (1955).

4. *Bromerian*, 106 Wn.2d at 576; *Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954).

5. See, e.g., *Perry's Case*, 14 Howell's State Trials 1311 (1660); *Trial of Steven and Jessie Boorn*, 6 American State Trials 73. See generally *State v. Howard*, 102 Or. 431, 203 P. 311 (1921); Note, 103 U.Pa.L.Rev. at 646-47.

6. *Bromerian*, 106 Wn.2d at 576; *Developments in the Law—Confessions*, 79 Harv.L.Rev. 935, 1073 (1966); Note, 103 U.Pa.L.Rev. at 642-43.

7. *Hamrick*, 19 Wn.App. at 420.



possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual.<sup>8</sup> Thus, the corpus delicti rule was established to prevent not only the possibility that a false confession was secured by means of police coercion or abuse but also the possibility that a confession, though voluntarily given, is false.<sup>9</sup>

3.6 Washington State courts have recognized that proof of the corpus delicti in a case charging driving or being in physical control of a vehicle while intoxicated differs from many crimes where identity is not an element of the corpus delicti.<sup>10</sup> Proof that a car ran off the road, caused an accident or stopped in a traveling lane does not establish that an element of the offense was committed. Likewise, proof that someone was intoxicated does not prove that person

8. Note, 103 U.Pa.L.Rev. at 642-46; Note, *Confession Corroboration in New York: A Replacement for the Corpus Delicti Rule*, 46 Fordham L.Rev. 1205 (1978).

9. *Bremerton*, 106 Wn.2d at 576-77; Note, *Criminal Law—Confessions—Admissibility of Corroborative Evidence*, 42 N.C.L.Rev. 219, 221 (1963).

10. *State v. Hamrick*, 19 Wn.App. 417, 419 (1978).

drove or was in control of the car. Inherent in the offense is the requirement that the intoxicated person was the driver or was in control. Under Washington State case law, corpus delicti cannot be proved without proving someone's criminal agency which in turn requires identification of a particular individual who is under the influence. Thus, the corpus delicti of the offenses charged here cannot be established absent proof connecting the petitioners with operation or control of a vehicle while intoxicated."

3.7 Defendant has not offered any tangible reasons for this Court to adopt this ancient Anglo rule. It has been the experience in this Court that jurors in a tribal court carefully and critically evaluate the testimony of witnesses, especially police officers.

3.8 There is nothing in the record or cited by the Defendant that establishes a sufficient foundation for a finding by this Court that tribal court juries are not capable of critically evaluating all evidence in each case, including correctly weighing a confession in light of all evidence, or lack thereof, in the record.

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11. *Armstrong*, 106 Wa.2d at 574.

In addition, there is nothing in the record that tribal court juries are not capable of evaluating the weight of an alleged statement in light of the Tribe's burden of proof.

- 3.9 Until a record is established showing that this principle of Anglo-Saxon jurisprudence is rationally applicable within the tribal context, the Court will adhere to its ruling in *CCT v. Friedlander* and not adopt the corpus delicti rule.<sup>12</sup>
- 3.10 Self-incriminatory statements made by a defendant stemming from a custodial interrogation may be excluded if the procedural safeguards set forth in *Miranda v. Arizona*<sup>13</sup> are not followed. These safeguards are commonly referred to as *Miranda* rights.<sup>14</sup> *CCT v. Friedlander*, 82-5359, 2 (Colv.Tr.Ct. 1983); *CCT v. Martin*, APA191-11042, 3 (Colv.Ct.App. 1992).

- 3.11 By its definition, custodial interrogation means that a

12. In so holding, this Court notes that many Anglo courts and legal commentators are also critical of the corpus delicti rule. See, e.g., *Oppen v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954); *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985); *State v. Yoshida*, 44 Hawaii 352, 354 P.2d 906 (1960); *State v. George*, 109 N.H. 531, 257 A.2d 19 (1969); C. McCormick, *Evidence* § 145 (3d ed. 1984); Note, 46 Fordham L.Rev. 1205; Comment, 20 U.C.L.A.L.Rev. 1055; Annot., *Corroboration of Extrajudicial Confession or Admission*, 45 A.L.R.2d 1316 (1956).

13. *Cling Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

14. Under Tribal adoption of *Miranda*, the defendant must be informed prior to custodial interrogation: (1) right to remain silent; (2) anything he or she says can be used against him or her at trial; and (3) right to the assistance of a lawyer prior to questioning and during trial.

defendant must be advised of his or her *Miranda* rights if: (1) defendant is in custody; and (2) defendant is interrogated.

3.12 For *Miranda* purposes, a suspect is in custody as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest.<sup>15</sup> The sole inquiry is whether the suspect reasonably supposed his freedom of action was curtailed.<sup>16</sup>

3.13 Interrogation has been defined as "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect."<sup>17</sup> The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. Interrogation reflects a measure of compulsion above and beyond that inherent in custody itself.<sup>18</sup>

15. Non-binding state law is in accord. See *State v. Short*, 113 Wn.2d 35, 40, 775 P.2d 458 (1989); *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987).

16. *Short*, 113 Wn.2d at 41, 775 P.2d 458; see also *State v. Sargent*, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988) (emphasizing that the critical inquiry is whether the suspect's "freedom of movement was restricted").

17. *State v. Richmond*, 65 Wn.App. 541, 544-45, 828 P.2d at 1180 (1992)(citing *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

18. *State v. Wolf*, 58 Wn.App. 443, 448, 794 P.2d 31 (1990), rev'd on other grounds, *State v. Barnes*, 117 Wn.2d 701, 818 P.2d 1088 (1991).



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4 3.14 General on-scene questioning as to facts surrounding a  
5 crime or other general questioning of citizens in the  
6 fact finding process is not an interrogation.  
7 *Friedlander*, 82-5359 at 2.

8 3.15 Cpl. Evans testified that when he arrived at the scene  
9 of the one car accident, the Defendant, without being  
10 questioned, said, "I was driving and just slid off the  
11 road. I only had a six beers. Can you pull me out? I  
12 want to go home." At this point, the Defendant was  
13 neither in custody or being interrogated. Such  
14 unsolicited, volunteered comments of the Defendant do  
15 not fall within the safeguards of *Miranda*.

16 3.15 Normally, because of the non-testimonial nature, the  
17 administration of field sobriety tests do not require  
18 the advisement of *Miranda* rights.<sup>19</sup> However, when Cpl.  
19 Evans placed the Defendant under arrest, handcuffed him  
20 and placed him in the patrol car the safeguards of  
21 *Miranda* apply: Defendants freedom of movement was  
22 curtailed and Cpl. Evans should know that any words or  
23 actions on the part of the him or an other officer  
24 would reasonably likely to elicit an incriminating  
25

19. Non-binding state law is in accord. See *Heinemann v. Whitman County District Court*, 105 Wa.2d 796, 806-08, 718 P.2d 789 (1986).

1  
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4 response from the Defendant.

5 3.17 When a defendant is subjected to custodial  
6 interrogation he or she first must be read their  
7 *Miranda* rights. In addition, a Defendant must be  
8 advised prior to the administration of a BAC test the  
9 right to refuse the test. CTC § 9.3.01.


10 3.18 Cpl. Evans testified that he read the Defendant his  
11 *Miranda* rights at 22:18. This corresponds to the time  
12 on the Datamaster BAC Verifier that the observation  
13 period began. Thus, Defendant was advised of his  
14 rights prior to the conducting of the BAC test. After  
15 the Defendant was advised of his right to consult an  
16 attorney, he exercised that right by consulting an  
17 attorney by phone. After the conversation, at 22:21,  
18 Defendant was read his Implied Consent Warning advising  
19 him the right to refuse the BAC test. After the  
20 Defendant was read both rights, Cpl. Evans checked  
21 Defendant's mouth and waited the fifteen minutes before  
22 administering the actual BAC test. The physical  
23 checking of the mouth and the beginning of the fifteen  
24 minute observation period is when the test officially  
25 started. Therefore, this Court holds that both rights

were given prior to the conducting of the BAC test and the results of the test are admissible as evidence at trial.

#### IV. ORDER

ACCORDINGLY, it is ADJUDGED, DECREED and ORDERED that:

- 4.1 Defendant's motion to suppress evidence because of an illegal arrest is denied.
  - 4.2 Defendant's motion urging the Court to adopt the corpus delicti rule is denied.
  - 4.3 Defendant's motion to suppress statements made at the scene of the incident prior to the advisement of *Miranda* rights is denied.
  - 4.4 Defendant's motion to suppress the results of the field sobriety test because defendant was not advised of his *Miranda* rights is granted.
  - 4.5 Defendant's motion to suppress the results of the BAC test is denied.
  - 4.6 The Clerk of the Court shall set this matter for trial on April 27, 1995, at 9:00 (a.m.).
- DATED this 15th day of April, 1995.

  
MARY T. WYNNE  
Chief Judge

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
PAGE 17

I hereby certify that I served a copy of this document on:  
W.E. AC-T & KKA

Observed by 4-13-95  
R-Regular Mail; C-Certified; LKA-Last Known Address;  
I-Interoffice Mail; P-Personal Service; O-Other(Specify)

ATTACHMENT V.

**STATEMENTS FROM PEOPLE WHO PRACTICE  
IN TRIBAL COURT OR HAVE EVALUATED A TRIBAL COURT**

**PROVIDES A VIEW OF DAY TO DAY TRIBAL COURT FUNCTIONS  
BY THOSE WHO APPEARED ON MULTIPLE CASES  
OR MAINTAIN INTIMATE FAMILIARITY THROUGH  
EVALUATIONS OR WORK WITH TRIBAL COURT**



VERNON R. PEARSON  
JUSTICE OF THE WASHINGTON SUPREME COURT, RETIRED  
3408 117th Ave. N.W.  
Gig Harbor, WA 98338  
253-265-2577

April 2, 1998

The Honorable Ben Nighthorse Campbell  
Senate Select Committee on Indian Affairs  
Washington, D.C.

Dear Senator Campbell,

I served on the Washington State Supreme Court from 1982 to 1990. I was Chief Justice from 1987 to 1989. From 1987 to 1992 I chaired a national coordinating council set up by the Conference of Chief Justices of the United States. This council consisted of tribal court, state court and federal court judges and lawyers. It dealt extensively with creating solutions to jurisdictional conflicts between these three court systems. It involved much study of tribal court systems throughout the United States and resulted in jurisdictional agreements between state and tribal court systems in about twenty states with significant Indian populations. These included among others, Washington, Arizona, Oklahoma, North Dakota, Minnesota, Michigan and Wisconsin.

In addition I have visited several tribal courts in Oklahoma, Arizona and Washington. In my state of Washington I have visited the Quinault Tribal Court, the Colville Confederated Tribal Court and the Yakima Tribal Court. I know many tribal judges here and throughout the country.

It is my understanding that your Committee is now considering a bill, S1691, which would affect the rights of numerous citizens in Washington and other states. This bill, if enacted, would result in many thousands of cases being removed from tribal courts throughout the country, and shifted to state and federal courts. It is based on a premise that tribal courts are not enforcing the civil rights of people who use those courts. It also presumes, with regard to sovereign immunity, tribal courts are not rendering fair, impartial and independent judgements when the tribe is a party, or when non-members of the tribe are involved. Because of my background and experience with these courts, I can offer valuable comments with regard to these presumptions.

In 1991, at the request of the Colville Tribal Council, I completed a comprehensive evaluation of the Colville Tribal Court System. At that time, the Colville Court was not a "constitutional" court as today. The evaluation conducted included case statistical review, budget analysis, independence and competency of the judiciary, clerk of court review, auditing of accounts and receipting of money, etc.. In short, I did a full and comprehensive review of this

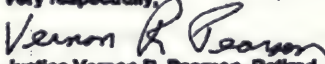
Page Two  
Vernon R. Pearson  
Letter of April 2, 1998

tribal court system. Although there were recommendations for improvement, clearly the Colville Court passed the test in each category. My review concluded that the judiciary of this tribal court dispensed justice equal to or better than some surrounding state courts. The evaluation included examination of cases where the Colville Tribal Court restrained the tribal business council, and resulted in judgments against the tribe. It also entertained cases involving non-members with the same diligence shown those cases involving members.

My review occurred before the Colville tribal members adopted a constitutional amendment to provide for a separation of powers, making the court system truly independent. The constitutional separation of power is now in place as it is in many tribal courts throughout the country.

In my opinion the proposal before your Committee is ill advised and would unnecessarily shift to state and federal courts with crowded dockets, matters that are being appropriately handled by independent and competent tribal courts. If I can be of further assistance please contact me.

Very respectfully,

  
Justice Vernon R. Pearson, Retired



STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES

PO Box 9162 • Olympia WA 98507-9162

March 27, 1998

TO: Chief Judge Mary Wynne  
Colville Tribal Court

FROM: Meg Sollenberger, Director *MS.*  
Division of Child Support

SUBJECT: TRIBAL COURT CHILD SUPPORT CASE STATISTICS

In response to your request that the Division of Child Support provide you with information on the number of child support cases where the State of Washington, Department of Social and Health Services, Division of Child Support either initiated a case action in tribal court or the state intervened to assert a claim in a case already started by another party, and the state obtained a favorable judgment involving a tribal member. The Division of Child Support (DCS) does not keep this type of information readily available. However, I can provide you with the following general information.

- DCS has initiated 123 cases in which a prior administrative or judicial order involving a tribal member was registered in Colville Tribal Court and in which said orders became orders of the Colville Tribal Court.<sup>1</sup>
- The Colville Tribal Court permitted DCS to intervene and obtain a favorable judgment on its claim on 4 cases.
- The Colville Tribal Court permitted DCS to intervene on one other case and DCS anticipates a favorable judgement on this claim.
- DCS has filed a motion in the Colville Tribal Court to intervene on 3 other cases.
- DCS has filed 13 motions to register child support orders for collection in the Tulalip Tribal Court.<sup>2</sup>
- DCS has filed 3 cases to establish child support obligations in the Tulalip Tribal Court.
- DCS has intervened on one case in the Chehalis Tribal Court.

Cc: Liz Dunbar, Assistant Secretary, Economic Services Administration  
Sarah Colleen Sotomish, Deputy Assistant, State Tribal Relations Unit  
Aaron Powell, Region 1 DCS Administrator

<sup>1</sup> This data is based on a letter and list of 122 cases from Mr. Bill Dodge, Region 1's prior Tribal Claims Officer, to Ms. Jane Smith, Colville Tribal Court Administrator, dated August 6, 1996. These cases were initiated by DCS. Initially, in each of these cases, the prior administrative or judicial order of the State was registered in the Colville Tribal Court and upon registration, became orders or judgments of the Colville Tribal Court against a tribal member. These cases are all pre-memorandum dated.

<sup>2</sup> The 16 motions filed in the Tulalip Tribal Court are still pending.

## WILLIAM C. DODGE

*Attorney/Guardian Ad Litem*

1511 West Lawrence Drive  
Spokane, WA 99218-2478  
Phone/FAX 509 468-9959

March 24, 1998

The Honorable Ben Knighthorse Campbell  
Chairman, Senate Select Committee / Indian Affairs  
Washington, D.C.

Dear Chairman Knighthorse Campbell:

The Honorable Mary Wynne, Chief Judge of the Colville Confederated Tribes (CCT) Tribal Court, Nespelem, WA has asked me to write to you regarding my experiences appearing in her court. I am honored to have the opportunity of sharing with you my experiences and willingly write this letter.

I worked closely with Judge Wynne, her staff, and members of the CCT Council and Office of the Reservation Attorney (ORA) in my former position with the Division of Child Support, Department of Social and Health Services, State of Washington. As an attorney, I represented the State in tribal court in matters relating to the establishment, enforcement and modification of child support obligations and establishment of paternity for children born to unwed mothers. We were developing a program to implement an agreement between the CCT and Washington for these child support purposes. We worked closely for a period of approximately two years and, in December, 1997, the CCT Council passed a resolution ratifying our plan.

During that two year period, I represented the state's interests in many cases. On several occasions, the party litigants were referred to our offices, by either the ORA, the court clerk or the Court itself, for assistance in going forward with their domestic cases. To the extent that the case involved child support issues and an assignment of child support rights (when the residential parent was receiving state public assistance - AFDC/TANF funds) we intervened.

I always found the Tribal court judges and clerk's staff to be professional, courteous, and organized. I have over eighteen years experience as an attorney and am admitted to practice in Washington State courts, Federal District Courts for both Eastern and Western Washington, Bankruptcy Court for Eastern District of Washington, and formerly, as a Navy Judge Advocate, in the military trial courts and court of military review and appeals for cases tried under the UCMJ. I am also admitted to practice in the courts of the CCT, Nez Perce, Coeur d'Alene, Kalispel, and Spokane tribes. Currently I am an Administrative Law Judge for the Office of Administrative Hearings, in Spokane, Washington. Based upon this experience, I feel comfortable and confident in recognizing the CCT Tribal Court as a professional court where all party litigants are treated evenly and with respect and where the dispensation of justice is uniform.

*P r o m p t                      a n d                      P r o f e s s i o n a l*

Phone/FAX (509) 468-9959

E-mail: bdodge1@juno.com



Some of the cases I was involved with dealt with high emotion. Where child support is involved, emotions can run high, especially when the failed relationship between the mother and father still simmers. The Court always demonstrated sensitivity to this dynamic in its demeanor to the parties. Yet, the Court was always able to maintain appropriate decorum throughout the proceedings. I never felt that this "balance" was lost during trial. One of the aspects of tribal court practice I have always valued is the sense that individuals really do count with the Court. The Court always took the time to explain procedures and "level the playing field" for the pro se litigants.

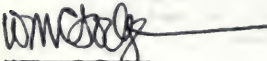
I always felt that the results of trial were appropriate and the decisions clear. The Court routinely deferred to the State's presentation of its laws and procedures after hearing, and, in the absence of applicable and relevant Tribal law. Of course, where relevant Tribal Law and Order Code existed, the Court consistently applied those provisions.

I miss those days. I miss the people with whom I worked and, in fact, have maintained contact with several friends in the Court, the Appellate Court, and the various staffs. I have tremendous respect for their accomplishments with relatively scarce resources and for their sense of dedication to justice and fairness which was always present in all of my intercourse on the reservation.

Please accept these thoughts and reflections in the spirit of openness and humanity with which they are shared. These are my personal thoughts only and should not be taken to reflect those of my former or present employer.

Please feel free to contact me at anytime if you wish further clarification on any aspect of this letter.

Very respectfully,

  
William C. Dodge

pc: The Honorable Mary Wynne

## The Law Office of Lynda C. Eaton

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P.O. Box 1131

(509) 775-2337

Republic, Washington 99166-1131

Fax (509) 775-2406

March 25, 1998

To: The Committee on Indian Affairs

**COPY FOR YOUR  
INFORMATION**

Regarding: S. 1691 American Indian Equal Justice Act

My name is Lynda Eaton; I am a part-time District Court Judge in Ferry County and a practicing attorney in state and tribal courts. Ferry County borders Canada in the central portion of Washington State. Approximately one half of Ferry County is tribal lands.

I have just read the two page summary of the proposed American Indian Equal Justice Act as provided by the office of Senator Slade Gorton in Spokane, Washington

While the stated purpose of the Act is to provide stability and consistency to the law, the proposed broad language will, in my opinion, create instability and confusion. Currently, the rules relating to jurisdiction are reasonably clear. During the last three and a half years as a District Court Judge, only two cases arose where jurisdiction was an issue. An Indian or a non-Indian must take some substantive step or act to submit themselves to tribal jurisdiction. In each of the cases in District Court, it was the wishes of the parties to have the matter heard in tribal court.

While it is possible that some decisions made in tribal courts lack thought and merit, those decisions are no more numerous than the occasional thoughtless, misguided decisions found in individual state and federal courts. Tribal courts produce thousands of well-reasoned decisions each year.

The Act, as I read it, implies that a non-Indian cannot get a fair result in tribal court. I have seen tribal judges rule against the Tribes in criminal and civil matters. I have also experienced tribal juries that have ruled against tribal prosecutions. My advice to clients and my personal experience have shown that Indian and non-Indians are as likely to receive well-reasoned judgements from tribal courts as from state courts.

I oppose enactment of the American Indian Equal Justice Act. If I can be of further help, please contact my office. Thank you for your time and attention to this matter.

Sincerely,



Lynda C. Eaton

Attorney at Law and

Colville Confederated Tribes Spokesperson

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**STEPHEN L. PALMBERG**  
**ATTORNEY AT LAW**

MIDWAY MALL

Grand Coulee, Washington  
Phone/FAX (509) 633-1000

Brenda Feeley  
Legal Secretary

P.O. Box 580, Grand Coulee, Washington 99133

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March 25, 1998

Senator Ben Nighthorse Campbell  
Senate Select Committee  
Committee on Indian Affairs  
Washington D.C.

Re: Colville Tribal Court

Dear Senator Campbell:

It is my understanding that your Committee is considering legislation which would remove or diminish the jurisdiction of tribal courts over non-tribal members and that the asserted rationale for this legislation is that tribal courts are inherently biased against non-Indians. I do not have any general experience with tribal courts other than the Colville Tribal Court but I have no hesitation expressing my opinion that the asserted rationale for this legislation does not apply to the Colville Tribal Court.

As you can see from my letterhead, I am an attorney in Grand Coulee, Washington. The town of Grand Coulee is located adjacent to the Colville Indian Reservation and I have practiced law in the Colville Tribal Court for many (15 or 16) years in the wide variety of cases that a small town sole practitioner handles. I estimate that approximately 20% of my practice involves cases in the Colville Tribal Court and of that 20% approximately one-half of my clients are members of the Colville Tribe and one-half are non-members. Due to the extent and length of my practice in the Colville Tribal Court and to being a judge myself (part-time in the local Municipal Court) I feel that I am in a good position to comment on the quality of justice that it dispenses.

The Tribal Court normally has two full time judges and a lay associate judge or magistrate who handles routine matters (such as criminal arraignments) and cases which require more "horse sense" than legal acumen (enforcement of the Tribe's ordinance requiring parents to insure that their children attend school, etc.). The Tribal Court's judges are, and have been for at least the last fifteen years, licensed attorneys who have had experience in the private practice before becoming judges.

The Colville Tribal Court is located at Nespelem, Washington, the administrative headquarters for the Colville Tribal Government (and the local Bureau Of Indian Affairs offices). The initial impression that I believe most people get when first coming into contact with the Colville Tribal Court is that it is both up to date and professional (two formal courtrooms, a law library, the usual bevy of clerks, a computer on everybody's desk, a full time administrator, etc.). Affiliated with the

court are a Probation Office (three probation officers), a Public Defender (two attorneys), a Legal Services Office (two attorneys and a paralegal) and a Prosecutor's Office (three attorneys). The Court also frequently utilizes the resources of the Tribal Community Counseling Services and Tribal Children And Family Services programs funded by the Colville Tribe, both with a substantial staff of professional counselors and social workers.

All of the Tribal Court's proceedings (except mediations) are formal and recorded. I believe it is obvious to anyone involved with the Colville Tribal Court that it is a "real" and professional court with no resemblance to the old Justice Of The Peace courts which dispensed informal, seat-of-the-pants and sometimes partisan justice.

I have not infrequently found that clients who are not Colville tribal members are initially fearful because they are involved in a Tribal Court proceeding or are reluctant to file their own case in the Tribal Court because they are afraid that the court will be biased against them. I do not recall anyone who had anything specific on which to base their initial concerns. When I ask clients why they have these concerns the normal answer is that they "heard it somewhere" or "that's just the way it is, isn't it?". I frequently have to spend some time convincing clients that "no, they are not going to take your children away because your mother-in-law is an Indian" or "yes, the Tribal Court will give you the same judgment against the fellow who wrecked your car as a state court judge would".

I frequently encourage non-tribal members to use the Colville Tribal Court in civil matters if they are within its civil jurisdiction (generally concurrent with the state courts for reservation residents and transactions) as the Tribal Court is frequently more convenient (the nearest county seat is an hour drive away) and the result of the case can be expected to be the same as it would be in a state court. I do not recall ever having any of the non-Indian clients I have encouraged to bring their case in the Tribal Court who ended up telling me "I told you those \*!@#\*\* Indians were gonna do it to me and they did".

The, unfortunately all too common, feeling that non-Indians will not be treated fairly in the Colville Tribal Court is simply not true. If the non-Indian employee who was fired by the Colville Tribe has a good case he will get reinstated in his job by the Tribal Court, with back pay. If the non-Indian father is a preferable parent he, not the Indian mother, will get custody of the kids.

I actually have more client relations problems with Indian clients in Tribal Court cases than non-Indian clients. Unfortunately, Indians are as prone as non-Indians to start out with the presumption that Indians win in a tribal court and non-Indians lose. It is sometimes very difficult to convince a tribal member that, for example, the Tribal Court will indeed make him pay his child support and garnish his pay check if he doesn't.

The Colville Tribe has done its best to fight the preconception that its court is biased by providing a capable and fair court, by enacting a

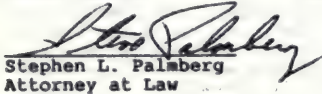


written Tribal Code, by applying state and federal laws to cases which are not covered by the Tribal Code, by having a Tribal Court Bar Association, requiring the passing a bar examination to practice in the Tribal Court and by making the tenure of the person holding the position of Chief Judge subject to a general referendum vote every five years but not to discipline or termination by the Tribal Business Council in order to insulate the court from any possible tribal political pressures.

I strongly feel that reducing the jurisdiction of the Colville Tribal Court would not benefit the non-indians who reside on or near the Colville Reservation and hope that your committee will consider this letter in your decision on this matter.

Thank you for your consideration and attention.

Yours truly,

  
Stephen L. Palmberg  
Attorney at Law

SLP:bgf



## WAYNE SVAREN

ATTORNEY AT LAW

Admitted to practice in Washington and Montana

Robert Castrodale, of counsel

306 Spokane Way • P.O. Box 650 • Grand Coulee, WA 99133-0650 • Tel (509) 633-2400 • Fax (509) 633-2401

March 25, 1998

The Honorable Ben Nighthorse Campbell,  
Chairman  
Senate Select Committee  
United States Senate Committee on  
Indian Affairs  
Washington, D.C. 20510-6450

Re: Pending Legislation

Dear Sir:

This letter is written regarding pending legislation which would have drastic and far reaching effects upon the jurisdiction of Tribal Courts and Tribal sovereignty. To my understanding, that legislation would effectively strip the Tribal Courts of jurisdiction in matters where the Tribes are a party or where non-Indians are parties. That legislation is apparently founded upon two premises: First, that Tribal Courts practice discrimination against non-Indian persons; second, that Tribal Courts are the mere alter ego of Tribal Government, resulting in automatic victory for the Tribes whenever they are a party. Those presumptions are simply not founded in fact.

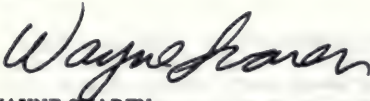
I served the Colville Confederated Tribes for over three years as a Deputy Prosecuting Attorney. During that time, I represented the Tribes and Tribal agencies in a variety of matters: criminal cases, traffic infractions, employment appeals, fish and game/parks--civil infractions, truancy cases, and juvenile dependency matters. I am currently in private practice, and I continue to practice in the Tribal Court in both civil and criminal matters. With regard to criminal matters, it remains my observation that the Court is exceedingly scrupulous with regard to safeguarding all rights safeguarded to criminal defendants by the United States Constitution, the Indian Civil Rights Act, and the Colville Tribal Civil Rights Act. With regard to matters where the Tribes or their agencies are parties, the Tribes/agencies win if and only if they are able to present a case well founded in law and based on evidence produced at hearing which meets or exceeds the required burden of proof. I personally am aware of the Tribes and Tribal agencies being on the losing side of many cases in each of the above-mentioned categories. To suggest that the Tribes or Tribal agencies always win, or that the Tribal Court is no more than a rubber stamp for the Tribal Government, is so ludicrous that I find myself dumbfounded to believe that any legislator would introduce legislation based on such a premise.

The Honorable Ben Nighthorse Campbell  
Chairman, Senate Select Committee  
March 25, 1998  
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With regard to the premise that the Tribal Court shows racial bias, favoring Indian parties over non-Indian parties, the number of cases involving non-Indians with which I have been involved is relatively small. Nevertheless, it has not appeared to me in those cases that the Tribal Court displayed bias. In those cases, as in the cases where the Tribes themselves were a party, it has appeared to me that the Court's decisions have been driven by the facts and the Court's interpretation of the law, not by bias.

In short, the presumptions upon which this legislation is founded are without basis in fact. That being the case, the legislation in question should not be enacted to become yet another disgraceful chapter in the history of relationships between the United States and Native Americans.

Respectfully,



WAYNE SVAREN

WS:cm

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OMAK, WASHINGTON 98841  
TELEPHONE (509) 826-5110  
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March 26, 1998

Honorable Mary T. Wynne  
Chief Judge  
Confederated Tribes of  
Colville Reservation Tribal Court  
P.O. Box 150  
Nespelem, WA 99155

Dear Judge Wynne:

As a member of the Colville Tribal Court Bar, I am responding to your inquiry as to the fairness of the Tribal Court's treatment of non-tribal member parties appearing before the Tribal Court.

I have been a practitioner for the past 30 years in Omak, Washington. Over the course of my career I have had numerous occasions to appear in Tribal Court representing both tribal and non-tribal members. More recently I have been admitted to practice before the Tribal Court in accordance with the Court's admission requirements. I found the Bar admittance procedure to be very fair. Even more recently I have participated with the Court and other admitted attorneys in working to establish rules and regulations governing the formation of a formal Bar Association for Tribal Court.

Based on my experience I have found the Tribal Court to be very fair and impartial in its dealings with me and my clients. I have no compunction about representing a party in Tribal Court regardless of whether or not they are a tribal member. My satisfaction is evidenced by my intention to commence litigating non-tribal member personal injury cases in Tribal Court under appropriate circumstances.

I will not address the issue of sovereign immunity as part of this letter as I consider that to be a substantive law matter which presents difficult issues for resolution regardless of whether it arises in Tribal,



Honorable Mary T. Wynne  
March 26, 1998  
Page 2

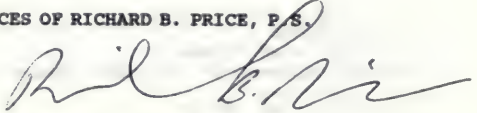
State or Federal Court.

Overall, I have been impressed with the Colville Tribal Court's efforts, over the years to provide a more formal and professional framework in which to dispense justice in an impartial and fair manner.

If I can provide any additional information with regard to the particular inquiry into this matter, I would be more than happy to make myself available for further comment.

Very truly yours,

LAW OFFICES OF RICHARD B. PRICE, P.S.

A handwritten signature in cursive script, appearing to read "Richard B. Price".

Richard B. Price

RBP:kb  
letters2\mynne.etc

Jeffrey Rasmussen  
4800 HWY. 7, #603  
Minneapolis, MN 55416

March 27, 1998

Honorable Ben Knighthorse Campbell  
U.S. Senate Select Committee on Indian Affairs  
Washington, D.C.

Dear Sir:

I am writing to you regarding Senator Gorton's proposal to eliminate tribal sovereign immunity and to restrict tribal court jurisdiction.

I want to focus my letter on one premise of that legislation. The legislation is based upon what I believe is an erroneous belief that tribal courts do not adequately afford civil rights to litigants.

I believe I am well-qualified to speak to that issue. I was the Lead Public Defender for the Colville Tribes from June, 1993--February, 1998. In that position, I represented hundreds of clients, both Indian and non-Indian, and I gave advice to non-Indian attorneys and litigants on a regular basis. On an average day, I spent several hours in the Tribal Court.

I was admitted to practice in Washington state in 1991 and admitted to practice in the Colville Tribal Court in 1993. Prior to working in the Colville Tribal Court, I represented clients in Courts in Washington State.

As Public Defender for the Colville Tribe, 80% of my caseload was criminal defense, and 20 % was representation in civil child dependency cases. As a Public Defender, I raised civil rights claims in the majority of my cases. I also raised these issues in child dependency cases regularly, and argued several appeals on civil rights cases. I also have read all civil rights related tribal court cases published in the Indian Law Reporter in the past 10 years. (That publication compiles reported decisions from all tribal courts in the United States.)

As you know, the Indian Civil Rights Act insures many civil rights in tribal courts. In the Colville Tribal Court, civil rights are further insured by the Colville Tribal Civil Rights Act, Colville Tribal Code 1.5 (attached). By statute, the tribes also follow federal caselaw with regard to search and seizure.

Because tribal civil rights law mirrors federal civil rights law, the tribal court's decisions, for good and for bad, usually follow federal caselaw. See, e.g., CCT v. Fred Clark (freedom of speech); CCT v. Noreen Lezard (illegal search); CCT v. Ronald Diek (right to be informed of charge); In Re Colville Tribal Jail (Cruel and Unusual Punishment); etc. From what I have seen, tribal judges take their responsibility to

Page: 2  
March 27, 1998

protect civil rights as seriously as other judges, and tribal judges come as close to that goal as judges in other courts.

While decisions usually follow federal caselaw, the Court has afforded greater civil rights protections where warranted by local conditions.

One area where greater protection is afforded is in the area of informing people of their rights. As the tribal Appellate Court noted in Clark v. CCT, 2 CTR \_\_, 3, (1995) "the Colville Tribal Court is not a traditional justice system for any of the tribes of the reservation, and that the tribal court therefore has a greater need to insure that tribal defendants understand the system..."

CCT v. Abrahamson, 94-17010, apparently followed similar reasoning. In Abrahamson, the Court held that a defendant who is arrested for driving while intoxicated must be read his Miranda rights prior to any custodial field sobriety tests. Most state courts do not afford such protection.

In child dependency cases, the Court has similarly insured that rights are understood by informing participants of their rights at the beginning of hearings (as required by tribal statute), and by appointing counsel, at tribal expense, for every indigent parent, guardian custodian who requests counsel. The tribes also provide an attorney for the child to protect the rights of the child.

In child dependency decisional law, the Court has required that a parent who voluntarily gives the tribes custody of a child must do so in open Court so that the Court can insure the parent fully understands his or her rights related to the child.

The tribal court has also customized substantive civil rights law, to allow for local differences, and again these changes afford individuals greater protection. For example, in CCT v. Pavel and other unreported cases, the Court afforded greater protection against search of a motor vehicle because many people on the reservation live in vehicles. Similarly, the prosecution has conceded suppression in cases related to camping even though federal law would not have protected against search.

As I think these cases show, the Court is affording civil rights protections, and is doing so in a conscientious manner, to insure that individual rights are protected.

From my experience, I know that many litigants—in both tribal and non-tribal courts—are unhappy with decisions of the Court. I also know that a substantial number of appeals in tribal, state, and federal courts are based upon civil rights claims, and that trial judges do make mistakes on those issues. It would be nice if all judges, both tribal and non-tribal, were closer to perfect.

From my experience, I believe tribal judges' imperfection and errors are not because of lack of respect for civil rights, and that they have at much respect for such rights as other judges.

Sincerely,

Jeffrey Rasmussen

## The Law Office of Lynda C. Eaton

---

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Republic, Washington 99166-1131

Fax (509) 775-2406

March 25, 1998

Senator Slade Gorton  
730 Hart Senate Building  
Washington, D.C. 20510-4701

Dear Senator Gorton:

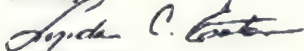
I have just read the two page summary of your proposed American Indian Equal Justice Act. I am a part-time District Court Judge in Ferry County and a practicing attorney in state and tribal courts. While I agree that some decisions made in tribal courts lack thought and merit, those decisions are no more numerous than the occasional thoughtless, misguided decisions found in individual state and federal courts. Tribal courts produce thousands of well-reasoned decisions each year.

While the stated purpose of the Act is to provide stability and consistency to the law, the proposed broad language will, in my opinion, create instability and confusion. Currently, the rules relating to jurisdiction are reasonably clear. A non-Indian must take some substantive step or act to submit themselves to tribal jurisdiction. If the choice was made by the non-Indian to submit to jurisdiction, why would you propose a law removing that choice?

The Act, as I read it, implies that a non-Indian cannot get a fair result in tribal court. I have seen tribal judges rule against the Tribes in criminal and civil matters. I have also experienced tribal judges that have ruled against tribal prosecutions. My advice to clients and my personal experience have shown that Indians and non-Indians are as likely to receive well-reasoned judgements from tribal courts as from state courts.

Senator Gorton, I have followed your political career from the mid 1970's when you canvassed my door on Capitol Hill in Seattle. I have followed your political successes as an admirer and have always believed that you respected the rights of your constituents. One of those rights is the right to choose judicial forums. This bill will only protect the person who has committed an act which confers jurisdiction to the Tribes and then desires to remain unaccountable in the tribal forum.

Sincerely,



Lynda C. Eaton

Attorney at Law and

Colville Confederated Tribes Spokesperson



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\*Also admitted to Idaho

\*\*Also admitted to New York

\*\* Also admitted to California

\*Admitted to Idaho only

\*Also admitted to Oregon

\*Also admitted to Alaska

April 1, 1998

Hon. Ben Nighthorse Campbell  
Chairman  
Committee on Indian Affairs  
United States Senate  
Washington D.C. 20510-6450

Dear Senator Campbell:

I am glad to have an opportunity to comment upon proposed Bill S169 on tribal courts and tribal sovereign immunity which is currently under review by your committee. It is my understanding that there are included in the bill certain provisions calculated to restrict the jurisdiction of tribal courts, based upon some belief that tribal courts do not dispense justice as efficiently or as fairly as non-Indian courts. I write to say that because the premise is not supportable in my own experience, I cannot conclude that the proposed constriction of the jurisdiction of tribal courts is necessary or wise.

To give you some idea of my credentials (so that you can decide what weight to attach to my comments) permit me to point out that I am a lawyer residing in Spokane, Washington. I am a member of the bars of the states of Washington, Idaho, Oregon and Hawaii, and of the Tribal Court of the Confederated Tribes of the Colville Reservation. I have practiced as a trial lawyer for eighteen years. I have appeared in state, federal and territorial courts in Washington, Idaho, Oregon, Montana and Guam and have practiced consistently in the Colville Tribal Court since 1993. I should probably also point out that (though my surname has occasionally misled people into thinking otherwise) I am not an American Indian, accordingly my remarks need not be discounted for any presumed ethnic bias.

I assume that the evidence offered in favor of some limitation on tribal court jurisdiction must be anecdotal. Indeed, I am aware of no studies of the

April 1, 1998

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functioning of tribal courts as compared to municipal, county or federal courts in other jurisdictions. I do not know of any standard index of judicial performance according to which courts could be judged for comparative purposes (it is the fashion nowadays among federal courts to measure themselves according to the speed with which they "process" greater numbers of cases; I am confident based on my experience in federal courts that there is no reason to believe handling greater numbers of cases with greater speed correlates to more just outcomes). I further assume that the anecdotal evidence offered in favor of the bill consists of cases in which it is also argued that the outcome of a given proceeding was in favor of someone, say, a tribe or tribal member, in circumstances where someone feels the outcome should have gone the other way.

In response to such evidence, I think your committee should consider two things. First, my own anecdotal evidence is that there is no improper bias in the Colville Tribal Court. I have appeared in that court on behalf of a mix of clients, including the Confederated Tribes of the Colville Reservation (or "Colville Tribe") itself and certain business entities owned by the Colville Tribe on the one hand, and (non-Indian) insurance companies and a railroad, on the other. Though I am from a private law firm in a city nearly a hundred miles from the Colville Reservation, my clients and I have never been treated by the court or its staff with anything less than the utmost courtesy. While I have not always prevailed when I thought I should, I have never detected the slightest bias or impropriety in the basis for any ruling against a client of mine (indeed, in the case which comes most quickly to mind, the ruling was against a business owned by the Colville Tribe).

Second, I believe the Committee should consider not whether isolated examples of local bias can be found, but whether they are universal and consistent (I suspect your Committee would find they are not). For local bias infects every court, at every level, to some degree. I should be very surprised if you succeeded in finding a trial lawyer of any experience who did not believe he or she had been

April 1, 1998  
Page 3

the victim of "home cooking" (as local bias is often called in these parts) at some time or another.

Our federal court system has recognized, since the passage of the Judiciary Act of 1879, that local bias is an ever-present possibility. That is the reason for diversity jurisdiction and the right to remove cases of a certain large size to federal court from state court where the parties hale from different states. No one has ever suggested, of course, that the state courts be limited in their jurisdiction or disestablished to eliminate the possibility of bias. That could not be done without violating the Constitution. While the Congress likely does have the power to affect tribal courts without violating the Constitution, it could not do so without trenching seriously upon its ancient and somber treaty obligations to the tribes.

Permit me to suggest, respectfully, that if some measure is thought necessary to remedy the possibility of bias in tribal courts, that it be the same as that employed to avoid bias in state courts. The diversity and removal statutes could be amended, without affront to the dignity of any court, to permit larger cases to be brought in or removed to federal courts where there is diverse citizenship to the same extent as is possible in connection with the state courts (given the volume of the caseloads in tribal courts, however, the impact upon the federal courts of such a proposal would merit careful study). Further, to ensure that the Constitution of the United States is properly applied in the tribal courts under the supervision of the Supreme Court, as is true of the state courts, the certiorari power of the Supreme Court could be expanded to permit constitutional cases to be brought up to the Supreme Court from tribal courts, as they are from state courts.

April 1, 1998  
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I urge your committee to avoid unnecessarily constricting the power of the tribal courts, where to do so would deprive the tribes of an important aspect of their sovereignty.

Respectfully submitted this 1<sup>st</sup> day of April, 1998.

Very truly yours,

Witherspoon, Kelley, Davenport  
& Toole

By:

Leslie R. Weatherhead

A handwritten signature in dark ink, appearing to read "Leslie R. Weatherhead", written over the printed name.



ATTACHMENT VI.

**STATEMENTS FROM PEOPLE WHO JUDGE  
IN TRIBAL COURT REGARDING S.1691**

THIS ATTACHMENT PROVIDES VIEWS OF S.1691 BY  
EXPERTS WHO WORK OR PUBLISH NATIONALLY  
IN AND REGARDING TRIBAL COURTS

# NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION



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Telephone: (860) 572-6156  
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Colorado River  
Phoenix, AZ  
Director

March 19, 1998

Honorable Ben Nighthorse Campbell  
Chairman  
United States Senate Committee  
on Indian Affairs  
Washington, DC 20510-6450

Re: Formal Views of NAICJA on S.1691

Dear Senator Nighthorse Campbell:

Thank you for your letter dated March 13, 1998. We spent a great deal of time at our Annual Meeting discussing the very issues you raised in your letter. Per your request, please find NAICJA Resolution 98-02 which sets forth NAICJA's formal views concerning S.1691, entitled the "Indian Equal Justice Act." In short, we view this bill as an unwarranted and egregious infringement on tribal sovereignty, self-government and jurisdiction, in direct contravention of tribal treaty rights, the federal trust responsibility, federal law and federal legislative intent.

We are extremely troubled by the lack of factual support for the allegations Senator Gorton makes in the findings of S.1691. We are working in conjunction with NCAI to gather statistics on the operation and fairness of tribal courts, as well as, to document the number of tribal governments which have already waived tribal sovereign immunity for a wide variety of causes of action, ranging from tort claims to civil rights violations.

I had the opportunity to hear Attorney General Janet Reno introduce the Indian Country Law Enforcement Initiative to the Impact Week gathering of the United South and Eastern Tribes on February 2, 1998. While we are encouraged by the inclusion of the \$10 million for tribal courts, it is an extremely small sum when compared to the whole initiative. There also already appears to be specific projects earmarked for this funding, such as intertribal appellate courts in California (we do not begrudge the California tribes this need, however). The critical need of tribal courts is for day to day operational funds, not new special Department of Justice projects.

It has been heartbreaking to tribal justice systems that the 1993 Tribal Justice Act, which would provide \$50 million for each of five years, has been sitting unfunded for the past five years and no move is afoot to fund this most important law. NAICJA is in the process of completing an updated survey of the needs of

Hon. Ben Nighthorse Campbell  
March 19, 1998  
Page 2

tribal justice systems. This survey should be completed by the end of this month.

Tribal courts have the broadest jurisdiction of all jurisdictions in the United States. Thus, it is simply amazing how much these tribal systems have been able to provide in terms of justice services given their shoestring budgets when compared to the funding received by state and federal courts. As tribal judges, we are extremely offended by the baseless accusation that the tribal courts are not fair. We are bound to uphold tribal law and to administer fair and just proceedings, just as state and federal judges are. Senator Gorton has failed to substantiate this allegation and we believe he would be hard pressed to.

NAICJA intends to monitor S.1691 very closely and would be willing to have representatives testify with regard to the impact of the bill were it to be enacted if such a request were made of us. We hope that the Committee will see that this bill would abrogate the inherent sovereign authority of an Indian tribe to make its own laws and be ruled by them. *Williams v. Lee*, 358 U.S. 217 (1959).

We appreciate the opportunity to address these issues with you and the Committee. As we gather our information and statistics, we will forward the results to you as quickly as we are able. Should you require additional information or have any questions, please do not hesitate to contact me at (860) 572-6156.

*Woli won.*

Cordially,



Judge Jill E. Shibles  
President, NAICJA

Enclosure

# NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION



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WILLIAM S CHRISTIAN  
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Santa Fe, NM  
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NEIL T FLORES  
Colorado River  
Parker, AZ  
Director

## NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

### RESOLUTION 98-02

WHEREAS, the National American Indian Court Judge Association ("Association") was incorporated in the State of Delaware on March 31, 1969, and

WHEREAS, the objectives and purposes of the Association include: (a.) to foster the continued development, enrichment and funding of tribal justice systems as a visible exercise of tribal sovereignty and self-government, (b.) to provide continuing education for tribal judges and tribal justice staff members in order to promote and enhance the operation of the tribal judiciary, (c.) to further the public knowledge and understanding of tribal justice systems; and

WHEREAS, the Association's Board of Directors are delegated with responsibility to carry out the objectives and purposes of the Association; and

WHEREAS, Senator Slade Gorton (R-WA) has introduced S. 1691 entitled the "American Indian Equal Justice Act" which would require Indian tribes, tribal corporations and tribal members to collect excise and sales taxes on sales to non-members of the Indian tribe, would waive tribal immunity of Indian tribes and subject the tribes to suit in the district courts of the United States and state courts, and which would waive tribal immunity for civil rights actions alleging a violation of the Indian Civil Rights Act; and

WHEREAS, Senator Ben Nighthorse-Campbell, Chairman of the U.S. Senate Committee on Indian Affairs has requested "[i]n furtherance of the Committee's resolution to fully air the issues implicated by this legislation . . . the formal views of the Association on [the legislation]."

WHEREAS, this legislation if approved would effectuate an abrogation of treaty rights, the federal government's trust responsibility to Indian tribes and nations, two hundred years of federal Indian law and policy, and international human rights; and

WHEREAS, the sovereignty of Indian tribes was first recognized by the U.S. Supreme Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) in which Chief Justice Marshall stated that Indian nations were: "distinct political communities having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States"; and

WHEREAS, this legislation would clearly infringe on the inherent sovereign authority of an Indian tribal government to make its own laws and be ruled by them. *Williams v. Lee*, 358 U.S. 217 (1959);



NAICJA Resolution 98-02  
 "American Indian Equal Justice Act"  
 Page 2 of 3

WHEREAS, tribal authority over the activities of non-Indians on reservation lands is an important aspect of tribal sovereignty. *Montana v. United States*, 450 U.S. 544 (1981), *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), *Fisher v. District Court*, 424 U.S. 382 (1976); and

WHEREAS, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 889-893 (1986), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165 (1977); and

WHEREAS, the United States Government and the governments of its 50 states as sovereigns were entitled to elect or not elect to waive sovereign immunity and to set limitations on such waivers as they found appropriate and likewise, tribal governments possess the same right of election; and

WHEREAS, the findings of S. 1691 fail to recognize the fact that many tribal governments having exercised the power of self-government have already waived immunity from suit for a wide range of actions where the tribes found such waivers to be appropriate; and

WHEREAS, the U.S. Supreme Court held in *Santa Clara Pueblo v. Martinez*, that suits against an Indian tribe under the Indian Civil Rights Act ("ICRA") are barred by tribal sovereign immunity from suit and that "providing a federal forum for issues arising under [ICRA] constitutes an interference with tribal autonomy and self-government . . ."; and

WHEREAS, "[t]ribal forums are available to vindicate rights created by the ICRA . . . [and] [t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo*; and

WHEREAS, this bill if adopted, would be a clear abrogation of section 402 of the ICRA which provides that any further grants of Indian country jurisdiction to states could only be accomplished "with the consent of the tribe occupying the Indian country"; and

WHEREAS, civil jurisdiction over the activities of non-Indians on reservation lands "presumptively lies in the tribal courts" *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987); and

WHEREAS, this bill would be in direct contravention of Congressional finding (6) of the Indian Tribal Justice Act (25 U.S.C. 3601) which articulated that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights"; and

NAICJA Resolution 98-02  
 "American Indian Equal Justice Act"  
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WHEREAS, Indian tribal justice systems are committed to providing fair and just proceedings meeting the guarantees of due process and equal protection, and have consistently demonstrated their ability to conduct such proceedings; and

WHEREAS, the National American Indian Court Judges Association has devoted the past three decades to providing continuing judicial education in order to promote and enhance the operation of tribal justice systems;

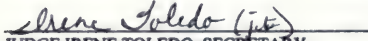
NOW THEREFORE, BE IT HEREBY RESOLVED, that the National American Indian Court Judges Association opposes the adoption of S. 1691, "American Indian Equal Justice Act," as an unwarranted and egregious infringement on tribal sovereignty, self-government and jurisdiction in direct contravention of tribal treaty rights, the federal trust responsibility and federal law.

\*\*\* CERTIFICATION \*\*\*

The foregoing resolution was considered and adopted by the Board of Directors of the National American Indian Court Judges Association on the 18th day of March 1998 and the vote was 10 in favor, 0 opposed, and 0 abstaining.



JUDGE JILL E. SHIBLES, PRESIDENT  
 National American Indian Court Judges Association



JUDGE IRENE TOLEDO, SECRETARY  
 National American Indian Court Judges Association

## JUSTICE IN INDIAN COUNTRY

This statement is freely given by Mike Somday, Associate Judge, Colville Tribal Court. I preside over Civil and Criminal Cases. The cases include Colville Tribal Members, Indians from other Federally Recognized Tribes, and Non-Indians.

I am a Tribal Elder, a Spiritual Leader, retired U.S. Navy ETCS (E-8), I am a member of the Washington State Law and Justice Council (WSLJaC), and a member of the Okanogan County Local Law and Justice Council, and a member of the WSLJaC Community Corrections Sub-Committee. and former two term member of the Washington State Citizens Advisory Council on Alcohol and Substance Abuse.

Judges and Courts, just as in older times, our chiefs and "sub-chiefs" were not chosen/appointed or elected for their own benefit or for their power and control, but for the benefit of those that he could serve.

Nor were they allowed to benefit or gain from that status or power. The intent was to cause/allow him to decide the issue(s) for the fair and consistent benefit of those he served.

Just as in today's adversarial judicial system, a defendant is brought before the Judge/Court when he has committed an offense against the Tribe. NOTE: The laws that have been written and adopted by our Tribe coincide with the standards of behavior that our Tribal Membership have established. It is, then, only when someone does not want to abide by community standards of behavior, that he is brought to Court. Then in accordance with a defined process, guilt or innocence is established, and appropriate sanctions are invoked.

The major differences between today's system and "a 100 years ago" is that, back in them days, the people collectively enforced community standards of behavior; ie: not the Courts. It was first handled on the level of each family, then it may have risen to the level of Tribal membership, including the Chiefs. Note: the Chiefs were usually elders, who had gained considerable wisdom and understanding over the years, from observation and/or experience. More importantly, the Chiefs, by that time in their lives, had given up their former desires for personal gain, or power or control.

Further, the Chiefs, who were allowed to make the decisions for the Tribe, consulted with the Membership, and were, if/when necessary, reminded, by the Membership, of their obligations to represent the people.

Just as in today's system, the people advise the elected Tribal Councilmen on which laws are necessary for peace and harmony on our Reservation. The Council then, after consultation with attorneys, draft and enact laws.

The Colville Tribal Court is a Constitutionally Separate Court, that provides for the election of the Chief Judge, by a popular vote of the membership every three years. There is also

in place, provisions for impeachment of Judges.

Just as in "a 100 years ago", persons not formerly associated with "Our Tribe", were extended rights and privildges and the responsibility to abide by our standards of behavior.

Just as in olden times, all persons had their due process provided for, including victim(s), the offender, and their families, and other persons that may have been harmed by that violation, and they had an equal voice, and equal opportunity to present facts and evidence.

As they are called now, the Plaintiffs and the Respondents also had due process defined and they too have an equal voice.

Initially, I believe, that each Separate band, they WERE Separate back in those days, held their own "Pow-Wows" to set their own possibly different standards of behavior. But over the years, many of those band distinctions have blurred (for many reasons not explained here). However, the big difference is that back in those days, what one band did was not necessarily forced upon another band or Tribe. Different life styles, different legends, different resources (salmon, deer, elk, coyote, eagle..) brought about different values and therefore at times different "laws". Each band was different, the dialects were different.... It is not good that "Our Tribe" should have to abide by a law that evolved out of a different Tribe, or State, or District Court.

Just as many, or all ??, Judges and Attorneys will tell you, each case is different, so too, are each Tribes different. Just as other Sovereign Nations are different, here in the Americas and in the old countries of Europe and Asia and Africa.

*W. H. Sunday*  
24 March 1998

*Notaried this 24<sup>th</sup> day of  
March, 1998.*

*James D. Smith*

*Notary in & for the State of Wt.  
Residing at Culea Dam. Commission  
expires 11/30/02.*

*LS*



# ROBERT N. CLINTON

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Wiley B. Rutledge Professor of Law  
 Chief Justice, Winnebago Supreme Court  
 Associate Justice, Cheyenne River Sioux Tribal Court of Appeals

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March 30, 1998

The Honorable Senator Ben Nighthorse Campbell, Chairman  
 Indian Affairs Committee  
 United States Senate  
 Washington DC 20510

Dear Senator Campbell:

I write in my individual capacity to express my strong opposition to Senate Bill 1691 as an unwarranted, unnecessary, inequitable and heavy-handed federal intrusion on the sovereignty and governmental autonomy of Indian tribes. For information purposes, please note that while the views I express in this letter are solely my own personal perspectives and not those of any of my employers, I serve as the Wiley B. Rutledge Professor of Law at the University of Iowa College of Law, the Chief Justice of the Winnebago Supreme Court, and an Associate Justice of the Cheyenne River Sioux Court of Appeals. During my 25 year academic career, most of my legal scholarship has been in the field of Indian law and I have had long practical experience with tribal affairs.

My opposition to S. 1691 stems from two observations. First, the proposed bill is totally unnecessary since many tribes already waive or limit sovereign immunity for suits in their own courts and provide very fair forums for the enforcement of civil rights and other claims brought by both tribal members and nonmembers. Second, the proposed legislation, insofar as it purports to waive sovereign immunity for litigation in forums other than tribal courts, represents a novel, unwarranted and totally unfair intrusion into the governmental autonomy of Indian tribes, of a type which has not been and would not be permitted for federal or state governments. Indeed, just two years ago, in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1116, 134 L.Ed.2d 252 (1996), the United States Supreme Court declared unconstitutional a similar federal statutory effort to waive state sovereign immunity to permit Indian tribes to sue states in federal courts under the Indian Gaming Regulatory Act.

While proponents of S. 1691 claim that Indian tribes do not waive or limit tribal sovereign immunity for enforcement of civil rights under the Indian Civil Rights Act and for other claims, this assertion is simply factually incorrect. Any fair and systematic reading of

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the recent decisions from tribal courts in the *Indian Law Reporter*, the major source for publication of tribal court opinions, reflects that tribal courts regularly entertain Indian Civil Rights Act claims against tribal officials and reject sovereign immunity defenses to such claims. For example, in *Moran v. Council of the Confederated Salish & Kootenai Tribes*, 22 Indian Law Repr. 6149 (C.S. & K. T. Ct. App. 1996), the Confederated Salish & Kootenai Tribes Court of Appeals held that the members of the tribal council could be sued notwithstanding claims of tribal sovereign immunity. In *Thompson v. Cheyenne River Sioux Board of Police Commissioners*, 23 Indian Law Repr. 6045 (Chy. Rv. Sx. Tr. Ct. App. 1996), the Cheyenne River Sioux Tribal Court of Appeals, on which I sit, held that the members of the Cheyenne River Sioux Board of Police Commissioners and the agency itself could be sued on an Indian Civil Rights Act claims, notwithstanding assertions of tribal sovereign immunity. This position at Cheyenne River is longstanding. See e.g. *Dupree v. Cheyenne River Housing Authority*, 11 Indian Law Rep. 6106 (Chy. Riv. Sx. Tr. Ct. App. 1988). The *Thompson* case is significant in that the tribal court's opinion went beyond existing federal and state law on sovereign immunity and permitted a tribal agency to be sued in a civil rights case in agency name without an express tribal ordinance permitting such suits, an approach most states and the federal government would not permit under their respective doctrines of sovereign immunity. Recently, in *Rave v. Reynolds*, 23 Indian Law Repr. 6150 (Winn. Sup. Ct. 1996), the Winnebago Supreme Court, where I serve as Chief Justice, surveyed the tribal court cases on sovereign immunity and concluded that the clear trend in the recent tribal court cases rejects tribal sovereign immunity claims where governmental officials are sued to enforce the Indian Civil Rights Act, thereby affording precisely the same approach to sovereign immunity for cases involving civil rights enforcement as in cases where federal or state officials are sued in nontribal courts. See also, *Bordeaux v. Wilkinson*, 21 Indian Law Repr. 6131 (Ft. Berth. Tr. Ct. 1995); *Simplot v. Ho-Chunk Nation Department of Health*, 23 Indian Law Repr. 6235, 6239 (Ho-Chunk Tr. Ct. 1996). Indeed, in *Rave*, the Winnebago Supreme Court noted that the Indian Civil Rights Act had been adopted by and made part of tribal law through inclusion by amendment in the Constitution of the Winnebago Tribe of Nebraska as a separate bill of rights enforceable as a matter of tribal law. While the plaintiffs may not always prevail in such suits, just as they do not always prevail in federal or state courts, the important point is that a competent, fair, and available forum already exists for such cases in tribal courts.

When the United States Commission on Civil Rights undertook extensive hearings on this question in 1986-88, that agency concluded that the problem was not tribal sovereign immunity, it was, rather, the inadequacy of funding of tribal courts. While Congress has passed the Tribal Justice Act of 1995 to authorize such funding, it has never seen fit to fund that program and therefore provide tribal courts the badly needed resources necessary to address this problem. There is therefore no need to displace these tribal court efforts to enforce the Indian Civil Rights Act by creating a new forum in state and federal courts, as proposed in §. 1691. The real need is for full funding of the Tribal Justice Act of 1995.

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Proponents of S. 1691 also seem to incorrectly assume, perhaps out of their own racial prejudices, that nonmembers will not be treated fairly in tribal courts or that tribal forums will not provide an adequate remedy for their grievances. My experience in tribal courts and my review of the cases suggests that nothing could be further from the truth. In fact, nonmembers tend to be treated more fairly in tribal forums than Indians are treated in state or, sometimes, federal forums. For example, in *Schwab v. CTEC Construction, Inc.* 21 Indian Law Reprtr. 6027 Colv. Admin. Ct. 1994), the Colville Administrative Court held that a non-Indian employee of a tribal contractor was improperly fired in a misguided effort to comply with the tribe's tribal employment rights ordinance (TERO), which required tribal preference, by creating open positions for tribal members. The court held that the TERO ordinance only applied to new hires and not existing employees. See also, *Clown v. Coast to Coast*, 23 Indian Law Reprtr. 6055 (Chy. R. Sx. Tr. Ct. App. 1993) (non-Indian creditor afforded forum to collection of debt against former tribal council member).

Additionally, it is truly ironic that the proponents of S. 1691 falsely claim that the federal government and the states generally have waived sovereign immunity claims for property actions brought against them and seek to involuntarily impose such a waiver on the Indian tribes. Much of the land area of the United States originally was Indian land and some of it was illegally taken from Indian tribes by the federal government. Yet, when Indian tribes seek to enforce their possessory claims to property against the United States or a state, there is usually no statutory waiver of sovereign immunity which they can use to get their property claims into federal or state court. In this area, federal and state sovereign immunity frequently is used as a defensive shield against tribal property claims. S. 1691 therefore seeks to create the totally iniquitable situation of permitting tribes to be sued on property claims in federal or state courts without permitting tribes to sue the federal or state governments to regain possession of lands they claim were wrongly taken from them. A more blatant example of a marked return to the colonialism which long characterized relations between the federal government and the tribes is hard to imagine.

Second, the real vice of S. 1691 is not merely that it invades tribal sovereignty by arrogating to the federal government the tribe's sovereign right to decide when and under what terms it will be sued, it is, rather, that the statute purports to waive sovereign immunity for suits in federal and state courts, not tribal courts. Under the guise of making Indian tribes like all other sovereigns in the United States, the bill actually creates a totally unique situation by permitting the tribes to be sued *in forums other than their own*. While federal and state governments frequently have partially waived sovereign immunity, such waivers invariably permit suit only in the courts of that sovereign. I know of no federal or state statute that gives a blanket waiver of sovereign immunity of the type that S. 1691 unfairly seeks to impose on tribal governments for suits in the courts of another sovereign. Indeed, whenever Congress

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tries to pass legislation making states amenable to suit in federal court, the states strongly object to such an invasion of their sovereignty. For example, when Congress passed an extraordinarily limited waiver of state sovereign immunity permitting suits in federal court by Indian tribes against states in federal court under the Indian Gaming Regulatory Act of 1988, the states strenuously objected to such a compelled federal waiver of sovereign immunity for suits in another forum and the Supreme Court declared it unconstitutional in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1116, 134 L.Ed.2d 252 (1996). Most sovereigns are not generally amenable to suits in the courts of another sovereign without their consent. They can be sued, if at all, only in their own courts. S. 1691 would uniquely and unfairly change that aspect of sovereignty for Indian tribes.

In short, since S. 1691 is both unnecessary and totally inequitable, I strongly urge the Senate Indian Affairs Committee to reject this misguided bill. I would appreciate your including this letter in the hearing record on the proposed legislation.

Sincerely,

*Robert N. Clinton*

Robert N. Clinton



ATTACHMENT VII.

**ONE YEAR OF REPORTED TRIBAL COURT CASES:  
TRIBAL COURTS ARE INTERPRETING AND APPLYING LAW  
IN COMPETENT, IMPARTIAL FORUMS THAT SEEK JUSTICE**

**THIS ATTACHMENT PROVIDES A SCHOLARLY ANALYSIS  
OF ALL NATIONALLY PUBLISHED TRIBAL COURT OPINIONS  
FOR THE YEAR 1996: CASES AFFECTED BY S.1691**

## TRIBAL COURT PRAXIS: ONE YEAR IN THE LIFE OF TWENTY INDIAN TRIBAL COURTS

Nell Jessup Newton\*

### *1. Introduction: Assuming the Worst*

In July 1997, Sen. Slade Gorton (R.-Wash.) appended a rider to the Interior Appropriations Act requiring all tribes receiving federal funds to waive sovereign immunity in federal court for cases brought by non-Indians.<sup>1</sup> Although ultimately defeated,<sup>2</sup> the rider was an attack on the entire tribal court system, because it was premised on the assumption that tribal courts are not neutral, justice-administering institutions. A recent letter to the editor of the *Washington Post*, written by a man whose son was killed in an automobile accident with a Yakima tribal police officer, makes this assumption painfully clear. Mr. Bernard Gamache's letter implied that he had no remedy because he could not sue the tribe in state or federal court. He apparently did not even attempt to file suit in tribal court, asserting that the tribe has a "makeshift court system that operates without a constitution." Mr. Gamache broadened this denunciation of the Yakima Tribal Court system to include *all* tribes: "Indian tribal courts have routinely shown their inability to administer justice fairly." Senator Gorton, in an op-ed piece published the same day, made the

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In memoriam, Philip Samuel Francis Deloria.

\*Professor of Law, American University, Washington College of Law. Work on this article was supported by a generous summer research grant from Dean Claudio Grossman of American University, Washington College of Law. Thanks also to the people at Boston College Law School who supported this and other tribal court projects, including Dean Aviam Soifer; Howard Brown, B.C. class of 1998, who provided extraordinary research assistance; and Irene Good of the B.C. Law Library. Lynetta St. Clair, WCL class of 1998, Nancy Dunn, and Jacqueline Hamilton smoothed over rough parts of the draft. Mark Van Norman asked me to present a review of tribal court litigation for the Federal Bar Association Indian Law Conference in April 1997. This article is an expanded version of that presentation. A note on citations. Like most scholars, I do not have access to many of the primary sources of tribal law relied on in the tribal court opinions discussed in this article, such as tribal codes and constitutions. Instead of direct citations to these sources, I will cite the tribal court opinion referring to them. Readers should note, however, that the codes or constitutions may have been amended since the case relying on them was decided.

1. See Les Blumenthal, *Gorton Says Bills Would Make Tribes Accountable; Measures Defended in Senate As Indians Work to Defeat Them*, NEWS TRIB. (Tacoma, Wash.), Sept. 4, 1997, at B1 (describing provisions appended to the appropriations bill).

2. Dana Wilkie, *Senator Delays Action on Indian Sovereignty*, SAN DIEGO UNION-TRIB., Sept. 17, 1997, at A2. The administration had threatened to veto the appropriation bill if the riders were not deleted. See Philip Brasher, *Senate Drops Legislation Opposed By Tribes*, ASSOCIATED PRESS, Sept. 17, 1997, available in 1997 WL 2549996.

3. Bernard Gamache, Letter to the Editor, *Simple Justice*, WASH. POST, Sept. 16, 1997, at

point only slightly more subtly: "[N]on-Indians and state governments may not seek justice in an *impartial* court when they have a dispute with tribal governments."<sup>4</sup> Senator Gorton apparently is not disturbed by the fact that after *Seminole Tribe*,<sup>5</sup> Indian governments may not seek justice against *state* governments in the federal courts, but rather are forced to take their disputes with the states into state courts. He also glosses over the numerous barriers presented by the common law and constitutionalized doctrines of sovereign immunity to suits against federal, state, and local governments.

Moreover, Mr. Gamache's letter is misleading because federal law has provided for a forum for such accidents. Before 1990, he would have been able to bring a claim in tribal court because the Indian Self-Determination and Education Act required tribes entering into 638 self-government contracts, as they are called,<sup>6</sup> to secure liability insurance and waive sovereign immunity up to the limits of the insurance policy.<sup>7</sup> Since the added expenses and difficulty of securing insurance cut into the grant money provided under the program, in 1990, Congress provided that tribal officers, like the police officer who hit Mr. Gamache's son, in the performance of a 638 contract are "deemed hereafter to be part of the Bureau of Indian Affairs . . . and its employees are deemed employees of the Bureau . . . while acting within the scope of their employment."<sup>8</sup> Consequently, Mr. Gamache had a remedy under the Federal Tort Claims Act (FTCA).<sup>9</sup> Had Mr. Gamache taken his claim to tribal court, the tribal court would certainly have held that the FTCA preempted tribal law, as did the Colville Tribal Court in a recent case.<sup>10</sup> Mr. Gamache knew about

A-16.

4. Slade Gorton, *Equal Justice For Indians, Too*, WASH. POST, Sept. 16, 1997, at A-17 (emphasis added).

5. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1995).

6. The Indian Self-Determination and Educational Assistance Act of 1975 provided for tribes to contract with the Department of the Interior to assume responsibility for delivering services formerly delivered by the Department. Since the public law number was 93-638, the contracts are popularly known as 638 contracts.

7. See Act of June 6, 1972, Pub. L. No. 92-310, § 229(c)(2), 86 Stat. 201, 208 (superseded).

8. Act of Nov. 5, 1990, Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959-60, amended by Act of Nov. 11, 1993, Pub. L. 103-138, Title III, § 308, 107 Stat. 1416 (codified at 25 U.S.C.A. § 450f notes (West Supp. 1997)).

9. *Id.* The statute provides:

[A]ny civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act.

*Id.*

10. See *Palmer v. Millard*, 23 Indian L. Rep. 6094 (Colville Ct. App. 1996) (dismissing as preempted by the FTCA a variety of tort claims against tribal police for seizing and destroying the plaintiff's dogs).



this federal remedy when he wrote his letter because he had filed suit in federal court under the FTCA for \$2 million.<sup>11</sup> The case was scheduled to go to trial in December 1997, but was settled and dismissed by court order on November 26, 1997.<sup>12</sup> Unfortunately, the public's ideas about tribal courts are so ill-informed that assertions like Mr. Gamache's are presumed to be the truth. Such assumptions require the application of a corollary presumption: that tribal courts are not justice-administering institutions.

When tribal courts have been subjected to intense scrutiny, as they have been in the last fifteen years,<sup>13</sup> they have survived the test.<sup>14</sup> Even

11. *Estate of Gamache v. United States*, No. CY-96-3177 (E.D. Wash. 1996).

12. Telephone Interview with Office of the Clerk of the Court (Jan. 5, 1998).

13. Both Houses of Congress have held major hearings to consider problems in the administration of justice in tribal courts. See, e.g., *Tribal Sovereign Immunity: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong. (1996); *Oversight Hearing on Public Law 103-176, Indian Tribal Justice Act: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong. (1995); *To Assist the Development of Tribal Judicial Systems: Hearing on S. 521 Before the Senate Comm. on Indian Affairs*, 103d Cong. (1993); *Proposed Substitute Bill to S. 1752, the Indian Tribal Courts Act of 1991: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1992); *To Assist in the Development of Tribal Judicial Systems, and for Other Purposes: Hearing on H.R. 4004 Before the House of Representatives Comm. on Interior and Insular Affairs*, 102d Cong. (May 21, 1992); *To Provide Support for and Assist the Development of Tribal Judicial Systems: Hearing on S. 667 Before the Senate Comm. on Indian Affairs*, 102d Cong. (1991); *Oversight Hearing to Provide a Broad Overview of the Status of Jurisdictional Authority in Indian Country: Hearing Before the Select Comm. on Indian Affairs*, 102d Cong. (1991); *To Make Permanent the Legislative Reinstatement, Following the Decision of Duro Against Reina* (58 U.S.L.W. 4643, May 29, 1990), *of the Power of Indian Tribes to Exercise Criminal Jurisdiction Over Indians: Hearing on S. 962 Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1991); *To Confirm the Jurisdictional Authority of Tribal Governments in Indian Country: Hearing on S. 963 Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1991); *To Make Permanent the Reinstatement, Following the Decision of Duro Against Reina* (58 U.S.L.W. 4643, May 29, 1990), *of the Power of Indian Tribes to Exercise Criminal Jurisdiction Over Indians: Hearing on H.R. 972 Before the House of Representatives Comm. on Interior and Insular Affairs*, 102d Cong. (1991); *Oversight Hearing to Provide Support for and Assist the Development of Tribal Judicial Systems and the Implementation of the Indian Civil Rights Act by Indian Tribal Governments: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1991); *To Establish Whether or Not a Direct Right of Appeal Should be Provided to a Federal Court From Judgments of Tribal Courts for Actions Arising Under the Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1991); *To Confirm the Jurisdictional Authority of Tribal Governments in Indian Country: Hearing on S. 963 Before the Senate Select Comm. on Indian Affairs*, 102d Cong. (1991); *Oversight Hearing on Tribal Initiatives for the 1990's: Hearing Before the Senate Select Comm. on Indian Affairs*, 101st Cong. (1990); *To Provide an Overview of the Status of Tribal Courts in Today's Legal System: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong. (1988); *To Authorize the States and the Indian Tribes to Enter into Mutual Agreements and Compacts Respecting Jurisdiction and Governmental Operations in Indian Country: Hearing on S. 1181 Before the Senate Select Comm. on Indian Affairs*, 96th Cong. (1980).

14. Some of the hearings cited in footnote 13, *supra*, were held at the behest of legislators who introduced bills to limit tribal court authority. For example, during several terms in the



investigations which began with apparent hostile intent have ended by stressing the strengths of tribal courts and noting that their weaknesses stem from lack of funding and not pervasive bias. The Reagan-Bush Civil Rights Commission held five hearings across the country targeted at a hot button issue: enforcement of civil rights on reservations.<sup>15</sup> In 1991, the Commission issued its Final Report recommending no changes in federal law and rejecting proposals to bring the tribal judiciary under the control of the federal courts.<sup>16</sup> Rather, the Commission pointed its finger at Congress by concluding that greater financial support should exist for the tribal court

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1980s, Sen. Orrin Hatch (R.-Utah) introduced legislation requiring automatic federal court review of civil rights cases, but this effort was unsuccessful. For a discussion of Senator Hatch's bill, see Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 271-75 (1989). Instead, these hearings resulted in legislation strengthening tribal courts as tribally controlled institutions, either by reaffirming tribal court jurisdiction or by providing for greater resources to be made available to tribal courts. See, e.g., 25 U.S.C. § 450n(1) (1988) (amending the Indian Self-Determination and Educational Assistance Act, to provide that the Act should not be read as "affecting, modifying diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." The most significant legislation was the Indian Tribal Justice Act, 25 U.S.C.A. §3601-3631 (West Supp. 1997), providing for increased funding for tribal courts. Unfortunately, Congress has yet to appropriate the funds to carry out the obligations of the Tribal Justice Act.

15. *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, Rapid City, S.D. (July 31-Aug. 1 & Aug. 21, 1986); *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, Flagstaff, Ariz. (Aug. 13-14, 1987); *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, Washington, D.C. (Jan. 28, 1988); *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, Portland, Or. (Mar. 31, 1988); *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, Flagstaff, Ariz. (July 20, 1988).

16. U.S. COMM'N ON CIVIL RIGHTS: THE INDIAN CIVIL RIGHTS ACT (1991). The Commission decried the fact that the "failure of the United States Government to provide proper funding for the operation of tribal judicial systems, particularly in light of the imposed requirement of the Indian Civil Rights Act of 1968, has continued for more than 20 years." *Id.* at 72. The Commission urged that Congress enact legislation to increase funding of tribal courts in amounts equal the funding provided to similar state courts. *Id.* at 73. In particular, the Commission recommended to increase funding for training tribal court judicial personnel and council members on the requirements of the ICRA. While expressing concern that tribes may not waive sovereign immunity to the same extent as state and federal courts, the Commission noted that "[e]very level of government within our Federal system invokes the defense of sovereign immunity from suit to some extent." *Id.* at 63. The Commission noted the many differences among individual tribes in their courts' approaches to sovereign immunity and suggested that some tribes may simply not be aware of the kinds of options for waiving sovereign immunity followed by state legislatures and congress as well as the state and federal judiciaries. As a result, the Commission recommended increased appropriations and grants for pilot projects by which "the Federal Government can play a positive role in encouraging the tribes to examine the extent to which they can enact statutory waivers of their sovereign immunity for adjudication of civil rights claims, recognizing that such an examination must include factors such as the size of the tribe's treasury and the competence of their judges." *Id.*

systems. In other words, those who examine what is actually occurring in tribal courts cannot help but be impressed with how well the courts function with the few resources at their disposal. Unfortunately, most people, including elites such as journalists and attorneys, know nothing about the existence, much less the day-to-day operation, of tribal courts.

Those opposing the Gorton rider directed their criticism at the legislative process, arguing against tacking riders on bills to make substantive policy<sup>17</sup> or stressed the importance of tribal sovereign immunity to tribal governments.<sup>18</sup> It is certainly appropriate to criticize making substantive changes to existing law by means of riders to appropriations acts. Laws should result from a deliberative process taken in the open; yet the practice of appending riders to bills without publication until the appropriations act becomes law persists. Appropriations acts require an up or down vote on the floor of Congress. To oppose a rider requires voting down the entire appropriations bill. It is not surprising that legislators are loathe to risk political capital by shutting down a department of the government in order to vindicate institutions not known to exist by most lawyers, much less members of the public. Such riders are more objectionable when they take aim at the smallest racial minority in the United States, members of Indian tribes. Defending tribal sovereign immunity is also an important task. Tribal immunity from suit is very important to Indian tribes for many reasons apart from the most obvious: lawsuits can drain treasuries of local governments.<sup>19</sup>

But perhaps the best answer to Senator Gorton is to reveal that his proposal is premised on a false assumption that tribal courts are biased. This failure to address the actual and potential role of tribal courts as justice-administering institutions indicates that even those working on Indian political and legal issues are ignorant of the day-to-day work performed by tribal judges. This lack of knowledge is understandable. First, most tribal court opinions are not widely distributed. In 1996, for example, only twenty tribes<sup>20</sup> submitted

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17. See, e.g., Timothy Egan, *Senate Measures Would Deal Blow to Indian Rights*, N.Y. TIMES, Aug. 27, 1997, at A1 (decrying secrecy surrounding the measures); Editorial, *Ambushing Indian Sovereignty*, PRESS-ENTERPRISE (Riverside, Cal.), Sept. 14, 1997, at A18 (same); Editorial, *Senator Gorton's Ignoble Crusade*, N.Y. TIMES, Aug. 31, 1997, § 4, at 8 (same); Editorial, *Slade's Stealth: This Is No Way to Rewrite Indian Law*, ANCHORAGE DAILY NEWS, Aug. 29, 1997, at B10 (same).

18. Suits against tribes not only subject them to potentially ruinous damage awards, but interfere with the day-to-day operations of government both directly and by requiring reallocation of resources from basic services in order to defend such suits. Permitting such suits also undercuts tribal sovereignty, which is a right accorded tribes because of their government-to-government relationship with the United States recognized in treaties and by the Constitution. For defenses and criticisms of tribal sovereign immunity, see Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power*, 27 U.S.F. L. REV. 419 (1993); Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1072-74 (1982).

19. Other reasons: control over the pace of economic assimilation, overcoming psychological barriers to bringing cases in tribal court.

20. In descending order of the number of opinions published: Mashantucket Pequot (16);



opinions to the *Indian Law Reporter*, a looseleaf service.<sup>21</sup> Few law libraries subscribe to the *Indian Law Reporter*, probably because libraries respond to the needs of their faculty and student constituencies and most law professors and student researchers are not aware of the reporter's existence. Consequently, only those who routinely use tribal court opinions have access to them. A second factor contributing to the law community's ignorance of tribal courts is that tribal court jurisdiction is not generally publicized or acknowledged. Casebooks — the primary method of educating law students — do not include property, tort, or contract cases from tribal courts.<sup>22</sup> Law review articles have begun to address the jurisprudence of tribal courts,<sup>23</sup> but those articles might escape notice as seemingly addressed to a narrow area, holding little interest for those not concerned with Indian law.

If tribal court opinions were more widely available, the work of tribal judges would become visible to the legal as well as the general public. This education will in turn benefit the tribal courts and help to counteract and dispel accusations like those of Mr. Gamache which are now too readily published despite the lack of facts supporting them.

For a presentation to the Federal Bar Association Indian Law Conference in April 1997, I read the eighty-five cases published in the *Indian Law Reporter* during 1996. Although I have read many tribal court opinions in the past, I have never read so many unrelated cases in a sustained manner. I was struck by the diversity of the issues, the difficulty, complexity and subtlety of the choice of law, and other procedural and substantive issues addressed. I was most impressed by the richness of the dialogue in tribal court opinions — a dialogue between the court and the tribal councils, tribal people, and members of the bar. One may also read the opinions as initiating a conversation with the general public. A conversation requires listening, however, and until tribal court opinions are more widely available, accusations such as those of Mr. Gamache will remain unchallenged.

In this article, I will bring to light the work of tribal courts as reflected in

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Colville Confederated Tribes (13); Confederated Salish & Kootenai (11); Cheyenne River Sioux (10); Ho-Chunk (formerly Wisconsin Winnebago) (9); Navajo Nation (5); Winnebago (4); Southern Ute (3); Chitimacha (2); Walker River Paiute (2); Choctaw of Mississippi (1); Choctaw of Oklahoma (1); Coeur d'Alene (1); Intertribal Court of Appeals of Nevada (1); Miccosukee (1); N.W. Region Supreme Court for the Tulalip Tribe (1); Rosebud Sioux (1); Seneca Peacemaker Court (1); St. Regis Mohawk Tribe (1); Three Affiliated Tribes of the Fort Berthold Reservation.

21. In addition to the *Reporter*, the Falmouth Institute publishes the *Native American Law Digest*, which is a monthly summary of court and administrative decisions of interest to the Native American community. The *Digest* does include some tribal court opinions.

22. To my knowledge only one casebook reprints a tribal court case. See CURTIS J. BERGER & JOAN C. WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE §11.4 Native American Artifacts, at 1164-1173 (reprinting Chilkat Indian Village IRA v. Johnson, No 90-01, Chilkat Tribal Court 1993).

23. See *infra* note 39.

the eighty-five opinions. I will begin in part II by sketching an overview of the structure of tribal courts and the role that tribal courts play, both in the ongoing construction of tribal identity and in establishing legitimacy within the tribe and the dominant society's legal system. I will then discuss the problem of availability of tribal court opinions, offering some suggestions for greater access to the work of tribal courts. In part III, I will analyze the 1996 cases, beginning with a snapshot of the cases and then addressing the law applied in tribal court opinions. This survey demonstrates that there is a great range of legal norms available to tribal judges in the average case, including tribal, state, and federal norms. In part IV, I will address political and civil rights cases and consider the area giving people like Senator Gorton and Mr. Gamache the most trouble: cases involving non-Indian parties. Political cases are the most delicate, dangerous, and important cases tribal courts must adjudicate; in so doing tribal courts are engaged in a dialogue with the tribal council, the tribal chair, and tribal citizens. Cases involving non-Indians impel judges to initiate a different kind of dialogue with the non-Indian public: a conversation about justice and legitimacy.

## *II. Overview of Tribal Courts*

### *A. Diversity and Legitimacy*

Tribal courts are a study in syncretism. Modern tribal courts had their genesis in the Courts of Indian Offenses, tools of colonialism imposed at the end of the nineteenth century to keep order on Indian reservations while educating tribal people in the dominant culture's norms.<sup>24</sup> The Indian Reorganization Act of 1934<sup>25</sup> was designed to put an end to coercion, but continued the policy of assimilation by requiring tribes seeking the benefits of the IRA to organize Western-style governments. While the IRA constitutions did not provide for a separate judicial branch, tribal legislatures began creating court systems. This process has accelerated greatly since the enactment of the Indian Self Determination and Education Assistance Act in 1975.<sup>26</sup> Today, most tribes have taken over the Courts of Indian Offenses. At the same time, the courts' jurisdiction has broadened from primarily criminal to include civil suits of increasing complexity. As a result, modern tribal courts vary in structure,<sup>27</sup> jurisdiction,<sup>28</sup> and substantive norms.

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24. For a history of the Courts of Indian Offenses, see WILLIAM T. HAGAN, *INDIAN POLICE AND JUDGES* (1966).

25. Ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1994)).

26. Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450(a) (1994)). For an excellent treatment of Indian tribal courts, see FRANK POMMERSEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* (1995).

27. The tribal opinions studied indicated that most of the tribes had two-tier systems, with a tribal trial and appellate court. Two of the opinions were decided by intertribal courts, one by an intertribal appellate court, *Kizer v. Walker River Hous. Auth.*, 23 Indian L. Rep. 6214 (Inter-



Traditional non-judicial dispute resolution mechanisms continue to function in some tribes along with Peacemaker courts,<sup>29</sup> courts of specialized jurisdiction, such as administrative commissions,<sup>30</sup> gaming,<sup>31</sup> small claims

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Tribal Ct. App. Nev. 1996) (remanding for determination of whether the tribe's discharge of the employee violated due process), and one by an intertribal court system, *In re C.W.*, 23 Indian L. Rep. 6213 (Northwest Regional Tribal Sup. Ct. 1996) (affirming tribal court order denying motion to intervene of potential adoptive parents in child custody proceeding). For descriptions of aspects of these intertribal courts, see, e.g., Christine Zuni, *The Southwest Intertribal Court of Appeals*, 24 N.M. L. REV. 309 (1994) (SWITCA), and U.S. COMM'N ON CIVIL RIGHTS, *supra* note 16, at 34-35 (describing Northwest Regional court system and several intertribal appellate systems). On various structures adopted in tribal courts, see Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 127, 128-30 (1995).

28. With regard to subject matter jurisdiction, the Choctaw Nation's court limits jurisdiction to "disputes arising under any provision of this Constitution or any rule or regulation enacted by the Tribal Council," while the Ho-Chunk Nation's jurisdiction is broader, extending over "all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and traditions of the Ho-Chunk Nation." *Compare Morrison v. Choctaw Nation*, 23 Indian L. Rep. 6093, 6094 (Ct. Indian App. 1995) (quoting tribal constitution and affirming motion to dismiss for lack of jurisdiction) with *Kingsley v. Ho-Chunk Nation*, 23 Indian L. Rep. 6113, 6114 (Ho-Chunk Tribal Ct. 1996) (quoting HO-CHUNK NATION CONST. art. VII.) The Ho-Chunk Nation (formerly the Wisconsin Winnebago Tribe) recently adopted a new constitution, which may account for the broader jurisdiction. In addition, the Choctaw court's limitation to tribal constitutional and statutory law may be influenced by the court's status as one of the few remaining Courts of Indian Offenses. With regard to persons who may be subject to jurisdiction, some tribes extend their jurisdiction to the acts of persons outside the reservation. The Ho-Chunk Nation Judiciary Act provides for personal jurisdiction over persons "who enter its territory, its members, and persons who interact with the Nation or its members wherever found." See *Decorah v. Rainbow Casino*, 23 Indian L. Rep. 6128, 6129 (Ho-Chunk Tribal Ct. 1996) (quoting Judiciary Act of 1995). The Rosebud Sioux Tribe provides for personal jurisdiction "consistent with due process of law" and has been interpreted as permitting jurisdiction over off-reservation defendants who commit acts having an effect within the reservation.

29. For descriptions of the Navajo Peacemaker court, see Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225 (1989); Honorable Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); Honorable Robert Yazzie, "Hozho Nahasdlit" — *We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996); James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (1997). For a description of the Sitka Court of Elders, see Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 253 (1994). Although in name denominated a Peacemaker court, the Seneca Nation court has been structured to function as a western court system according to Robert Porter. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

30. The Colville Tribes have waived sovereign immunity to permit tribal agency employees to contest disciplinary proceedings. See *Brooks v. Yellow Cloud Residential Center*, 23 Indian L. Rep. 6035 (Colville Admin. Ct. 1995) (ordering employee terminated in violation of the Tribal Policies and Procedures Manual and the Colville Tribal Code guarantee of due process reinstated with back pay with record expunged).

31. The Mashantucket Pequot Tribal Council has created a Gaming Enterprise Division of the Mashantucket Pequot Tribal Court which has jurisdiction for tort claims against the tribe's

courts,<sup>32</sup> and courts of general jurisdiction. These differences are a sign of creativity as tribal councils and courts balance variances among the tribes' traditions and present needs against the traditions and requirements of the dominant society's law.

Differences among tribal courts given is to be expected that law is one of the methods by which a community constitutes its own identity. Like all communities, tribal cultures are in a process of continual change, responding to pressures from various interest groups within tribes as well as pressures from the outside world. Tribal court systems create law and justice for a changing world as they apply tribal codes, constitutions, customary, and common law, as well as federal and state law. Nevertheless, because of their colonial origin, tribal courts must continually build legitimacy within the tribe, both among tribal members and with the Tribal Councils. To be sure, the opinions of courts on every level of federal, state, and local government serve to legitimate the work of these courts. The difference is that the legitimacy of state and federal courts is, for the most part, taken for granted, while tribal courts have only begun to thrive in the last fifty years. As a result, tribal courts do not yet have the same degree of respect among tribal people as do state and federal courts which have had hundreds of years of independent operation.

In addition to the ongoing project of establishing legitimacy among the people they serve, tribal courts must also counter attacks on their legitimacy by outside sources, to an extent not encountered by their state and federal counterparts. In other words, tribal courts work under a constant threat that the dominant legal society, acting through Congress or the federal courts, may react to one out of hundreds of tribal disputes in any given year by diminishing the judicial jurisdiction of *all* tribes. The Supreme Court has been active in this regard since *Oliphant v. Suquamish Indian Tribe*,<sup>33</sup> although in the past Congress took the lead.<sup>34</sup>

gaming enterprise. See *Lefevre v. Mashantucket Pequot Tribe*, 23 Indian L. Rep. 6018, 6018-19 (Mashantucket Pequot Tribal Ct. 1992) (describing the statutory scheme and dismissing for lack of subject matter jurisdiction a claim filed for an injury occurring before creation of the tribal court). The Mohegan Nation, for example, presently operates a gaming court to adjudicate personal injuries and employment cases arising out of the operation of its casino. At the same time, the tribe is creating a Council of Elders for intra-tribal conflicts. Telephone Interview with Thomas Acevedo, Chief of Staff, Mohegan Nation (April 1997).

32. See *Castillo v. Charlie*, 23 Indian L. Rep. 6001, 6001 (Navajo Sup. Ct. 1995) (describing jurisdiction of Navajo small claims court).

33. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (denying tribal courts authority to exercise criminal jurisdiction over non-Indians). In *Oliphant*, non-Indians greatly outnumbered tribal members because the Suquamish reservation had been subjected to allotment. See *infra* note 56 for discussion of "allotment." Nevertheless, the Court's decision in that case applied to *all* Indian reservations. For a criticism of this practice, see Robert N. Clinton, *Reservation Specificity and Indian Adjudication: an Essay on the Importance of Limited Contextualism in Indian Law*, 8 *HAMLIN L. REV.* 543 (1985).

34. In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that neither the



In conscious or unconscious anticipation to the possibility of federal interference with tribal authority, some tribal courts operate as nearly exact replicas of state courts. Although this strategy has been criticized by some,<sup>35</sup> the reason for this strategy is understandable. The courts of gaming tribes, for example, frequently hear cases brought by non-Indians, especially those brought by non-Indian employees and customers injured on the premises. Given the large number of such suits,<sup>36</sup> it is not surprising that at least two of the gaming tribes, Oneida and Mashantucket Pequot, have created courts very much modeled on the courts of the states within which they are located, both as to judicial personnel<sup>37</sup> and the law applied.<sup>38</sup> As the near success of Senator Gorton's rider indicates, whatever the background of the judge, whatever law is applied in tribal court, at least when non-Indian parties are involved, tribal judges adjudicate with a kind of Sword of Damocles over their heads.

### *B. Bringing the Work of Tribal Courts to Public Attention*

Unfortunately, the work of tribal courts is little known outside the circle of attorneys practicing before tribal courts on a regular basis and scholars of Indian law. Yet many others could benefit from exposure to tribal court opinions. On the most pragmatic level, attorneys and judges unfamiliar with Indian law called upon to struggle with an Indian law question would find such a source of legal norms invaluable. Unfortunately, since tribal court

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Treaty of Fort Laramie with the Sioux nor federal statutes deprived the tribe of authority to punish Indians committing crimes against Indians. Congress responded to this affirmation of tribal sovereignty by imposing the Major Crimes Act on Indian tribes, the first major incursion into internal tribal sovereignty. 18 U.S.C. § 1153 (1994). For an excellent treatment of the background of the dispute and its use by the Bureau of Indian Affairs as a lobbying tool to obtain passage of the Major Crimes Act, see SIDNEY HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 100-41 (1994).

35. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997) (arguing that adoption of Anglo norms in tribal courts endangers tribal sovereignty); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 274, 288 (arguing that the Supreme Court's jurisprudence on tribal court jurisdiction forces tribes to develop Anglo systems of justice in place of traditional systems and thus commit "legal self-genocide" in order to be permitted to retain any quantum of self-government).

36. The deep pockets of casino operators not surprisingly attract many slip and fall cases.

37. In 1997, the Oneida Indian Nation retained two retired justices from the prestigious New York State Court of Appeals, Judge Stewart F. Hancock, Jr., and Judge Richard D. Simons. Oneida Indian Nation, Fact Sheet: Oneida Nation Court (Feb. 13, 1997) (on file with author).

38. Mashantucket Pequot directs judges to apply Connecticut law until tribal law has been developed. Mashantucket Pequot Tribal Ordinances (M.P.T.O.) 011092-02, § 5, *quoted in Eosso v. Foxwoods High Stakes Bingo & Casino*, 23 Indian L. Rep. 6027, 6027 (Mashantucket Pequot Tribal Ct. 1994).

opinions are not widely available, busy practitioners often consult regional reporters or *Restatements* for insight into a wide variety of substantive issues in cases in which no tribal code provision or case precedent points the way toward a just resolution of a particular issue. More important, ready access to tribal court opinions could dispel some of the stereotypes regarding the ability of tribal courts to administer justice fairly. Attorneys representing clients sued in tribal court would then be able to research that particular court's treatment of certain kinds of cases. With greater knowledge of and access to the work of tribal courts, attorneys might well choose to bring some cases in tribal courts for the same reasons. Access to tribal court opinions may also aid federal courts called upon to review tribal court exercises of jurisdiction over non-Indians. Judges (and their clerks) may then be better able to put the occasionally ill-considered opinion in context, instead of assuming such an opinion represents the norm. Finally, legal scholars and the press may also benefit from a more nuanced understanding of the work of tribal courts, and thus be less apt to assume the worst when informed that tribal courts exist and even have jurisdiction over non-Indians in some cases.

As noted above, the *Indian Law Reporter* is the major source of tribal court opinions. Although those practicing frequently in tribal courts do subscribe to this excellent publication, many law libraries do not. It would be enormously helpful to have a reporter devoted solely to tribal court opinions which could then make an effort to contact all the tribal courts urging them to submit their opinions for publication. This publication could take the form of a looseleaf binder service like the *Indian Law Reporter*, with back issues being made available on compact disk.

Unfortunately, most researchers today rely on online legal research services or the Internet. Attempts to interest the two major legal research services, LEXIS and Westlaw, in publishing tribal court opinions have yet to bear fruit, however. Professor Robert N. Clinton, the Chief Judge of the Winnebago Supreme Court and an associate justice of the Cheyenne River Sioux Court of Appeals, and Jill E. Shibles, Chief Judge of the Mashantucket Pequot Tribal Court, have been working with the National American Indian Court Judges Association to set up a web site for tribal court opinions. A web site would make an important contribution toward bringing the work of tribal courts to a broader audience. In particular, a web site would make these opinions available to legal elites and journalists with ready access to the Internet. Yet those laboring in the vineyards of Indian law, tribal court attorneys, lay advocates, and personnel, including judges, often have no Internet access. Success breeds success — as tribal court opinions become more available in hard copy, so will the pressure to provide on-line access increase. Ideally, of course, like state and federal judicial opinions, tribal court opinions will become available in a variety of formats.

A second method to bring the work of tribal courts to a larger audience is to encourage more articles on their work. Scholarly attention has begun to



focus on tribal court opinions, with some excellent work on tribal law beginning to appear in law reviews.<sup>39</sup> Greater availability of tribal opinions should cause this work to increase. An extremely beneficial undertaking for a law review would be to publish an annual review of tribal court decisions. The issues are fascinating and the opinions are often well-crafted. The resolution of a difficult problem may require discussion of federal and tribal

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39. This scholarship began in earnest in the late 1980s. See Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153 (1987) (examining tribal court decisions concerning sovereign immunity); Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987) (discussing choice of law, jurisdiction, procedural and substantive issues frequently arising in tribal courts and enforcement of judgments); Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553 (1986); Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49 (1988). Since then scholarship has blossomed. See, e.g., FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* (1995); Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589, 594-99 (1990) (arguing that tribal courts need not give full faith and credit to state court judgments); Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1 (1993) (examining tort, property, & family law issues decided by Navajo customary law and asserting that customary law is not used in deciding transactional matters); Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV. U. L. REV. 359 (1993) (analyzing tribal court sovereign immunity decisions); Daniel L. Lowery, Comment, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379 (1993) (examining the use of Navajo common law in criminal law, family law, property, torts, contracts, and individual rights cases); James W. Zion & Elsie B. Zion, *Hozho' Sokee' — Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407 (1993) (examining Navajo Courts' treatment of family violence cases); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994) (examining the use of custom in tribal court cases); Christine Zuni, *The Southwest Intertribal Court of Appeals*, 24 N.M. L. REV. 309 (1994) (detailing the appellate jurisdiction of SWITCA); Robert Laurence, *Dominant-Society Law and Tribal Court Adjudication*, 25 N.M. L. REV. 1 (1995) (analyzing potential and actual tribal court deviations from dominant society law rooted in formalism in the areas of double jeopardy, sovereign immunity from suit, and ex parte communications); Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse in Tribal Court*, 27, CONN. L. REV. 1003 (1995) (discussing the role of tribal courts in constituting community identity in the context of analyzing a dispute brought in tribal court by the Estate of Crazy Horse); Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69 (1995) (contrasting indigenous and Anglo legal perspectives on dispute resolution and comparing the codes and case law of 14 tribes with regard to domestic violence); Christian M. Freitag, Note, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 INDIANA L.J. 831 (1997) (analyzing the concept of due process in tribal courts); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997) (arguing that adoption of Anglo norms in tribal courts endangers tribal sovereignty). In 1995, the *Journal of the American Judicature Society* devoted an entire issue to tribal courts. *Indian Tribal Courts and Justice*, JUDICATURE, Nov.-Dec. 1995, vol. 79, no. 3.

codes, the tribal constitution, tribal customary and common law, as well as state law. Resolution of cases of first impression require the judges to consider how other tribes and states have resolved issues and then consider the extent to which those approaches are consistent with tribal values. In each year's crop of cases, some might merit separate treatment in a casenote. In addition, comments could usefully pursue either substantive areas, such as employment law, tribal sovereign immunity, and the Indian Civil Rights Act, or broader themes such as the use of customary law or the reliance on the law of other tribes. An annotated index to the tribal court opinions, more detailed than that currently available in the *Indian Law Reporter* would also be enormously helpful. The editors of the law journal undertaking this task could ask an academic to write a Foreword, like that published in the annual review of Supreme Court cases by the *Harvard Law Review* — a long, thoughtful article discussing a recent trend or focusing in depth on one particular issue. The tribal bar, legal scholars, federal and state judges, news media, and policymakers in general would find such a publication exceedingly useful. Such an annual review would well serve the cause of tribal court legitimacy, for anyone reading about the opinions issued by tribal courts in a single year could not help but be impressed by the professionalism of most tribal judges.

Nevertheless, as criticisms of federal and state opinions must be informed by an understanding both of the law and the context of the case, so too must criticism of tribal courts be similarly grounded. While someone ignorant of tribal courts might chastise a court for not following the United States Constitution, someone with knowledge of tribal courts would understand the role of the tribe's own civil rights' ordinances or constitutional bills of rights<sup>40</sup> as well as the Indian Civil Rights Act in developing a critical analysis of a tribal civil rights case.

In other words, students and scholars approaching tribal court opinions with respect for the tribal context would not automatically criticize deviations from state or federal law, but would understand that difference does not always mean inferiority. Moreover, just as tribal courts need not speak with one voice, those writing about tribal courts need not agree about whether a particular opinion is wise and just in context. One scholar may decry what she sees as overreliance on federal law in an opinion; another might think such reliance well placed, especially in a sensitive case; a third may argue a particular opinion is simply wrong on the law or bad policy.<sup>41</sup> Although,

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40. See JOHN R. WUNDER, *RETAINED BY THE PEOPLE: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS* 132 (noting that of the 247 tribes with constitutions in 1968, 117 included bill of rights provisions in their constitutions).

41. See Robert Laurence, *Full Faith and Credit in Tribal Court: Tribal Sovereignty, Cross-Boundary Reciprocity, and the Unlikely Case of Eberhardt v. Eberhardt*, N.M. L. REV., forthcoming in 1998 (criticizing a 1997 opinion of the Cheyenne River Sioux Tribe Court of Appeals).



some opinions may generate much more criticism than praise, such opinions might then be placed in better perspective. In short, it is the hope that articles like this reviewing the work of tribal courts each year may advance the understanding and legitimacy of tribal courts.

### *III. Analysis of Cases Published in 1996*

#### *A. Methodology*

This report is based on the cases published in the *Indian Law Reporter* during the calendar year 1996. Although many of the opinions were dated in 1995 or 1996, some were dated as early as 1992.<sup>42</sup> It must be stressed, therefore, that the sample of eighty-five tribal cases is much smaller than the actual number of cases heard by tribal courts. Tribes do not send all published opinions to the *Indian Law Reporter* and the reporter does not publish all trial court decisions submitted.<sup>43</sup> Therefore, one should not regard this sample as complete even for those twenty tribes which submitted opinions published by the *Indian Law Reporter* in 1996.

It is difficult to give an accurate snapshot of the issues before tribal courts, because many cases involved multiple issues.<sup>44</sup> For example, the opinion in *Estate of Tasunke Witko v. G. Heileman Brewing Co.*<sup>45</sup> by the Rosebud Sioux Supreme Court dealt primarily with personal and subject matter jurisdiction, yet the underlying conflict raises important issues of tort, property, and customary law. Most of the opinions considered issues of civil<sup>46</sup> or criminal procedure;<sup>47</sup> only a relatively small number of criminal law cases reached the

42. Most of the earlier opinions were released by the Mashantucket Pequot Tribal Court, which was created in 1992. See *Lefevre v. Mashantucket Pequot Tribe*, 23 Indian L. Rep. 6018, 6018 (Mashantucket Pequot Tribal Ct. 1992) (describing creation of the court system). The Tribal Court publishes its own reporters: the Mashantucket Pequot Tribal Court reports and the Mashantucket Pequot Reporter (court of appeals decisions).

43. According to Chief Judge Jill E. Shibles, the *Indian Law Reporter* "is many months behind in its publication of tribal court opinions [and] is very selective about the trial-level decisions that go in." Letter from Chief Judge Jill E. Shibles to Nell Jessup Newton (July 13, 1997).

44. I attempted such a snapshot for the federal bar conference, but on reflection have decided to omit it in these written remarks, because pigeonholing the cases obscures their richness.

45. 23 Indian L. Rep. 6104 (Rosebud Sioux Sup. Ct. 1996). This case is discussed *infra* notes 153-8, 189 and accompanying text.

46. See, e.g., *Lee v. Tallman*, 23 Indian L. Rep. 6029 (Navajo Sup. Ct. 1996) (holding in a suit by Taiwanese nationals and a Japanese Corporation against Peabody Coal, denying defendant's motion to dismiss corporate defendant as a non-jural entity for failure to raise the issue at trial and denying the corporate plaintiff's motion to modify the record on appeal by adding documents from a simultaneous state court case).

47. See, e.g., *Handboy v. Carroll*, 23 Indian L. Rep. 6012 (Cheyenne River Sioux Ct. App. 1995) (holding that because an ineffective assistance of counsel claim requires a factual record complete with factual findings, it must be first heard by trial court; appellate court has discretion to grant original jurisdiction over writs for habeas corpus, but no extraordinary circumstances

merits.<sup>48</sup> Twenty cases addressed purely procedural issues, including statutes of limitations cases; some considered more thorny procedural issues, such as personal and subject matter jurisdiction and immunity from suit, which require an analysis of issues of tribal constitutional law and Indian Civil Rights Act questions. There were fifteen employment cases, representing a significant number in the sample,<sup>49</sup> and a few property, tort, or family law opinions on the merits.<sup>50</sup>

## *B. Sources of Law Applied in Tribal Courts*

### *1. Choice of Law and a Note of Caution*

Tribal codes often contain choice of law provisions, which vary widely. All tribal courts must apply federal and tribal law on point. In ranking outside sources of law, tribal codes vary in some interesting ways. Some codes rank state law immediately after tribal law. The Colville Tribal Law and Order Code, for example, provides that: "In all cases the Court shall apply, in the

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exist in this case); Navajo Nation v. Hunter, 23 Indian L. Rep. 6005 (Navajo Sup. Ct. 1995) (ruling on timeliness of filing appeal of conviction); Colville Confederated Tribes v. Wiley, 23 Indian L. Rep. 6037 (Colville Tribal Ct. 1996) (granting motion to dismiss a misdemeanor charge of possession of alcohol on due process grounds); Elk Nation v. Chasing Hawk, 23 Indian L. Rep. 6085 (Cheyenne River Sioux Ct. App. 1994) (denying defendant's motion for a stay pending appeal in this contempt case on grounds stay is an extraordinary remedy authorized by the Cheyenne River Sioux Tribal Rules of Civil Procedure only "in those cases in which manifest injustice would result if no stay were issued"); Mississippi Band of Choctaw Indians v. Ben, 23 Indian L. Rep. 6119 (Miss. Choctaw Crim. Tribal Ct. 1996) (denying defendant council member's motion to dismiss criminal charges for unauthorized possession of documents); Walker River Paiute Tribe v. Jake, 23 Indian L. Rep. 6204 (Walker River Tribal Ct. 1996) (dismissing complaint without prejudice sua sponte because of procedural errors); Walker River Paiute Tribe v. Miller, 23 Indian L. Rep. 6207 (Walker River Tribal Ct. 1996) (dismissing complaint without prejudice because of procedural errors); Colville Confederated Tribes v. Tatshama, 23 Indian L. Rep. 6211 (Colville Tribal Ct. 1996) (denying defendant's motion for deferred prosecution); Southern Ute Indian Tribe v. CHB, 23 Indian L. Rep. 6204 (Southern Ute Tribal Ct. 1996) (denying motion to dismiss charges against juvenile on grounds right to speedy trial not violated and noting that defendant's counsel had caused delay by requesting pre-trial conference); Waters v. Colville Confederated Tribes, 23 Indian L. Rep. 6120 (Colville Ct. App. 1996) (reversing conviction in domestic violence case on grounds of prosecutorial misconduct and remanding for a new trial).

48. See Colville Confederated Tribes v. Seymour, 23 Indian L. Rep. 6008 (Colville Ct. App. 1995) (affirming misdemeanor convictions); Confederated Salish & Kootenai Tribes v. Devereaux, 23 Indian L. Rep. 6099 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (affirming conviction for driving under the influence); Colville Confederated Tribes v. Condon, 23 Indian L. Rep. 6127 (Colville Ct. App. 1996) (affirming conviction for constructive possession of alcohol by a person under 21 years of age); Boyd v. Colville Confederated Tribes, 23 Indian L. Rep. 6245 (Colville Ct. App. 1996) (upholding defendant's stipulation to judgment and sentence).

49. See *infra* notes 93-98 and accompanying text.

50. Tort cases included *Castillo v. Charlie*, 23 Indian L. Rep. 6001 (Navajo Sup. Ct. 1995) (affirming judgment in negligence case) and *Bick v. Pierce*, 23 Indian L. Rep. 6175 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (upholding damages award in personal injury claim).



following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law."<sup>51</sup> In the past many, if not most, tribal courts were directed to apply the law of the state within which the reservation was located.<sup>52</sup> The Confederated Salish and Kootenai Tribes of the Flathead Reservation continue such a practice. Their tribal code directs courts to apply Montana law to decide issues not specifically addressed by tribal or federal law. Nevertheless, the tribal code provides an escape clause, noting that Montana law should be applied only where it is "just and appropriate."<sup>53</sup> Since the Mashantucket Pequot Tribal Court has only been in existence since 1992, its code directs the tribal court to apply Connecticut law: "Until such time as a sufficient body of tribal court law has developed, the Gaming Enterprise Division, unless otherwise specified, shall apply the principles of law applicable to similar cases in Connecticut."<sup>54</sup> Nevertheless, where tribal law differs, the court can and does develop common law.<sup>55</sup>

For many tribes, the application of state law to fill gaps may be regarded

51. See *Colville Confederated Tribes v. Seymour*, 23 Indian L. Rep. 6008, 6009 (Colville Ct. App. 1995) (quoting COLVILLE TRIBAL CODE 4.1.11). The reference to international law is not typical to my knowledge, but has been appearing more frequently of late.

52. NATIONAL AM. INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 43 (1978) [hereinafter INDIAN COURTS AND THE FUTURE] (noting that tribal opinions at the time actually relied on state case law and ordinances more than tribal judges reported in a survey).

53. See *Lulow v. Peterson*, 23 Indian L. Rep. 6200, 6201 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (summarizing the Law & Order Code choice of law provision); see also *Sherman v. Scottsdale Ins. Co.*, 23 Indian L. Rep. 6232, 6233 (Chitimacha Ct. App. 1996) (quoting § 501 of the tribal code ranking "applicable" U.S., then tribal constitutional and statutory law, then tribal customary law not in conflict with tribal positive law or federal law, and finally stating that "[w]here appropriate, the Court may . . . be guided by statute, common law or rules of decision of the State in which the transactions or occurrence giving rise to the cause of action took place").

54. *Mashantucket Pequot Tribal Ordinance 011092-02*, § 5, quoted in *Eosso v. Foxwoods High Stakes Bingo & Casino*, 23 Indian L. Rep. 6027 (Mashantucket Pequot Tribal Ct. 1994). In deciding that the plaintiff could not name fictitious parties in a personal injury action, the court turned to Connecticut case law, noting: "This is not an appropriate occasion to develop a new or different body of 'tribal law' on this subject." *Id.* at 6028.

55. See *Tajildeen v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6030, 6031 (Mashantucket Pequot Tribal Ct. 1993) (noting, because tribal ordinance requiring that a written notice of claim be filed with the tribal court differs from procedure used in Connecticut, where filing must be done with municipal or state agencies, that "Connecticut case law . . . is of limited utility [and] it is appropriate for the Mashantucket Pequot Tribal Court to develop its own body of tribal case law on this subject"); see also *Casillo v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6036 (Mashantucket Pequot Tribal Ct. 1994) (relying on tribal cases interpreting the tribe's statute of limitations); *Middleton v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6118 (Mashantucket Pequot Tribal Ct. 1994) (noting Tribal Code requires process to be filed with court to be timely and rejecting Connecticut case law to the contrary, citing *Tajildeen, supra*).

as appropriate in light of the tribe's assessment of the basic fairness of state common law doctrines and of the tribal interest in making tribal courts accessible for non-Indian parties. For example, the Mashantucket Pequot courts entertain many personal injury and employment cases involving non-Indians. The Flathead reservation is heavily allotted,<sup>56</sup> which may account for the acceptance of Montana state law in cases not governed by tribal law. As some tribes have repatriated their tribal courts, however, they have afforded those courts the opportunity to consult more sources of law, including the law of other tribes, and other states.

Other tribal codes direct the courts to turn to federal law before state law if there is no tribal law on point. The Winnebago Tribe of Nebraska is such an example ranking norms in the following order:

*2-111 Laws applicable in civil actions*

1. In all civil actions the tribal court shall apply:

A. The constitution, states, and common law of the tribe not prohibited by applicable federal law, and if none, then

B. The federal law, including federal common law, and if none, then

C. The laws of any state or other jurisdiction which the courts find to be compatible with the public policy and needs of the tribe.

2. No federal or state law shall be applied to a civil action pursuant to paragraphs (B) and (C) of subsection (1) of this section if such law is inconsistent with the laws of the tribe or the public policy of the tribe . . . .<sup>57</sup>

With the development of more tribal statutory as well as case law, tribes have turned less frequently to states or federal opinions for guidance. The Rosebud Sioux choice of law provision is particularly interesting in this respect.

56. The term "allotment" refers to the late nineteenth century policy under which reservation land was allotted to individual heads of families, with the excess or "surplus" lands not needed for allotment opened to settlement. In this way, the policy was designed both to encourage tribal people to assimilate by breaking their attachment to communal land ownership and turning them into farmers and ranchers and by making tribal land available for settlement by non-Indians. Although this policy was repudiated in the Indian Reorganization Act, over 27 million acres of tribal land was lost to tribal or Indian ownership. As a result, the majority of residents of some reservations are non-Indians. See generally FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* (1984) (relating the history of the allotment and assimilation movement); Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (tracing the history of allotment, its impact on tribal sovereignty, and criticizing the Supreme Court for continuing to give effect to a policy long repudiated by Congress and the Executive).

57. CODE OF THE WINNEBAGO TRIBE § 2-111, quoted in *Rave v. Reynolds*, 23 Indian L. Rep. 6150, 6156 (Winnebago Sup. Ct. 1996). The case is discussed *infra* notes 89-91 and accompanying text.



The court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in actions before it. Any matter not covered by applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe. Where doubt arises as to customs and usages of the Tribe, the Court may request the advice of persons generally recognized in the community as being familiar with such customs and usages. In any matter in which the rule of law is not supplied by any of the above, the Tribal Court may look to the law of any tribe or state which is consistent with the policies underlying tribal law, custom and usages.<sup>58</sup>

In short, while some tribes still require the application of state law or federal law to resolve issues not covered by tribal law, many merely refer to state and federal law as potential sources of norms available for application in an appropriate case as long as those norms do not contradict tribal norms. For this reason, attorneys practicing in tribal court should take care to examine carefully any tribal code provision listing potential sources of legal norms and remember that permissive use of a federal or state norm does not mean the attorney should automatically turn to the closest federal or state case to resolve the particular issue. Even in areas such as sovereign immunity, significant differences may exist. The Tribal waiver of sovereign immunity may be more limited,<sup>59</sup> or the proffered state or federal norm may not fit the tribal context.<sup>60</sup> Attorneys not familiar with tribal courts may also assume the Federal Rules of Civil Procedure apply in tribal courts, although in some tribal courts this assumption may be completely unwarranted.<sup>61</sup> Application of procedural norms is discussed below.

## 2. Tribal Law in Tribal Courts

On the one hand, all of the cases reviewed involved application of tribal law, whether tribal constitutions, codes, statutes, traditional, customary, or common law, including opinions which turn to federal or state law for norms applicable to the tribal context. Moreover, many tribal court opinions discuss

58. ROSEBUD SIOUX TRIBAL LAW & ORDER CODE § 4-2-8 (1989).

59. See *Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs*, 23 Indian L. Rep. 6045 (Cheyenne River Sioux Ct. App. 1996) (stating that the tribe's sovereign immunity statute is narrower than federal sovereign immunity doctrine because the federal doctrine permits damages actions against officers in certain circumstances, but the Cheyenne River Sioux Tribal Code does not).

60. See, e.g., *Colville Confederated Tribes v. Coleman*, 23 Indian L. Rep. 6188, 6189 (Colville Ct. App. 1996) (noting that "[w]hile other courts have adopted the rule pursuant to the federal and state constitutions, the tribal court is not constitutionally or statutorily bound to adopt the rule of lenity [presuming criminal sentences to be concurrent]").

61. See *Palmer v. Millard*, 23 Indian L. Rep. 6094 (Colville Ct. App. 1996) See *infra* text accompanying notes 118-27 for a discussion of applicability of federal procedure in tribal courts.

the entire range of available norms. An excellent example is *Baylor v. Confederated Salish & Kootenai Tribes*,<sup>62</sup> a case arising out of an on-the-job accident in which an employee of a tribal saw mill lost his right hand. The lower court denied the tribe's motion to dismiss, which was based on an argument that Montana's workers compensation law provided the exclusive remedy according to tribal law. When the tribe appealed the denial of the motion to dismiss, the injured worker argued that the tribe's final judgment rule barred the tribe's appeal. The Confederated Salish & Kootenai Tribal Court of Appeals agreed with the worker, and dismissed the tribe's appeal. In so doing, however, the Court had to interpret the scope of the tribe's final judgment rule,<sup>63</sup> and in particular whether it should read tribal law, which permits the application of federal procedures in some situations, as adopting 28 U.S.C. § 1292(b),<sup>64</sup> which provides for narrow exceptions to the rule of finality. The court of appeals rejected this argument. Before arriving at this conclusion on the narrow issue of finality, the trial court and the court of appeals were required to engage in analyses of Montana workers compensation law, state judicial opinions, the opinion of a sister tribe, federal statutory and common law regarding the relations of states and tribes, tribal statutory law and the general policies regarding the relation of trial and appellate courts undergirded by the rule of finality.

With opinions covering such a wide scope of legal materials, it might not seem worthwhile to pigeonhole cases by whether tribal statutory or customary law or state or federal law was applied, but instead to analyze each substantive issue on its own terms. On the other hand, a major argument in favor of the tribal court system is that tribal judges are both familiar with tribal law and sensitive to the tribal context. In addition, tribal people and policymakers have increasingly invoked tribal traditions in a wide variety of contexts apart from judicial dispute resolution. In the wake of what some are hailing as a re-traditionalization movement, it is useful to examine the published cases, even though they are an imperfect sample of the reality of tribal court decision making, to determine the extent to which traditional or customary law is invoked in these tribal courts.

62. *Baylor v. Confederated Salish and Kootenai Tribes*, 23 Indian L. Rep. 6221 (Confederated Salish & Kootenai Tribes Ct. App. June 28, 1996) (dismissing appeal on grounds that denial of motion to dismiss is not an appealable order).

63. Ordinance 90B, §3-2-303, cited in *Baylor*, 23 Indian L. Rep. at 6222.

64. Federal law permits appeal from an otherwise unappealable order in cases involving "a controlling question of law as to which there is substantial ground for difference of opinion and . . . immediate appeal from the order may materially advance the ultimate termination for the litigation." *Id.* The Federal Rules of Appellate Procedure adopt this principle. FED. R. APP. P. 5.



### a) Customary Law

Most tribes are directed to apply customary or traditional law where applicable. Tribal codes also frequently provide formal mechanisms for tribal courts to consult elders for help in determining appropriate customs and usages. The Winnebago Tribe of Nebraska provides, for example: "Where any doubt arises as to the customs and usages of the tribe, the court either on its own motion or the motion of any party, may subpoena and request the advice of elders and counselors familiar with those customs and usages."<sup>65</sup> This practice is in sharp contrast to that followed in state and federal courts.

Tribal judges are not constrained only to apply customary law, however, but increasingly create tribal common law in a wide variety of settings. It is often difficult to distinguish between tribal customary or traditional and common law. The Winnebago Tribal Code uses the term "common law" to include both customary and what a state court would consider as common law:

The customs and traditions of the tribe, to be known as the tribal common law, as modified by the tribal constitution and statutory law, judicial decisions, and the condition and wants of the people, shall remain in full force and effect within the tribal jurisdiction in like force with any statute of the tribe insofar as the common law is not so modified, but all tribal statutes shall be liberally construed to promote their object.<sup>66</sup>

Where possible, I have distinguished decisions clearly invoking traditions of the tribe, whether those traditions were clearly linked to the past or reflect present needs, and opinions in which the court relies on previous judicial decisions or creates common law to fill the interstices of a tribal statutory scheme. Of course, even in opinions in which the reasoning appears indistinguishable from Anglo common law opinions, the choice to adopt or create a rule to solve the problem before the court is inescapably tied to the context of the case within the tribal system and of the parties within that system. As Gloria Valencia-Weber has said: "The legal reasoning based on custom can also result in outcomes facially indistinguishable from those based on federal or state law. One must distinguish external form from internal substance to appreciate how the outwardly similar is not so."<sup>67</sup>

An excellent example is *Castillo v. Charlie*, in which the Navajo Supreme

65. CODE OF THE WINNEBAGO TRIBE OF NEBRASKA § 2-111, *quoted in* Rave v. Reynolds, 23 Indian L. Rep. 6150, 6156 (Winnebago Sup. Ct. 1996).

66. CODE OF THE WINNEBAGO TRIBE OF NEBRASKA § 2-104, *quoted in* Rave v. Reynolds, 23 Indian L. Rep. 6150, 6157 (Winnebago Sup. Ct. 1996).

67. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 250 (1994).

Court affirmed the lower court's decision holding the owner of livestock liable for damage to a pickup truck incurred when the truck collided with a cow and bull which had wandered onto Navajo Route 9.<sup>68</sup> The issues discussed by the Supreme Court — whether the livestock owner had a duty to prevent the livestock from roaming on the highway, whether the accident was foreseeable, whether the driver was comparatively negligent, and whether the damages had been proven with reasonable certainty — mirrored similar discussions of the common law in a state court system, with citations to previous Navajo court cases instead of to state cases. The discussion of the Navajo Grazing Code, with respect to a closed grazing area, and the defendants' attempts to get the Navajo Nation to fix the cattle guards, as well as the reasonable expectations of someone driving in a closed rather than an open grazing range, were influenced both by life in a rural area as well as the relationships of all the members of a tribal community. Clearly sympathetic to the defendants' unsuccessful attempts to get the Nation to fix the problem, the court concluded that these attempts demonstrated the defendants knew what harm could result and held that the defendants had the duty to repair the fence, replace the gate, or install a cattle guard: "If they had done so, they would not have to chase cattle all night to prevent them from trespassing onto the road . . . ."<sup>69</sup>

Assuming that the conscious invocation of traditional law in a case reflects a tribal judge's attempt to link her present role to the tribe's traditional culture or otherwise to highlight the tribe's difference from the dominant culture, I think it is worth discussing these opinions separately. Customary law plays an important role in tribal adjudication in three major ways: (1) as the rule of decision in a case; (2) as a touchstone in analyzing the extent of an adoption of a state or federal norm in tribal court as tribal common law; and (3) as an aid in interpreting tribal law, including tribal sovereign immunity and civil rights laws, both tribal civil rights laws and those embodied in the Indian Civil Rights Act.

Perhaps because so many of the opinions printed in the *Indian Law Reporter* involve procedural issues and questions of first impression, only a few of the decisions in my sample were based solely on tribal customary or common law.<sup>70</sup> Resolution of customary law cases often takes place non-

68. 23 Indian L. Rep. 6001 (Navajo Sup. Ct. 1995).

69. *Id.* at 6002.

70. In addition to *Castillo*, see *Seneca Nation v. Williams*, 23 Indian L. Rep. 6254 (Seneca Peacemakers Ct. 1996). The *Seneca Nation* case is illustrative of differences between tribal and state common law. In holding that land on which a non-Indian had built a cottage was the common property of the Seneca Nation and issuing an order prohibiting the defendant from occupying the property and a civil penalty for trespass, the court noted that the defendant had not established a claim for adverse possession against the tribe, because the defendant had not occupied the property for a sufficient length of time. *Id.* at 6256. In so entertaining an adverse possession claim, the tribal court adopted a rule rejected by state and federal adverse possession



judicially or in traditional courts whose opinions are not published. Also, resolution of some disputes turning on tribal customary law may require the discussion of matters not appropriately revealed to outsiders.<sup>71</sup>

Although rarely the ratio decidendi of the published tribal cases, tribal traditions are often invoked when a tribal court examines a state or federal norm to determine whether the norm should be adopted in tribal court as tribal common law. Although tribal judges, many of whom are not tribal members, may lack familiarity with tribal law, invocations of tribal traditions can be a very powerful method of grounding the legitimacy of tribal decisions in tribal cultures, as well as tribal statutes and constitutions. Counsel, too, must make these links to traditional or customary law. In *Walker River Paiute Tribe v. Jake*,<sup>72</sup> the criminal defense attorney may have missed an opportunity to use Northern Paiute or Walker River custom or tradition to persuade the tribal court to adopt a twenty-four-hour, rather than forty-eight-hour, time period for holding a criminal defendant without a probable cause hearing. Chief Judge Johnny adopted the forty-eight-hour rule enunciated by the Supreme Court in *County of Riverside v. McLaughlin*,<sup>73</sup> in part because neither party had drawn the court's attention to any customs that might persuade it to adopt the shorter period. In the absence of any such persuasive authority, the court was much influenced by the realities of reservation life, in particular that "while this is the second largest Indian reservation in the state of Nevada . . . there are presently only two tribal policemen . . ."<sup>74</sup>

A striking example of sensitivity to tribal traditions is *Middlemist v. Member of the Tribal Council of the Confederated Salish and Kootenai Tribes*,<sup>75</sup> a case illustrating the tremendous importance of tribal courts as vehicles to educate the non-Indian as well as tribal public. The case involved a pre-enforcement challenge to a tribal regulatory ordinance. Several non-Indian residents of the Flathead reservation and an organization of members of three irrigation districts filed suit in federal district court, arguing that the tribe had no jurisdiction to apply its conservation ordinance to the use of aquatic lands by non-Indian fee owners under the principles of *Oliphant*<sup>76</sup> and

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doctrines, in which adverse possession can never run against the sovereign.

71. I recall a long discussion about a potential property claim with a tribal member of one of the Pueblos. The land was within the tribe's ancient land and had spiritual significance to the group. Although there were some promising avenues of federal Indian law on which to base a claim, my informant was forbidden to tell anyone where the land was or why it was significant religiously.

72. 23 Indian L. Rep. 6204 (Walker River Tribal Ct. 1996).

73. 500 U.S. 44, 53 (1991).

74. *Jake*, 23 Indian L. Rep. at 6206.

75. 23 Indian L. Rep. 6141 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

76. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that tribes have lost some authority over non-Indians by virtue of their dependent status, including criminal jurisdiction over non-Indians).

*Montana*.<sup>77</sup> The district court required them to exhaust their tribal remedies<sup>78</sup> under the principles of *National Farmers Union*<sup>79</sup> and *Iowa Insurance*.<sup>80</sup> At issue in the tribal court was whether the plaintiffs must exhaust their administrative remedies by seeking a permit from the Shoreline Protection Board created by the tribal ordinance, the Aquatic Lands Conservation Ordinance (ALCO), before asking for a declaration that the ordinance could not be applied to the non-Indian fee owners.

The tribal court required the plaintiffs to apply for a permit before challenging the statute. Under ordinary (i.e., non-tribal) administrative law principles as well as federal justiciability doctrines such as ripeness, ample precedent exists to require exhaustion before a regulatory body. The court did not solely rely on federal cases, but consciously referred to traditions of many indigenous peoples reaching consensus by persuasion and inspiration. The court noted that fewer than one percent of the applications had been denied to date and stressed that the process permits the Indian and non-Indian parties to better understand each other's interests, so that the tribes "may be willing to allow projects that have some adverse effect on tribal interests if the tribes have a full understanding of the interests of the non-Indian."<sup>81</sup> The court ended this discussion by noting: "We are not so naive as to believe that peace and harmony will reign in all matters as a result of each party understanding the position of the others. However, we do believe that some unnecessary litigation will be avoided."<sup>82</sup> Although the court referred to the *Handbook of Federal Indian Law*,<sup>83</sup> not to specific traditions of the Salish and Kootenai people, it is well-known that indigenous cultures generally resolve issues by consensus.<sup>84</sup> While it is important to avoid essentializing tribal people, it

77. *Montana v. United States*, 450 U.S. 544 (1981) (holding tribes lack inherent authority to regulate non-Indian activities on fee-land absent a consensual relationship or an interference with the political integrity, economic security, or health and welfare of the tribe).

78. *Middlemist v. Secretary, DOI*, 824 F. Supp. 940 (D. Mont. 1983), *aff'd* 19 F.3d 1318 (9th Cir. 1994).

79. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (holding those challenging tribal inherent authority under the *Oliphant/Montana* line of cases must give the tribal court the opportunity to address the issue before going to federal court).

80. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (extending exhaustion requirement to diversity cases).

81. *Id.* at 6143.

82. *Id.*

83. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 230 (Rennard Strickland et al. eds., 1982).

84. Several of the articles cited *supra* note 39 discuss the importance of consensus in traditional decision making. In addition, see Philmer Bluehouse and James W. Zion, Hozooji Naar'aanii: *The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993) (explaining the Navajo peacemaking process); Emily Mansfield, *Balance and Harmony: Peacemaking in Coast Salish Tribes of the Pacific Northwest*, 10 MEDIATION Q. 339 (1993) (explaining how three tribes traditionally settled inter-tribal and inter-family disputes); Catherine Rice, *Lakotas and Euroamericans: Contrasted Concepts of "Chieftainship" and Decision-Making*



does seem permissible for a court to take judicial notice of such well-accepted indigenous traditions. Making this appeal in the case of the Flathead irrigators seems particularly apt since their attack on tribal authority appears to be grounded in mistrust of the entire tribal judicial system with, as the court pointed out in the opinion, very little reason other than a willingness to label a system that might be different as inferior.

Although the *Middlemist* opinion is the most interesting of those invoking tribal tradition to determine whether to adopt state or federal norms, several other opinions referred to traditions in deciding the extent to which federal norms apply, particularly with respect to the Indian Civil Rights Act and sovereign immunity. A fuller discussion of these cases is contained in a separate section of this paper.<sup>85</sup>

Several of the opinions referred either to specific or general indigenous traditions in interpreting applicable law, or as an alternative ground of decision in a case in which tribal statutory law provided the *ratio decidendi*. Tribal cultural differences are most obviously marked in property and family law cases. Thus it is not surprising that an opinion deciding title to real property, *St. Regis Mohawk v. Basil Cook*,<sup>86</sup> and several family law cases referred to tribal traditions. *In re Felsman*<sup>87</sup> is an interesting family law case. In a contest between two non-Indian couples, one a heterosexual couple and the other a lesbian couple, for custody of two Salish & Kootenai children whose mother had committed suicide, the court granted temporary guardianship to the lesbian couple. There were grounds for disqualifying the heterosexual couple: the woman was ill and had not complied with discovery regarding her medical condition, and she and her husband did not have a preexisting relationship with the children. Yet the court also stressed that the lesbian couple, who had been close to the mother and knew the children, was "willing to provide the children with the unique values of Indian culture."<sup>88</sup>

Although one would expect discussions of tribal tradition in these family

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Authority, 41 ETHNOHISTORY 447 (1994) (explaining the importance of consensus within the leadership structure of Lakota society and the resulting inability of Euroamericans to understand this reliance on consensus); Sandra Robinson-Weber, *Native-Americans Before the Bench: The Nature of Contrast and Conflict in Native-American Law Ways and Western Legal Systems*, SOC. SCI. J., July 1982, at 47 (discussing differences between Indian and American law and noting the social and community influences on Indian law).

85. See *infra* notes 209-48 and accompanying text.

86. 23 Indian L. Rep. 6172, 6173-74 (St. Regis Tribal Ct. 1996) (relying on a contract, the Indian Gaming Regulatory Act, the Tribal Constitution, New York law and the "ancient Mohawk practice which has been that all tribal lands are community property with tribal members enjoying use and occupancy rights" to decide that land on the reservation purchased and put in the name of a development corporation in order to obtain financing for construction of a casino reverted to the tribe after the tribe had reimbursed the corporation for all development costs).

87. *In re Felsman*, 23 Indian L. Rep. 6086 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

88. *Id.* at 6087.

law and property cases, Chief Justice Robert Clinton of the Winnebago Supreme Court relied on tribal tradition to decide what may seem a quintessential Western legal concept — standing. The Burger and Rehnquist courts have considerably tightened standing doctrine to make it very difficult for a taxpayer or voter to obtain standing or for a litigant to raise the rights of third parties. In *Rave v. Reynolds*<sup>89</sup> the Court borrowed some of this standing doctrine but relied on tribal tradition to support an arguably broader standing doctrine.<sup>90</sup> The Court's rationale was a simple one: making it too difficult to get into court violates the tribal tradition of full participation in dispute resolution in a context designed to prevent friction and promote healing.<sup>91</sup> In deciding that voters had standing to challenge a tribal election and procedures, Justice Clinton observed:

The Winnebago tribal traditions of affording maximum opportunity through family, clan or council deliberations to air, heal and resolve other types of disputes within the community, however, counsel against this court adopting the same narrow limiting standing rules applied in federal courts. In small, close-knit tribal communities, like the Winnebago Tribe of Nebraska, denying an opportunity to air and heal grievances in a neutral forum otherwise possessed of jurisdiction, such as the tribal courts, could have disruptive effects by sowing dissension, hostility and distrust that otherwise could be ameliorated by airing and resolving the dispute.<sup>92</sup>

Unlike most of the cases involving difficult questions of mixed tribal and statutory law, which focus more on interpretation of the statutes and federal common law, the *Rave* opinion is replete with other references to tribal traditions. *Rave* and other cases involving election disputes, other civil rights, and constitutional law questions are discussed in part IV.

89. 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996).

90. The Court did note that under its reading of the federal standing doctrine involving election disputes the individual plaintiffs and the association would probably be granted standing, at 6159, but its citation to Supreme Court cases did include one rather important "but see": *United States v. Hays*, 115 S. Ct. 2431 (1995) (limiting standing to challenge gerrymandering to those living inside the district).

91. The court also noted that unduly strict standing requirements keep litigants from pressing important claims; moreover, the strict standing requirement in federal courts is also designed to preserve the autonomy of state courts, which is not an issue in tribal court. *Rave*, 23 Indian L. Rep. at 6158.

92. *Id.* The *Rave* court overturned the lower court's invalidation of tribal election ordinance requiring a person from voting or attending more than one caucus and the lower court's declaration that one council member's seat was vacant because his actions in the election dispute violated due process. This complicated case resolving a serious election controversy is more thoroughly discussed *infra* notes 272-74 and accompanying text.



*b) Tribal Statutes and Rules of Procedure*

Most tribal court opinions resolved questions of tribal statutory law or procedural law.<sup>93</sup> As Robert Porter has argued in a recent article,<sup>94</sup> tribal procedures have been modeled on state and federal procedures, a practice he decries as a fatal step down the long road to assimilation because procedural rules are designed to promote the goals of an adversary system of justice, which is antithetical to traditional tribal dispute resolution. While he argues that such procedures may play a role in tribal court cases involving commercial issues,<sup>95</sup> or resolving disputes between members of different

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93. Most opinions dealt with ancillary procedural issues, such as the appropriate standard of review of trial court findings of fact or conclusions of law. *See, e.g.,* Dorff v. Dorff, 23 Indian L. Rep. 6081 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (setting forth standards applicable in reviewing child support modification orders). Procedural issues predominated in some of the published opinions. *See* Lawrence v. Lawrence, 23 Indian L. Rep. 6251 (Cheyenne River Sioux Ct. App. 1996) (invoking tribal code provision providing for continuing jurisdiction in divorce cases involving children to reverse tribal court's refusal to reopen property settlement); Cheyenne River Sioux Tribe Bd. of Police Comm'rs v. Thompson, 23 Indian L. Rep. 6002 (Cheyenne River Sioux Ct. App. 1995) (issuing order requiring clerk of courts to maintain a civil docket book in which judgments are entered to facilitate ascertaining dates for timely appeals); Laramie v. Colville Confederated Tribes, 23 Indian L. Rep. 6250 (Colville Ct. App. 1995) (holding that absence of statutory procedure bars appellate court from deciding questions certified to it by the tribal court and remanding for trial). Some cases were decided on purely procedural grounds, however. *See* Navajo Nation v. Hunter, 23 Indian L. Rep. 6005 (Navajo Sup. Ct. 1995) (interpreting Navajo code provision excepting "court holidays" from time counted for purposes of timely appeal of criminal conviction as including days court is closed for judicial conference); Cheyenne River Sioux Tribe v. Handyboy, 23 Indian L. Rep. 6007 (Cheyenne River Sioux Ct. App. 1995) (clarifying rules of timely appeal and proper service under the CHEYENNE RIVER SIOUX TRIBAL R. CIV. P. 84); Brehmer v. White Wolf, 23 Indian L. Rep. 6073 (Cheyenne River Sioux Ct. App. 1993) (relying on court's supervisory authority to vacate lower court's temporary restraining order issued even though plaintiff had not filed a complaint); Baylor v. Confederated Salish and Kootenai Tribes, 23 Indian L. Rep. 6221 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (dismissing appeal on grounds denial of motion to dismiss is not an appealable order); *In re Felsman*, 23 Indian L. Rep. 6086 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (overturning tribal court dismissal of adoption proceeding without a hearing as violative of tribal code adoption proceedings); Urbanec v. Winnebago Tribe of Nebraska, 23 Indian L. Rep. 6244 (Winnebago Sup. Ct. 1996) (dismissing appeal as not timely filed). Opinions in criminal cases also involved procedural issues other than civil rights. *See, e.g.,* Elk Nation v. Chasing Hawk 23 Indian L. Rep. 6085, 6085 (Cheyenne River Sioux Ct. App. 1994) (denying defendant's motion for a stay pending appeal of contempt on grounds stay is an extraordinary remedy authorized by the CHEYENNE RIVER SIOUX TRIBAL R. CIV. P. 60, 84 only "in those cases in which manifest injustice would result if no stay were issued"); Confederated Salish & Kootenai Tribes v. Devereaux, 23 Indian L. Rep. 6099 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (affirming conviction on grounds trial judge had committed harmless error in refusing to reconvene to clarify jury instructions in violation of TRIBAL LAW & ORDER CODE R. J9(5), because instructions were otherwise clear).

94. Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

95. *See* Clown v. Coast to Coast, 23 Indian L. Rep. 6055 (Cheyenne River Sioux Ct. App.

tribes or non-Indians and tribal members, he is especially concerned about using an adversary model for intra-Indian disputes. The reported decisions, whether intra-tribal or involving disputes with non-members, do support his observation that tribal procedures are heavily influenced by state and federal law.<sup>96</sup> When applying federal or state procedures as persuasive authority, several of the opinions adapt the procedure to the tribal setting or otherwise note that the procedural rules should not be applied with rigidity. Many times the courts merely applied the procedural norm without comment.<sup>97</sup>

In addition to purely procedural issues, tribal courts also resolved questions in the grey area between substance and procedure, such as statutes of limitations,<sup>98</sup> survival of tort actions,<sup>99</sup> and interpretation of statutory waivers of sovereign immunity. For example, many of the Mashantucket Pequot cases interpreted the tribe's Tribal Sovereign Immunity Waiver Ordinance.<sup>100</sup>

1993) (holding that debt collection proceedings as a whole in a trial court in which neither party was represented by counsel violated the defendant's due process rights in violation of the ICRA and establishing guidelines to ensure due process in similar cases in the future). The plaintiff in *Clown*, a non-Indian who operated a business on the reservation, sued the defendant, a member of the Tribal Council, in tribal court to collect a debt. The court of appeals chastised the tribal court judge for "leading and directive questions" premised on an assumption of defendant's guilt. Robert Porter might well agree with this opinion because of the setting of the case. In a case involving only tribal members, however, he would perhaps want the tribal judge to have the kind of latitude exercised by the tribal judge in *Clown*. He contrasts traditional dispute mechanisms in which a judge can be an interested mediator bringing her own moral power to bear on the dispute with the adversary system's requirement of an impartial judge. PORTER, *supra* note 94, at 280. In tribal communities, judges frequently know one or both parties. For example, in *Clown*, it appears the judge knew the defendant True Clown.

96. See *Bartell v. Kerr*, 23 Indian L. Rep. 6209, 6210 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (noting that the newly enacted tribal survival statute "varies in no significant way" from Montana's survival statute).

97. See, e.g., *Bartell v. Kerr*, 23 Indian L. Rep. 6209, 6209 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (applying the harmless error standard for reviewing a tribal court failure to grant a directed verdict by referring to "caselaw from other jurisdictions").

98. See, e.g., *Mirabal v. Rael*, 23 Indian L. Rep. 6203 (Southern Ute Tribal Ct. 1996) (barring suit for child support enforcement to bar suit by state agency seeking reimbursement for AFDC benefits three years after the last AFDC payment had been made); *Watts v. Sloan*, 23 Indian L. Rep. 6033 (Navajo Sup. Ct. 1995) (applying the tribe's tort statute of limitations of two years to legal malpractice case).

99. *Bartell v. Kerr*, 23 Indian L. Rep. 6209 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

100. The tribe's Sovereign Immunity Waiver Ordinance permits claims for money damages for personal injuries if the injury would constitute a tort under Connecticut law and is covered by the tribe's liability insurance. The ordinance limits damage awards for pain and suffering or anguish to 50% of the amount of actual damages. See *Towpasz v. Mashantucket Pequot Tribal Enter.*, 23 Indian L. Rep. 6032 (Mashantucket Pequot Tribal Ct. 1994) (interpreting the waiver ordinance covering only actual damages and limiting damages for pain and suffering to 50% of the actual damages as not covering damages resulting from scarring sustained from an accident). Like the state and federal courts, the tribal court construes the waiver strictly. See *Lefevre v. Mashantucket Pequot Tribe*, 23 Indian L. Rep. 6018



Other statutory issues of importance included cases concerning the interpretation of tribal regulatory laws.<sup>101</sup> Fifteen of the opinions addressed employment law issues, usually cases challenging the termination of employees, but also cases based on tribal employment codes requiring accommodation of disabilities or protection of classes of employees from discrimination.<sup>102</sup> While most of these involved casino employees,<sup>103</sup> other

(Mashantucket Pequot Tribal Ct. 1992) (holding waiver of sovereign immunity to be jurisdictional and dismissing personal injury claim brought for injury occurring before the statute was enacted); *Jenkins v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6015 (Mashantucket Pequot Tribal Ct. 1993) (granting motion for summary judgment for failure to timely file personal injury claim); *St. Jean v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6030 (Mashantucket Pequot Tribal Ct. 1993) (same); *Casillo v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6036 (Mashantucket Pequot Tribal Ct. 1994) (same); *Maddelena v. Foxwoods Casino*, 23 Indian L. Rep. 6093 (Mashantucket Pequot Tribal Ct. 1994) (same); *Macaruso v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6117 (Mashantucket Pequot Tribal Ct. 1994) (same); *Middleton v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6118 (Mashantucket Pequot Tribal Ct. 1994) (same); *Eosso v. Foxwoods High Stakes Bingo & Casino*, 23 Indian L. Rep. 6027 (Mashantucket Pequot Tribal Ct. 1994) (ordinance does not waive sovereign immunity for tribe, only gaming enterprise; claim dismissed); *Tajildeen v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6030 (Mashantucket Pequot Tribal Ct. 1993) (denying tribe's motion to dismiss on grounds plaintiff's amended complaint was timely).

101. *See Pouley v. Confederated Tribes of the Colville Reservation*, 23 Indian L. Rep. 6143 (Colville Tribal Ct. 1996) (interpreting tribal membership ordinance); *In re JRB*, 23 Indian L. Rep. 6103 (Cheyenne River Sioux Ct. App. 1996) (noting tribe's comprehensive Children's Code established new standards, including that there is no need to prove harm to children from parent's alcohol abuse and affirming termination of parental rights); *Safe Ride Services, Inc. v. Todachine*, 23 Indian L. Rep. 6253 (Navajo Sup. Ct. 1996) (interpreting Navajo employment preference law); *Brehmer v. White Wolf*, 23 Indian L. Rep. 6073 (Cheyenne River Sioux Ct. App. 1993) (vacating temporary restraining order in dispute over tribal grazing rights).

102. *See, e.g., Ho-Chunk Nation Personnel Policies and Procedures*, HCN Legislature Resolution No. 2/15/96C equal employment policy, barring discrimination based on sex, race, religion, national origin, pregnancy, age, marital status, sexual orientation, or physical handicap, *quoted in Simplot v. Ho-Chunk Nation Dep't of Health*, 23 Indian L. Rep. 6235, 6238 (Ho-Chunk Tribal Ct. 1996).

103. *Cholka v. Ho-Chunk Gaming Comm'n*, 23 Indian L. Rep. 6075 (Ho-Chunk Tribal Ct. 1996) (reversing employee's suspension because of failure to give notice as required by Gaming Ordinance employment provisions); *Creapeau v. Ho-Chunk Nation-Rainbow Casino*, 23 Indian L. Rep. 6078 (Ho-Chunk Tribal Ct. 1996) (holding notice given to employee regarding suspension fulfilled the tribe's Personnel Procedures Manual); *Kingsley v. Ho-Chunk Nation Personnel Dep't*, 23 Indian L. Rep. 6113 (Ho-Chunk Tribal Ct. 1996) (upholding personnel commission's order to reinstate employee, but rejecting employee's argument that she was not placed in a comparable position); *Decorah v. Rainbow Casino*, 23 Indian L. Rep. 6128 (Ho-Chunk Tribal Ct. 1996) (holding ordinance did not waive sovereign immunity for review of personnel commission decisions); *Frogg v. Ho-Chunk Casino*, 23 Indian L. Rep. 6197 (Ho-Chunk Tribal Ct. 1996) (upholding termination of employee for excessive absences); *Rowlee v. Majestic Pines Casino*, 23 Indian L. Rep. 6218 (Ho-Chunk Tribal Ct. 1996) (holding tribe made a good faith effort to accommodate plaintiff's disability as required by the Tribal Personnel Policy and Procedures Manual); *Simplot v. Ho-Chunk Nation Dep't of Health*, 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996) (ordering reinstatement of employees terminated in violation of the manual and due process). Although the Ho-Chunk cases relied on the tribe's Policy and Procedure Manual as the

cases, several of them significant, arose in other tribal employment contexts.<sup>104</sup> Frequently tribal courts turned to common law to fill in the interstices of the statutory scheme. For example, several cases from the Mashantucket Pequot Tribal Court involved the extent to which an employee who resigned voluntarily can appeal his termination from employment in the tribe's Gaming Enterprise by arguing that his resignation was coerced or otherwise proffered under duress. In each case the tribal court turned to common law as expressed in federal and state opinions setting standards for what conduct constitutes coercion.<sup>105</sup>

Although tribes require exhaustion of administrative remedies before seeking review in tribal court, the Ho-Chunk Tribe held that exhaustion was not necessary in a sensitive case involving a tribal agency reorganization plan, because on the facts of the case, exhaustion would be futile.<sup>106</sup> Although tribal courts frequently upheld the tribal termination of employees, employees won some significant victories.<sup>107</sup> In *Brooks v. Yellow Cloud Residential*

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source of the binding norms, apparently the Ho-Chunk Tribe's manual was a product of Council Resolution, see *Simplot v. Ho-Chunk Nation Dep't of Health*, 23 Indian L. Rep. 6235, 6238 (Ho-Chunk Tribal Ct. 1996).

The Mashantucket Pequot Tribal Court produced several employment cases as well. See *Fickett v. Brown*, 23 Indian L. Rep. 6190 (Mashantucket Pequot Tribal Ct. 1995) (upholding termination of beverage server who "charged" for free drinks); *Mitchell v. Brown*, 23 Indian L. Rep. 6215 (Mashantucket Pequot Tribal Ct. 1995) (upholding termination for cause of floor supervisor aware of theft scheme); *McLean v. Brown*, 23 Indian L. Rep. 6229 (Mashantucket Pequot Tribal Ct. 1995) (upholding motion to dismiss on grounds tribal Temporary Emergency Employment Appeal Ordinance does not permit an employee to contest a voluntary resignation absent a showing of duress or coercion); *Busch v. Brown*, 23 Indian L. Rep. 6246 (Mashantucket Pequot Tribal Ct. 1995) (same); *Dulin v. Brown*, 23 Indian L. Rep. 6132 (Mashantucket Pequot Tribal Ct. 1995) (dismissing appeal of termination as not timely).

104. See *Lovermi v. Miccosukee Tribe*, 23 Indian L. Rep. 6090 (Miccosukee Tribal Ct. 1996) (dismissing appeal of employment termination board decision because tribe had not waived sovereign immunity); *Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs*, 23 Indian L. Rep. 6045 (Cheyenne River Sioux Ct. App. 1996) (interpreting tribal ordinance barring convicted felons from law enforcement positions as applicable to detention officers); *Brooks v. Yellow Cloud Residential Ctr.*, 23 Indian L. Rep. 6035 (Colville Admin. Ct. 1995) (ordering employee reinstated with back pay because of violation of Code of Conduct); *Kizer v. Walker River Hous. Auth.*, 23 Indian L. Rep. 6214 (Inter-Tribal Ct. App. Nev. 1996) (remanding for determination of whether employee's termination violated due process).

105. The cases involved "raked games," in which casino employees had participated in off-tribe games for profit. See *Busch v. Brown*, 23 Indian L. Rep. 6246, 6247-48 (Mashantucket Pequot Tribal Ct. 1995) (upholding tribal court finding after evidentiary hearing that senior level employee offered the opportunity to resign with a clean record or be terminated and possibly lose gaming license was not coerced); *McLean v. Brown*, 23 Indian L. Rep. 6229, 6230-31 (Mashantucket Pequot Tribal Ct. 1995) (same).

106. *Simplot v. Ho-Chunk Nation Dep't of Health*, 23 Indian L. Rep. 6235, 6240 (Ho-Chunk Tribal Ct. 1996). This case, ordering terminated employees reinstated with back pay in politicized tribal reorganization context is discussed more fully at *infra* notes 246-48 and accompanying text.

107. See *Cholka v. Ho-Chunk Gaming Comm'n*, 23 Indian L. Rep. 6075 (Ho-Chunk Tribal



*Center*,<sup>108</sup> the Colville Administrative Court reinstated an employee terminated in violation of the tribe's Personnel Manual and the protections of due process in the Tribe's Law and Order Code, stating: "The court is very protective of employee rights and has in the past required programs to follow procedures very narrowly."<sup>109</sup>

Cases requiring interpretation of tribal statutes also raised difficult questions regarding the jurisdiction of tribal courts, waiver of sovereign immunity, the scope of the Indian Civil Rights Act, and the role of the tribal court in interpreting the tribe's constitution. These cases typically mix issues of tribal and federal law and require great judicial sensitivity both to the role of the court in the tribe's political system and public acceptance of tribal courts as justice-administering institutions. Because of these multiple sources of law and the potential high-profile of the cases, they will be discussed later.

### 3. *The Law of Other Tribes*

Tribal court opinions increasingly refer to the decisions of other tribal courts when seeking persuasive authority in a case of first impression. As noted above, some tribal codes direct tribal courts to consider the law of other tribes *before* considering state law. But even without such direction, many judges have begun to refer to the law of other tribes in a wide variety of cases. In *Lovermi v. Miccosukee Tribe*,<sup>110</sup> holding that the tribe had not waived its sovereign immunity to permit review of the tribal Personnel Board's decision upholding a termination of employment, the court first cited an earlier Miccosukee tribal court case but then turned to consider: "[A]dditional legal precedent from sister tribal courts to support [defendants'] argument. A review of [these cases] may shed some light and show how other tribal judicial systems have dealt with this issue."<sup>111</sup> These references seem particularly apt in cases, such as *Lovermi*, touching upon issues of great importance to all tribes, such as sovereign immunity<sup>112</sup> or the meaning of

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Ct. 1996) (reversing employee's suspension because of failure to give notice as required by Gaming Ordinance employment provisions); *Creapeau v. Ho-Chunk Nation-Rainbow Casino*, 23 Indian L. Rep. 6078 (Ho-Chunk Tribal Ct. 1996) (holding notice given to employee regarding suspension fulfilled the tribe's Personnel Procedures Manual); *Simplot v. Ho-Chunk Nation Dep't of Health*, 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996) (ordering reinstatement of employees terminated in violation of the manual and due process). *Brooks v. Yellow Cloud Residential Ctr.*, 23 Indian L. Rep. 6035 (Colville Admin. Ct. 1995) (ordering employee reinstated with back pay because of violation of Code of Conduct).

108. 23 Indian L. Rep. 6035 (Colville Admin. Ct. 1995) (holding employer must give employee notice of specific violation such that a reasonable person could have understood the accusation).

109. *Id.* at 6036.

110. 23 Indian L. Rep. 6090 (Miccosukee Tribal Ct. 1996).

111. *Id.* at 6091.

112. *See, e.g., Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs*, 23 Indian L. Rep. 6045, 6048 (Cheyenne River Sioux Ct. App. 1996) (citing with approval Colville

due process of law in the tribal context. In *Colville Confederated Tribes v. Wiley*,<sup>113</sup> the court considered a Ponca Tribal Court case discussing the meaning of due process, cautioning: "parties to this action should be cautious in evaluating due process in Anglo terms."<sup>114</sup> In a difficult political case, *Colville Confederated Tribes v. Meusy*, the court looked solely to other tribal court opinions in deciding whether the separation of powers doctrine should apply in the tribal context.<sup>115</sup> Tribal courts also consider the opinions of sister tribal courts, considering whether to endorse or distinguish them<sup>116</sup> on more mundane matters. Almost every tribal appellate court opinion I read referred to other tribal court opinions.<sup>117</sup> As more tribal court opinions are available, one may expect this reliance on other tribal court opinions to displace reliance on state decisions.

#### 4. State Law in Tribal Courts: The Influence of State Law in Developing Tribal Law

Although many of the decided opinions refer to state or federal norms as persuasive authority, the courts often do not discuss the extent to which these norms are consistent with tribal customary law. Given that tribal courts continue to operate as institutions of assimilation as well as to reflect the assimilation of tribal people into the dominant culture, tribal courts looking for a solution to a knotty problem may automatically consider Western common law as expressing common-sense solutions to the problems of

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*Confederated Tribes v. Stock West*, 21 Indian L. Rep. 6075 (Colville Tribal Ct., 1994), interpreting similarly worded tribal sovereign immunity ordinance); *Kizer v. Walker River Hous. Auth.*, 23 Indian L. Rep. 6214 (Inter- Ct. App. Nev. 1996) (adopting the rationale of *Dubray v. Rosebud Hous. Auth.*, 12 Indian L. Rep. 6015 (Rosebud. Ct. 1985) in holding that a "sue and be sued" clause in a tribal ordinance creating a housing authority did not waive tribal sovereign immunity).

113. *Colville Confederated Tribes v. Wiley*, 23 Indian L. Rep. 6037 (Colville Tribal Ct. 1996) (Wynne, C.J.) (granting defendant's motion to dismiss a misdemeanor charge of possession of alcohol because defendant was prejudiced due to the insufficiency of the citation given him.

114. *Id.* at 6037 n.4.

115. *Colville Confederated Tribes v. Meusy*, 23 Indian L. Rep. 6223 (Colville Tribal Ct. 1996); see also *Rave v. Reynolds*, 23 Indian L. Rep. 6150, 6155 (Winnebago Sup. Ct. 1996).

116. See, e.g., *Baylor v. Confederated Salish & Kootenai Tribes*, 23 Indian L. Rep. 6221 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (distinguishing *Dupree v. Cheyenne River Hous. Auth.*, 16 Indian L. Rep. 6106 (Cheyenne River Sioux Ct. App. 1988) and refusing to adopt the federal rule permitting interlocutory appeals in certain circumstances); see also *Colville Confederated Tribes v. Tatshama*, 23 Indian L. Rep. 6211 (Colville Tribal Ct. 1996) (examining the tribal codes of tribes in the region to determine whether they provided for deferred prosecution).

117. See, e.g., *Colville Confederated Tribes v. Meusy*, 23 Indian L. Rep. 6223, 6224 (Colville Tribal Ct. 1996) (citing *Moran v. Council of the Confederated Salish & Kootenai Tribes*, 23 Indian L. Rep. 6149 (Confederated Salish & Kootenai Tribes Ct. App. 1995) (interpreting tribal code provision authorizing court to interpret the law as including the power of judicial review).



everyday life. In such opinions it is difficult to determine whether the court made a separate assessment of whether those norms are consistent with the tribe's past traditions and present needs.

As noted earlier, some tribal codes still point the court toward state law. Nevertheless, even these code provisions may contain discretionary language. For example, the Salish & Kootenai statute provides for application of tribal law, federal law where necessary, and then notes that the tribal court "may" decide the case according to the laws of Montana. In several cases the court referred to Montana precedents but did not adopt them blindly. For example, *Lulow v. Peterson*<sup>118</sup> involved a claim for palimony by Robert Lulow, who argued that he and Delores Peterson had an implied-in-fact contract to pool resources during the years they lived together. They shared resources: he worked on her property, including seventy-five acres belonging to the children of her first marriage, which she managed; she worked in his business, Bob's Auto Mart, as a bookkeeper, and both of them helped to raise children from each of their previous families. After their six-year relationship ended, Mr. Lulow sued for compensation of up to \$60,000 on several theories of express and implied contract. (Apparently Ms. Peterson had sold her house and five acres and the surrounding land owned by her children for \$225,000). The trial court dismissed his claim, applying Montana case law establishing a presumption against finding intent to contract in this type of case. Noting that Montana had developed "reasonable, fair principles to apply to the domestic situation before the court,"<sup>119</sup> the court of appeals agreed with the trial court's adoption of the Montana presumption, but drawing on Montana law, the court held that the trial court erred in granting summary judgment with so many material issues of fact remaining regarding the parties' relationship. In short, although recognizing the difficulties in overcoming the Montana presumption against finding a contractual relationship, Judge Wheelis, writing for the court of appeals, remanded for further findings and a determination of whether the parties had an express or implied agreement or whether the court should impose one to compensate Mr. Lulow for his expenses in improving Ms. Peterson's property.

In *Bick v. Pierce*,<sup>120</sup> the court of appeals upheld a tribal jury damage award of \$199,834.30 for injuries suffered by a tribal journalist in an automobile accident. The plaintiff's injuries were so substantial that even the defendant's own expert witness testified that the plaintiff suffered permanent injury. In fact, the defendant's medical evidence was stronger for the plaintiff than the plaintiff's own doctor's testimony. In upholding the award of \$150,000 for pain and suffering, Chief Justice Perego cited Montana precedents regarding measurement of damages for pain and suffering and

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118. 23 Indian L. Rep. 6200 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

119. *Id.* at 6201.

120. 23 Indian L. Rep. 6175 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

went into considerable detail in justifying the award as fair. The court noted that the plaintiff had forty-seven years of life expectancy and had been a healthy productive worker, earning \$18 an hour as a journalist, but would now live in constant pain for the rest of his life. Applying a per diem analysis to demonstrate the reasonableness of the award, an analysis also used in Montana law, the court concluded that the compensation, though considerable, amounted to approximately \$9 a day. It is this kind of careful explanation of damage awards that will do much to win legitimacy for tribal courts.

The Colville tribal courts also look to state law. Section 1.5.0.5 of the Colville Tribal Code permits a great deal of discretion in adopting procedures, stating "any suitable process or mode of proceeding may be adopted" if it is "conformable with the spirit of tribal law."<sup>121</sup> The tribal court has rejected application of state law in some cases after considering both Colville law and the law of other tribes. In *Colville Confederated Tribes v. Tatshama*,<sup>122</sup> for example, the defendant sought deferred prosecution, a provision for alternate treatment in lieu of prosecution permitted by the law of the State of Washington. The tribal court observed that the tribal code had no such provision and that deferred prosecution was normally a creature of statute. Nevertheless, since one could interpret the tribal code as permitting the court to adopt such a procedure on its own, the court noted that tribal codes of the region did not provide for deferred prosecution. Consequently, the court refused to adopt the Washington state deferred prosecution statutes as common law, holding that separation of powers concerns counseled against judicial adoption of deferred prosecution procedure absent any clear direction from the Council.<sup>123</sup>

In sum, even when tribal codes direct the decision-maker to state law as an appropriate source of legal norms, it does not appear that any of the tribes studied required the courts to apply state law. For example, the Mashantucket Pequot Tribal Code directing the courts to apply state law refers to state common law and procedure<sup>124</sup> until appropriate tribal rules are developed. Thus, tribal advocates should take care to argue that the particular norm urged

121. See *Colville Confederated Tribes v. Tatshama*, 23 Indian L. Rep. 6211, 6211 (Colville Tribal Ct. 1996) (quoting provision cited in text), compare *id.* (rejecting application of Washington State statutory scheme) with *Colville Confederated Tribes v. Wiley*, 23 Indian L. Rep. 6037, 6038 (Colville Tribal Ct. 1996) (noting the tribal court has adopted the Washington state two-step analysis of the sufficiency of criminal citations).

122. 23 Indian L. Rep. 6211 (Colville Tribal Ct. 1996).

123. *Id.* at 6212. The tribal council responded by enacting a deferred prosecution provision, the court invalidated the provision in part on separation of powers grounds. See *infra* notes 66 and accompanying text.

124. See *Busch v. Brown*, 23 Indian L. Rep. 6246, 6246-47 (Mashantucket Pequot Tribal Ct. 1995) (noting that the tribal code requires Connecticut substantive and procedural rules to be applied until tribal rules are in place in ruling that a motion to dismiss is the appropriate procedure to contest subject matter jurisdiction).



on the court is not only the law of the particular state, but a good law that fits the tribal context as well.

### 5. *Federal Law in Tribal Courts*

As with the law of other jurisdictions, federal law may be applied because a tribal statute may point toward federal law. As noted above, the Winnebago Tribal Code requires application of tribal law, when federal law does not prohibit its application, then directs the courts to apply federal law, including federal common law, and the law of states or other jurisdictions which the tribal court finds compatible. Such tribal choice of law ordinances leave ample room for tribal court discretion and equal room for counsel to make arguments appealing to the context of the case and traditions of the tribe. Federal law can influence a tribal court opinion because it is a necessary part of a multilayered analysis, as when a difficult issue of tribal court jurisdiction over non-Indian parties or over particular subjects may begin with an examination of tribal law and end with an examination of federal law. Or, federal law can be a ready source of norms — especially procedural norms, but also norms concerning justiciability such as standing. In short, federal procedure, common law, constitutional law, or even statutory law may be applied as persuasive or mandatory authority in a case of first impression.

#### a) *Federal Procedural Rules*

Tribal courts frequently must address questions of first impression, often involving procedural matters. Attorneys practicing in state courts are well aware of the influence of the Federal Rules of Civil and Appellate Procedure on the development of state rules. Many state supreme courts have adopted verbatim some or all of the federal rules. Some tribal courts or tribal councils have also adopted uniform rules.<sup>125</sup> Rule 1(c) of the Cheyenne River Sioux Tribal Rules of Civil Procedure states:

Any procedures or matters which are not specifically set forth herein shall be handled in accordance with the Federal Rules of Civil and Appellate Procedure, insofar as such are not inconsistent with these rules, and with general principles of fairness and justice as prescribed and interpreted by the courts of the Cheyenne River Sioux Tribe.<sup>126</sup>

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125. For example, the Coeur D'Alene Tribal Code provides that "the Coeur d'Alene Rules of Civil Procedure shall govern all civil proceedings in tribal court." See *Coeur d'Alene Tribe v. AT&T Corp.* 23 Indian L. Rep. 6060, 6065-66 (Coeur d'Alene Tribal Ct. 1996) (citing code and noting that COEUR D'ALENE R. CIV. P. 19 is "similar to Federal Civil Rule 19" in holding that states opposing the provision of telephone service to the tribe for a national lottery are not indispensable parties).

126. See *Cheyenne River Sioux Tribe Bd. of Police Comm'rs v. Thompson*, 23 Indian L. Rep. 6002, 6003 n.4 (Cheyenne River Sioux Ct. App. 1995).

Often tribal procedural codes or rules do not contain a collateral reference and are otherwise not very complete. Given the familiarity of many attorneys with the federal rules, it is not surprising that attorneys frequently assume tribal courts have adopted the federal rules. In many of the cases in the sample, tribal courts did apply the rules of federal civil or appellate procedure or the Federal Rules of Evidence to resolve questions not clearly covered by the tribal rule,<sup>127</sup> although often stressing that while the rules may function as important guidelines, the court is not bound to apply them.<sup>128</sup> The difference between a case in which the tribal court applies the tribal rule, albeit one based on the federal rule, and adopts a federal rule to resolve a particular issue is subtle, but important. A tribe adopting the federal rules may feel more inclined to follow the federal case law interpreting the rules; however, a court adopting a rule for convenience need not adopt every variation or case law gloss.

An example of judicial adoption of the federal rules is *Hall v. Tribal Business Council*,<sup>129</sup> involving the politically sensitive issue of the distribution of grazing unit leases, a scarce resource. Special Judge Pommersheim cited an earlier decision of the court stating that "[i]n light of the paucity in the tribal code on discovery (see ch. 2 § 7 [of the tribal code], the Court shall look for appropriate guidance from the Federal Rules of Civil Procedure and the attendant case law."<sup>130</sup> In light of this directive, the court in *Hall* decided "[f]or purposes of consistency" the federal rules "shall govern all aspects of this litigation unless they conflict directly with any tribal rule of civil procedure."<sup>131</sup> Applying FRCP 8(a)(2) to the adequacy of the plaintiffs' complaint, the court dismissed the allegations of fraud because the plaintiffs had made no statements of law or fact to support the claim, but held the complaint's allegations sufficient to state claims for violation of the Indian Civil Rights Act.<sup>132</sup>

127. See, e.g., *Waters v. Colville Confederated Tribes*, 23 Indian L. Rep. 6120 (Colville Ct. App. 1996) (adopting federal rules of evidence and attendant case law regarding hearsay and impeachment, while noting tribal council had expressed its intent that the court not adopt state law even where analogous); *Confederated Salish & Kootenai Tribes v. Devereaux*, 23 Indian L. Rep. 6099, 6100 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (applying Federal rule of Evidence § 606(b) and citing a federal case in discussing public policy behind the rule).

128. See *Hitchcock v. Shaver Mfg. Co.*, 23 Indian L. Rep. 6137 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (discussing earlier decision by the court of appeals in the same case refusing to apply FRCP Rule 54 and thus permitting an appeal of the dismissal of the retailer's products liability case in which the lower court had upheld jurisdiction over the manufacturer).

129. *Hall v. Tribal Bus. Council*, 23 Indian L. Rep. 6039 (Fort Berthold Dist. Ct. 1996).

130. *Id.* at 6040 n.5.

131. *Id.*

132. *Id.*; see also *Baylor v. Confederated Salish & Kootenai Tribes*, 23 Indian L. Rep. 6221, 6222 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (stating federal rules are "important guidelines" for the tribal court "in matters not specifically covered either by the Law and Order



In addition to federal rules, tribal courts have also adopted standards of review used in reviewing federal cases and analytical constructs utilized by federal trial courts. An example of a tribal court embracing federal law can be found in *Estate of Tasunke Witko v. G. Heileman Brewing Co.*<sup>133</sup> The defendants filed a motion to dismiss for lack of jurisdiction, which the trial court granted, without appearing to distinguish between personal and subject matter jurisdiction and without providing any guidance regarding the standard it had used to make its determination. The Rosebud Sioux Supreme Court adopted from case law of the United States Court of Appeals for the Ninth Circuit both the appellate standard of de novo review for jurisdictional questions of law and the proper analysis for jurisdictional questions by the tribal court on remand. To survive a motion to dismiss, the plaintiff must make a prima facie showing of jurisdiction. This burden is not tremendous because all facts are reviewed in the light most favorable to the plaintiff. An initial decision in plaintiff's favor, however, does not guarantee that the case will go forward to trial. If, after remand by the appellate court, additional questions of credibility or fact arise, the trial court has the discretion to hold a preliminary evidentiary hearing at which plaintiff must establish jurisdictional facts by a preponderance of the evidence. Failure to do so may result in dismissal. The Rosebud Supreme Court in embracing the federal circuit law noted both that the prevailing de novo standard seemed reasonable and fair and that neither party had objected.<sup>134</sup>

### *b) Jurisdiction and Justiciability*

The extent of tribal court jurisdiction is a matter of federal as well as tribal law, involving as it does issues at the heart of the relationship between the federal government and Indian tribes. Most civil personal jurisdiction cases involving tribal members are resolved purely by reference to tribal statutes; personal jurisdiction over non-members cannot be resolved without reference to both tribal and federal law. The Supreme Court continues to take an activist role in asserting the authority to deny tribal courts jurisdiction over cases involving non-Indians and Indians not members of the governing tribe. Accordingly, a tribe which asserts jurisdiction in disputes involving these classes of litigants must adjudicate with the knowledge that a federal court

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Code or by the Rules of Practice in Civil Actions and Proceedings in the Tribal Court of the Confederated Salish & Kootenai Tribes"); *Brehmer v. White Wolf*, 23 Indian L. Rep. 6073, 6073 (Cheyenne River Sioux Ct. App. 1993) (citing *Dupree v. Cheyenne River Hous. Auth.*, 16 Indian L. Rep. 6106 (Cheyenne River Sioux Ct. App. 1989) (adopting federal procedural structure with regard to interlocutory appeals)); *Clown v. Coast to Coast*, 23 Indian L. Rep. 6055, 6056 (Cheyenne River Sioux Ct. App. 1993) (citing FED. R. EVID. 103(a)(1) and FED. R. CIV. P. 46 regarding waiver of technical procedural errors not raised at trial).

133. 23 Indian L. Rep. 6104, 6106-07 (Rosebud Sioux Sup. Ct. 1996).

134. See *Estate of Tasunke Witko v. G. Heileman Brewing Co.*, 23 Indian L. Rep. 6104, 6106-07 (Rosebud Sioux Sup. Ct. 1996).

may review the court's opinion to determine whether the court properly asserted jurisdiction. Since jurisdiction is an aspect of tribal sovereignty, the resulting federal court decision may result in a loss both to the tribe involved and for all Indian tribes. It is a heavy responsibility to shoulder for a tribal court trying to do justice in a particular case to realize that its opinion may not just be reversed by a federal court, but that the result may be a loss of tribal sovereignty for all tribes. But the Supreme Court's recent activist role in limiting tribal court jurisdiction has created a situation tribal courts cannot ignore.

The legal issues encompassed by the broad term "jurisdiction" are conceptually and analytically quite different. Personal jurisdiction focuses solely on the legality under tribal law and fairness of subjecting a particular defendant to the power of a court. Subject matter jurisdiction is normally concerned solely with the competency of a particular court to address a particular issue, such as whether a landlord-tenant case can be brought in superior court, and is normally a question of purely internal domestic statutory law. In the tribal context, however, the term "subject matter jurisdiction" has become a term of art describing federal common law doctrines limiting both the states' powers to adjudicate tribal cases<sup>135</sup> and the power of tribal courts to adjudicate cases involving non-tribe members.<sup>136</sup> Finally, legislative jurisdiction focuses on the applicability of the forum's law in a case otherwise within its jurisdiction. Legislative jurisdiction is a question of due process and focuses on the outer limits the constitution or federal law may impose on a sovereign's ability to apply its law to a case in which the parties and the events giving rise to the cause of action have only a minimal relationship to the forum. In sum, personal jurisdiction questions focus on fairness to the defendant, subject matter jurisdiction focuses on whether the case is in the proper court, and legislative jurisdiction focuses on the law applied.

In three of the cases studied, defendants contested tribal court personal and subject matter jurisdiction, and in at least one plaintiffs contested tribal court authority.<sup>137</sup> In *Strate v. A-1 Contractors*,<sup>138</sup> discussed below, the Supreme Court has conflated civil adjudicatory and regulatory jurisdiction. Nevertheless, because the issues are analytically and conceptually distinct and are often resolved without implicating federal common law, I will discuss personal and subject matter jurisdiction separately.

135. *Williams v. Lee*, 358 U.S. 217 (1959).

136. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding as a matter of federal common law that tribal courts lack criminal jurisdiction over non-Indian defendants).

137. *Middlemist v. Member of Tribal Council of the Confederated Salish & Kootenai Tribes*, 23 Indian L. Rep. 6141 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (requiring exhaustion of administrative remedies before challenging tribal Aquatic Land Conservation Ordinance).

138. 117 S. Ct. 1404 (1997).



*(1) Personal Jurisdiction*

Some tribal and state long-arm statutes identify situations in which an out-of-state (or off-reservation) defendant can be subjected to the forum, (think of this as the "rules" approach), while others are deliberately written broadly to invoke due process as an over arching standard without limiting the fact patterns that can bring an out-of-state defendant into state court (the "standards" approach). In tribes and states adopting the rules approach, some courts have interpreted restrictively worded long-arm statutes broadly, as merely enumerating examples rather than representing an exclusive list of appropriate exercises of jurisdiction.<sup>139</sup> Whether a court has interpreted its long-arm statute "correctly" is, of course, an issue of domestic law, unless the particular exercise of jurisdiction is unconstitutional. In short, long-arm statutes require a two-step interpretive process: the interpretation of the long-arm statute, a question of domestic law, and then the question whether the assertion of jurisdiction, which may be lawful under domestic law, violates due process. In a rules jurisdiction, the domestic law question may be a difficult one, requiring an analysis of the statutory language and applicable precedents. In a standards jurisdiction, one may answer that question easily, because the statute directs the court to proceed immediately to the due process question.

Two of the three cases raising personal jurisdiction issues required an analysis of the tribal long-arm statutes. The Rosebud Sioux Tribe's long-arm statute is of the "rules" variety: listing particular contacts with the forum creating jurisdiction. At the same time, the long-arm statute also states that the tribe will exercise its jurisdiction in these cases consistent with due process. While such a statute is open to a narrow interpretation, the Rosebud Sioux Supreme Court has interpreted the Tribe's Constitution and long-arm statute as indicating "the tribe's clear intent, consistent with notions of due process, to assert jurisdiction over nonresidents who, for example, commit tortious acts that have effects within the reservation."<sup>140</sup> In contrast to the Rosebud Sioux Tribal Code, the Coeur d'Alene Tribal Code adopts the "standards" approach, however, providing for jurisdiction over matters occurring within the reservation, "or involving any act affecting the Coeur d'Alene Tribe or the Coeur d'Alene Reservation or involving at least minimal contacts with the Coeur d'Alene Tribe or the Coeur d'Alene Reservation."<sup>141</sup>

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139. In other words some courts apply the negative implications principle of statutory construction, *expressio unius est exclusio alterius*, while others adopt the principle of *ejusdem generis* to hold that a list is merely a representative sample.

140. See *Estate of Tasunke Witko v. G. Heileman Brewing Co.*, 23 Indian L. Rep. 6104, 6107 (Rosebud Sioux Sup. Ct. 1996) (quoting ROSEBUD SIOUX TRIBE LAW & ORDER CODE § 4-2-7 (1989)).

141. See *Coeur d'Alene Tribe v. AT&T Corp.*, 23 Indian L. Rep. 6060, 6061 (Coeur d'Alene Tribal Ct. 1996) (quoting COEUR D'ALENE TRIBAL CODE ch. 1-3.01.); see also *Hitchcock v.*

There appears to be a consensus among tribal courts that in analyzing the extent to which a tribe's exercise of personal jurisdiction is consistent with due process of law as required by the Indian Civil Rights Act and tribal constitutional and statutory civil rights provisions, the courts will interpret due process by reference to the United States Supreme Court's precedents. Even in cases in which the court is careful to note that it is not bound to interpret the term "due process" to "mirror" the interpretations given the phrase by the Supreme Court in all settings, on the issue what minimum contacts comport with fair play and substantial justice, the courts are either satisfied that the Supreme Court's analysis does justice in the tribal setting as well or conclude that these precedents have become binding federal common law for tribal courts. In a proper case a court could stretch the concept of due process a little beyond the Supreme Court precedents arguing for a construction of the idea of fundamental fairness that fits the tribal context.

On the other hand, in the non-Indian cases, caution seems to rule the day. Certainly there is a lot of wiggle room in the Supreme Court's precedents to make lawyerly arguments that personal jurisdiction is appropriate. In *Estate of Tasunke Witko v. G. Heileman Brewing Co.*, for example, the Rosebud Sioux Supreme Court held that the United States Supreme Court precedents delineating the contours of due process in the context of personal jurisdiction were binding on the court, because the question of "the proper extent of tribal court jurisdiction [is] ultimately a matter of federal (common) law and therefore as to matters of jurisdiction, federal standards — including 'minimum contacts' due process analysis — [are] applicable."<sup>142</sup>

The most controversial issue surrounding tribal courts involves the exercise of jurisdiction over non-Indians. The sampled cases indicate that the assumption of tribal court bias against non-Indians is simply not warranted. Cases involving non-Indians comprised a significant part of the sample. For example, in sixteen cases, the courts stated that one of the parties was not an Indian, and twenty-one additional cases most likely involved non-Indians.<sup>143</sup> In only three cases, however, was personal jurisdiction over non-Indians a significant issue. In each, the tribal court upheld personal jurisdiction over non-reservation defendants: *Hitchcock v. Shaver Manufacturing Co.*,<sup>144</sup> *Coeur*

*Shaver Mfg. Co.*, 23 Indian L. Rep. 6137, 6138 (Confederated Salish & Kootenai Tribes Ct. 1996) (quoting LAW AND ORDER CODE OF THE CONFEDERATED SALISH & KOOTENAI TRIBE § (2)(a), asserting jurisdiction "to the fullest extent possible not inconsistent with federal law").

<sup>142</sup> *Hitchcock*, 23 Indian L. Rep. at 6108.

<sup>143</sup> This is a conservative estimate, based on the following assumptions: that all of the Mashantucket Pequot tort and employment cases were brought by non-Indians (because there are few tribal members) and that because some courts, such as Ho-Chunk Tribal Court, identify Indian plaintiffs, failure to do so by such a court in an employment case indicates the plaintiff is an Indian.

<sup>144</sup> 23 Indian L. Rep. 6137 (Confederated Salish & Kootenai Tribes Ct. App. 1996).



*d'Alene Tribe v. AT&T Corp.*,<sup>145</sup> and *Estate of Tasunke Witko v. G. Heileman Brewing Co.*<sup>146</sup> *Hitchcock* was a products liability case, arising out of an accident caused by a defective hydraulic post-hole digger purchased from an off-reservation retailer, Triple W, in Montana, and manufactured by an Iowa corporation. The tribal trial court dismissed Triple W on the grounds that the retailer had insufficient contacts with the reservation unlike the manufacturer who can be presumed to intend to sell its products as widely as possible. Although the plaintiffs had alleged that Triple W advertised on the reservation and sold other products that are used on the reservation, the tribal court concluded that Triple W had insufficient contacts with the plaintiffs. The Confederated Salish and Kootenai Tribal Court of Appeals reversed the order dismissing Triple W, distinguishing *World-Wide Volkswagen Corp. v. Woodson*<sup>147</sup> as involving an isolated occurrence. Noting that the Triple W and the reservation are both located in Western Montana which shares the same economic base, Justice Wheelis's opinion concluded that "[i]t is not plausible to argue that equipment and materials sold within the land between the rocky Mountains, Idaho, and Canada is not intended for the use of any person living there."<sup>148</sup>

*Coeur d'Alene Tribe v. AT&T Corp.* involved a dispute between the tribe, AT&T and several states regarding the tribe's plan to institute a national lottery. The tribe had entered into a gaming compact with the State of Idaho, which had been approved by the Secretary of the Interior. In addition, the tribe's management agreement had been approved by the National Indian Gaming Commission. In the middle of its negotiations with AT&T and Sprint Communications for the provision of the 800 service needed for the lottery, ten states informed AT&T that in the opinion of their legal officers, the lottery was not legal. When AT&T informed the tribe that it needed to resolve the legal issues before submitting a bid, the tribe then sued AT&T in tribal court seeking an injunction requiring them to provide the services.<sup>149</sup> Relying on *Hanson v. Denckla*<sup>150</sup> and *Burger King Corp. v. Rudzewicz*,<sup>151</sup> the tribal court held that AT&T had purposefully directed its activities at the forum by negotiating with tribal representatives to provide services for over a year and had significant forum-related activities because it provided services

145. 23 Indian L. Rep. 6060 (Coeur d'Alene Tribal Ct. 1996).

146. 23 Indian L. Rep. 6104, 6108 (Rosebud Sioux Sup. Ct. 1996).

147. 444 U.S. 286 (1979) (holding Oklahoma court had no jurisdiction over an Audi distributor in New York for an accident occurring in the state while the plaintiffs were moving from New York to Arizona).

148. *Hitchcock*, 23 Indian L. Rep. at 6139.

149. Although the defendant moved to dismiss for lack of jurisdiction it appeared that AT&T was eager to get the issue settled, for it submitted a bid during the pendency of the tribal court action. *Coeur d'Alene Tribe*, 23 Indian L. Rep. at 6061.

150. 357 U.S. 235 (1958).

151. 471 U.S. 462 (1985).

throughout the reservation, thus requiring the defendant to litigate in the tribal court was reasonable.<sup>152</sup>

Although both *Hitchcock* and *Coeur d'Alene* would be easy cases were a state court the forum, *Estate of Tasunke Witko* presented a much closer case of personal jurisdiction. The administrator of the estate of Tasunke Witko, known as Crazy Horse in English, filed suit in Rosebud Sioux tribal court on behalf of the family against the creators and manufacturers of "The Original Crazy Horse Malt Liquor." The estate sought both money damages and traditional remedies for the appropriation of the name Crazy Horse without the permission of the family.<sup>153</sup> The case involved intellectual property and publicity rights, which have traditionally presented somewhat trickier jurisdictional analyses. The case has been written on extensively by others, including myself, so I will not go into it in detail here.<sup>154</sup> Because the defendants had not marketed their product in several states with Native populations, including North and South Dakota, they contested personal as well as subject matter jurisdiction. The trial court held that the defendants lacked the significant contacts essential to satisfy both the Rosebud Sioux Tribal Code and the Supreme Court minimum contacts analysis to determine whether an exercise of jurisdiction violated due process of law, because they had not marketed the product in South Dakota.

On appeal, the Rosebud Sioux Supreme Court reversed the tribal court en banc, finding both in personam and subject matter jurisdiction over the controversy.<sup>155</sup> Applying these precedents, the Court concluded that the administrator of the estate had made a prima facie showing that the defendant had conducted business on the reservation (by selling other products on the reservation), had some contact, albeit limited, with the estate's attorney, and continued to market the product once it became aware of the offense taken. In light of all the other activities of defendant targeted toward the forum, the Court suggested the plaintiff was trying to have it both ways by avoiding

152. *Coeur d'Alene Tribe*, 23 Indian L. Rep. at 6068 (granting motion for summary judgment in favor of plaintiff).

153. *Estate of Tasunke Witko*, 23 Indian L. Rep. at 6106. The estate sought equitable remedies and asked for monetary relief as well as traditional remedies for interference with the right of publicity, intentional infliction of emotional distress, defamation of the spirit and various other common law and federal causes of action.

154. See Nell Jessup Newton, *Memory & Misrepresentation: Representing Crazy Horse in Tribal Court*, 27 CONN. L. REV. 1003 (1995); Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. REV. 1 (1996); Cecilia R. Herrera, *Not Even His Name: Is the Denigration of Crazy Horse Custer's Final Offense?*, 29 HARV. C.R.-C.L. L. REV. 175 (1994). On the issue of appropriation in general, see Jeremy J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 2 CAN. J. OF L. & JURIS. 249 (1993).

155. Joseph William Singer of Harvard and I filed an amicus brief on the issue of personal jurisdiction; Oliver Goodenough and Bruce Duthu filed an amicus brief on the question of subject matter jurisdiction.



marketing Crazy Horse malt liquor on the reservation. Noting that the product's label contained a prominent reference to "the Black Hills of Dakota . . . home of proud Indian nations," the Court concluded:

Given the marketing and sale of similar — but non-offending — products in the forums this avoidance appears to be the most cynical ploy. Defendants exalt and target the forum where it taps a likely vein of customers, but studiously avoid marketing and sale in the forum itself because their conduct is potentially offensive and tortious there. It seems wholly unlikely that the due process clause can be made to countenance such distortion and manipulation and this court holds that it does not.<sup>156</sup>

In balancing the interests of the plaintiff, defendant, and forum, the court also noted that the tribal court was especially appropriate because many of the claims were based on tribal custom and common law that "as questions of first impression, will not be readily discerned or easily answered in a state or federal forum at a substantial cultural and geographical remove from the reservation forum."<sup>157</sup> Moreover, since under federal common law doctrine, the jurisdictional issues can be litigated in federal court, the court noted that "the tribal court is uniquely capable to 'provide other courts with the benefit of their expertise in such matters in the event of further judicial review.'"<sup>158</sup> The court reversed and remanded for trial on the merits.

## (2) Subject Matter Jurisdiction

Even in a case in which a tribal court has personal jurisdiction, a second hurdle remains. Unique to Indian law is a doctrine permitting a challenge to jurisdiction in tribal court based on the status of the parties before the tribal court. Even in a case in which the tribe clearly has personal jurisdiction over the defendant, the tribe may not have subject matter jurisdiction over a non-member under the doctrine announced in *Oliphant v. Suquamish Tribe*,<sup>159</sup> and developed in a series of cases narrowing tribal regulatory authority over non-Indians, especially *Montana v. United States*.<sup>160</sup> A further discussion of this doctrine is necessary to prepare the uninitiated for the treatment of subject matter jurisdiction in the cases studied.

156. *Estate of Tasunke Witko*, 23 Indian L. Rep. at 6110.

157. *Id.* at 6111.

158. *Id.* (quoting *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985) (requiring federal courts to abstain from deciding extent of tribal court jurisdiction over non-Indian defendants until tribal courts have decided the issue)).

159. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding tribal courts lack criminal jurisdiction over non-Indian defendants).

160. *Montana v. United States*, 450 U.S. 544 (1981) (holding that the Crow Tribe lacks authority to regulate hunting and fishing on fee land within the reservation).



Essentially this line of cases reverses the presumption in favor of tribal court authority over activities taking place within reservations involving non-members. Instead of starting with the presumption that tribes enjoy all the authority possessed by other sovereigns except that abrogated by statutes or ceded in treaties, the *Oliphant* case added an exception that could end up swallowing the rule: cases in which exercise of authority would be "inconsistent with the tribe's status" as dependent sovereigns. The Court held that exercise of criminal jurisdiction was inconsistent with the historical understanding of the authority of Indian tribes over non-Indians and also raised questions about the fairness of subjecting non-Indians to tribal jurisdiction because of racial and cultural differences. *Montana, Brendale*,<sup>161</sup> and *Bourland*<sup>162</sup> extended this doctrine to tribal regulations of land use involving land held in fee by non-members of the tribe. In *Montana* the court announced that the tribes could overcome the presumption against tribal authority in these cases in two circumstances, the now-famous *Montana* exceptions:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.<sup>163</sup>

The issue in *Oliphant* was criminal misdemeanor jurisdiction over non-Indians. In *National Farmers Union Insurance Cos. v. Crow Tribe*,<sup>164</sup> decided in 1985, the Supreme Court rejected the argument that tribes lacked civil jurisdiction over non-Indians as well. The court noted that while policymakers in all branches of government had uniformly assumed that tribes lacked such jurisdiction throughout the uneasy relationship of tribes and the

61. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that tribe lacks authority to zone property owned by nonmembers in areas of reservation open to the public).

62. *South Dakota v. Bourland*, 508 U.S. 679 (1993) (holding Cheyenne River Sioux Tribe lacked authority to regulate hunting and fishing on land ceded to the government for a dam).

63. *Montana*, 450 U.S., at 565-66 (citations and footnote omitted).

64. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (requiring federal courts to abstain from deciding extent of tribal court jurisdiction over non-Indian defendants until tribal courts have decided the issue).

federal government, the opposite presumption had operated in favor of tribal court civil jurisdiction. While acknowledging that *Oliphant* had raised concerns about fair treatment in tribal courts in criminal cases, the Supreme Court distinguished civil cases as not involving the same fundamental issues of liberty as criminal cases. After *National Farmers* and *Iowa Mutual Insurance Co v. LaPlante*,<sup>165</sup> a case decided two years later, federal courts must stay their hands and defer to tribal courts, the courts with the greatest expertise in this area, to permit them to make the first determination of the scope of tribal jurisdiction by analyzing the applicable treaties, statutes, and tribal law. Non-Indians wishing to challenge tribal court jurisdiction based on the *Oliphant-Montana* claim that jurisdiction in a particular kind of case is "inconsistent with the dependent status" of tribes, may only take this issue to federal court after the tribal court has been given the first chance to decide the issue; however, the non-Indian may take the jurisdictional issue, although not the merits, to the federal court for review. In short, the *National Farmers* principle appears to restore the presumption in favor of tribal courts even in non-Indian cases in the civil adjudicatory context. As the Supreme Court stated in *Iowa Insurance*:

Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute . . . . In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.<sup>166</sup>

The *National Farmers* exhaustion rule as it is called, has had an important role in acquainting non-Indian attorneys with tribal court systems. Significantly, of the many cases forced into tribal court by this doctrine, only a few have appeared back in federal court. If these non-Indian plaintiffs and defendants had been treated uniformly unfairly, one would have expected many more challenges to the authority of the tribal courts in federal court after exhaustion of tribal remedies.

### (3) *Some Strate Talk*

These issues arose to a significant extent in at least three of the tribal cases discussed. Those cases were decided before the Supreme Court decided *Strate v. A-1 Contractors*,<sup>167</sup> a case holding that tribal court subject matter jurisdiction does not extend to accidents between non-Indians occurring on state-maintained public highways within a reservation, but also containing

165. 480 U.S. 9 (1987) (extending *National Farmers* exhaustion to diversity cases involving non-Indian defendants).

166. *Iowa Mutual*, 480 U. S. at 18.

167. *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997).



broader language that may complicate tribal court litigation in the future. *Strate* will have an impact on two issues in future tribal court cases. First, it clearly requires application of the *Montana* test to the issue of subject matter jurisdiction. Second, the opinion provides an incentive to non-Indian litigants to avoid the exhaustion rule by arguing that exhaustion is unnecessary because the tribe plainly lacks jurisdiction.<sup>168</sup> Finally, the Court's interpretation of the *Montana* test will cause confusion, because although the Supreme Court's reading of the *Montana* principle is broad and its concomitant interpretation of the exceptions is narrow, one must consider the Court's language in the context of the unusual facts of the case.

To tease out the implications of *Strate*, I will first address these issues as they were resolved by tribal courts and then consider the application of the Supreme Court's opinion to these cases. In each of the three cases discussed above, the tribal court reached and resolved the question of subject matter jurisdiction. In *Hitchcock*, which involved an accident on tribal land, the Court resolved the issue with a simple citation to *Hinshaw v. Mahler*, a Ninth Circuit case decided before *Strate* upholding tribal court jurisdiction over an automobile accident occurring on a U.S. highway within the reservation.<sup>169</sup> In *Coeur d'Alene*, the Court relied on *National Farmers* and the importance of affording a tribal court forum the first opportunity to consider the issue under tribal and federal law. Nevertheless, the tribal court also applied the *Montana* test to the issue of subject matter jurisdiction and concluded that (1) federal law permitting damage actions against common carriers in federal court, being limited to damages claims, does not preempt the tribal case and (2) the denial of service to a gaming operation designed to bolster the economy of the tribe and operated with federal approval under a federal statute furthering the goals of "promoting tribal economic development, tribal self-sufficiency, and strong tribal government,"<sup>170</sup> met the second prong of *Montana*, the so-called "effects test" because of the impact on tribal economic security.<sup>171</sup>

68. *Strate*, 117 S. Ct. at 1416 n.14 (stating that "[w]hen, as in this case it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct"). This language appears to be an invitation to non-Indian litigants to proceed directly to federal court, thus preventing tribal courts assessing the reach of their jurisdiction.

69. *Hitchcock*, 23 Indian L. Rep. at 6138 (citing *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994) (upholding tribal subject matter jurisdiction over a wrongful death claim arising out of an on-reservation accident)).

70. *Coeur d'Alene*, 23 Indian L. Rep. at 6067 (quoting the Indian Gaming Regulatory Act, 25 U.S.C. § 2701(4) (1994)).

71. *Coeur d'Alene*, 23 Indian L. Rep. at 6062. In tribal court, the defendant had also argued successfully that the states protesting the provision of service were indispensable parties to the case. Under the tribal court's version of Rule 19, which tracks the federal rule, Idaho, which entered into a gaming compact with the tribe, had not protested the proposed national lottery.



In *Estate of Tasunke Witko*, the Rosebud Sioux Supreme Court rejected the application of the *Montana* test to civil adjudicatory jurisdiction. Noting that the *Montana* line of cases each involved regulatory jurisdiction over non-Indian owned fee land,<sup>172</sup> the Court read *National Farmers* and *Iowa Insurance* as the governing cases. According to the Court, these cases reaffirmed that *Oliphant* (and hence *Montana*) did not apply to tribal civil jurisdiction and further established a presumption in favor of tribal civil jurisdiction over nonmembers.<sup>173</sup> Nevertheless, the Court was careful to argue in the alternative that even were *Montana* to be applied, the defendant's conduct met both prongs of the proviso. First, the consensual relation prong of the *Montana* test was met, according to the Court, because the plaintiff had alleged the defendant was exploiting the name Crazy Horse for commercial gain and viewing the case through this lens, the gist of defendant's wrong was refusing to enter into a consensual agreement. Permitting jurisdiction for cases arising out of consensual agreements, yet denying jurisdiction to those in which a defendant had refused to negotiate, would "constitute the most arid formalism and insofar as the trial court so reasoned it is hereby rejected."<sup>174</sup> With regard to the second prong, the Court focused on the health and welfare of the tribe, concluding that providing a forum for tribe members injured by off-reservation conduct is vital to the tribe's health and welfare.<sup>175</sup>

As noted above, *Strate* requires application of the *Montana* test to questions of civil adjudicatory jurisdiction, but the question remains *which* issues of adjudicatory jurisdiction? Unfortunately the opinion is somewhat internally contradictory. The first part of the opinion stresses continually that the decision is a narrow one, applying only to a "public highway maintained by the State under a federally granted right-of-way over Indian reservation land."<sup>176</sup> The court begins by phrasing its holding as follows:

tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question. We express no view on the governing law

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After resolution of the issue in tribal court, the state of Missouri sued in state court attempting to block the tribe from permitting Missouri residents from accessing the tribe's lottery web site. The tribe successfully removed the case to federal court which is presently considering a motion to dismiss by the tribe. *Missouri ex rel. Nixon v. Coeur d'Alene Tribe*, No. 97-0914-CV-W 1997 U.S. Dist. LEXIS 14980 (W.D. Mo. Sept. 29, 1997).

172. *Estate of Tasunke Witko v. G. Heileman Brewing Co.*, 23 Indian L. Rep. 6104, 61 (Rosebud Sioux Sup. Ct. 1996).

173. *Id.* at 6112.

174. *Id.*

175. *Id.*

176. *Strate*, 117 S. Ct. at 1407.

or proper forum when an accident occurs on a tribal road within a reservation.<sup>177</sup>

One may read the phrasing of this holding to create a "right-of-way" exception to add to the list of cases in which the *Oliphant* and *Montana* line of cases apply, essentially reversing the presumption in favor of tribal court jurisdiction. Although not mentioned in the Supreme Court's opinion, allegations contained in an amicus brief filed by the American Trucking Association, the American Automobile Association, and the Burlington Northern Railroad may well have influenced the Court.<sup>178</sup> The amicus brief described a Crow tribal court wrongful death case resulting in a jury verdict of negligence in the death of three women at a railroad crossing and awarding damages of \$250 million. The brief contained lurid descriptions of the proceedings in tribal court, in which a Crow judge allegedly lectured the jury venire on the past sins of Burlington Northern and suggested that this was the case in which to exact retribution. The facts of this case, which is not reprinted in the *Indian Law Reporter*, are contested, to say the least,<sup>179</sup> and the defendant has yet to complete the appeal process provided in the Crow system, in part because the defendant has been attempting to use the federal courts to overturn the tribal trial court. The Ninth Circuit denied the railroad's request for an injunction against further tribal court proceedings, applying the exhaustion doctrine.<sup>180</sup> The Supreme Court granted certiorari and remanded for reconsideration in light of *Strate*.<sup>181</sup> Of course if there were procedural irregularities in the tribal trial court, one would hope the Crow appellate court would correct them as well as take a good look at what appears to be an excessive damage award. Yet if the railroad crossing is a state or federally maintained public right of way, the railroad will be able to avoid the tribal court completely. This result seems particularly unfortunate in a case in which the defendant has an ongoing relationship with the tribe and a past history including many accidents resulting in the death of tribal members.

In short, even a "public right of way" exception to tribal court jurisdiction undercuts tribal sovereignty in the interest of preventing the occasional misguided result, which can be overturned on appeal or remedied in federal

177. *Id.* at 1408.

178. Amicus Brief for the American Trucking Associations, Inc., the American Automobile Association, and Burlington Northern Railroad Company, in Support of Respondents, *Strate v. Contractors*, 117 S. Ct. 1404 (1997) (No. 95-1872), available in 1996 WL 711202.

179. For a thorough description of the background of the case and a description of the positions of both sides, see Bill Ibelle, *Indian Court Awards \$250 Million for Deaths of Native Americans: Railroad Claims Fair Trial Impossible With All-Crow Jury*, LAWYERS WEEKLY USA, Jan. 13, 1997, at B8.

180. *Burlington Northern R.R. v. Estate of Red Wolf*, 106 F.3d 868 (9th Cir. 1996), *remanded*, 1997 U.S. App. LEXIS 6599.

181. *Burlington Northern R.R. v. Estate of Red Wolf*, 139 L. Ed. 2d 5 (U.S. 1997) (vacating and remanding for reconsideration in light of *Strate*).



court by application of a contextually sensitive standard rather than a blanket exception. *Strate* will provide an invitation to resist jurisdiction in such cases as *Bick v. Pierce*,<sup>182</sup> discussed earlier, as a model of judicial care in explaining the basis for the award of significant damages (close to \$200,000). The tribal court defendant in *Bick*, who was not a member of the Confederated Salish and Kootenai Tribe, apparently did not contest jurisdiction, or if he did, did not appeal the question. Yet after *Strate*, these cases will be taken out of tribal hands, at least when the highway is maintained by the state or federal government, an issue not even considered relevant in *Bick*.<sup>183</sup>

Yet *Strate* may well have an impact beyond the narrow confines stressed at the beginning of the opinion. For although announcing a blanket exception in narrow terms, the Court nevertheless concluded that the *Montana* presumption applies to *all* exercises of civil adjudicatory jurisdiction in tribal courts. Thus, although a given exercise of civil adjudicatory jurisdiction may not involve an accident on a public highway, tribal courts must still assess the impact of *Montana* on their jurisdiction. As noted above, *Montana* can permit a contextually sensitive assessment of tribal court jurisdiction.

Unfortunately, however, the Court read the second *Montana* exception narrowly. This exception focuses on effects on political integrity, economic security and health and welfare of the tribe. The tribe argued in *Strate* that providing a forum for accidents resulting from conduct, such as driving carelessly, that could endanger the community alone provides a sufficient tribal interest. The Supreme Court signaled its intent not to let the exception swallow the rule, relying on broad language in *Montana* limiting a tribe's inherent authority to "what is necessary to protect tribal self-government or to control internal relations"<sup>184</sup> and invoking the examples used in *Montana* of situations involving jurisdiction solely over tribal members. After giving this limited reading to the second *Montana* exception, the Court's application of this exception to the facts was extremely cursory — the Court merely asserted that "requiring A-1 and Stockert [the driver] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or the welfare of the (Three Affiliated Tribes).'"<sup>185</sup>

Surely tribal court judges struggling to make sense of *Strate* will stress that the Court's *Montana* analysis depended solely on the fact that the case involved a "commonplace" automobile accident. But the Court's down-playing of tribal interest in a case involving a plaintiff who, though not a tribal

182. 23 Indian L. Rep. 6175 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

183. See *Bick v. Pierce*, 23 Indian L. Rep. 6175 (stating merely that the accident occurred "on the Flathead reservation").

184. *Strate*, 117 S. Ct. at 1409 (quoting *Montana*, 450 U.S. at 565-66).

185. *Id.* at 1416 (quoting *Montana*, 450 U.S. at 566).



member, was married to a tribal member, had adult children who were enrolled, lived on the reservation and clearly regarded herself as a member of the tribal community is most troublesome. A careful reading of the case seems to indicate that even if the plaintiff were a member of the tribe, the result would be the same, for the court states its narrow holding in terms of the status of the defendant and not that of the plaintiff. In short it is the defendant's status as a nonmember, judicial concern that he not have to defend in "an unfamiliar court" that seems to have greater sway with the Court. Are there more exceptions to the *National Farmers* and *Iowa Insurance* presumption of tribal civil adjudicatory jurisdiction to come?

*Strate* will force tribal judges to distinguish cases involving non-Indian defendants based on whether the claim is "commonplace" or more uniquely suited to a tribal forum. Therefore, if anything is left of the second *Montana* exception in the context of tribal adjudicatory jurisdiction after *Strate*, then the *Estate of Tasunke Witko*, in which the claim was based on tribal traditional law should have passed the test. Nevertheless, the Eighth Circuit has interpreted *Strate* broadly as foreclosing adjudicatory jurisdiction over activities or conduct of non-Indians occurring outside their reservations.<sup>186</sup> On the other hand, one could say that *Coeur d'Alene* represents the "commonplace" federal statutory law — the reach of the Indian Gaming Regulatory Act. If the Supreme Court were to accept this argument, then tribal court jurisdiction in cases involving the interpretation of federal law could be curtailed.

Finally, *Strate* establishes that the federal courts may entertain appeals of jurisdictional question before trial on the merits, because this was the posture in which *Strate* reached the Supreme Court. In *Coeur d'Alene*, AT&T did not appeal to federal court, and it must be stressed that not all non-Indian parties in tribal court will challenge tribal court authority either in the tribal trial court or in the federal system. Certainly AT&T seems to have been a somewhat reluctant defendant even in tribal court, desirous as it was of obtaining a lucrative contract from the tribe. Arguably permitting federal court review of the jurisdiction issue is bad policy in a case involving the interpretation of tribal law, especially tribal customary and common law, such as *Estate of Tasunke Witko*. In that case, the trial court stated without analysis that the common law of the tribe permitted a claim for interference with the right of publicity, a claim derived from the common law developing in several states. Yet the plaintiff sought relief based on tribal customary law relating to respect for the dead, which the estate termed "defamation of the spirit." In a case so intimately tied to tribal norms, it would seem to defeat the purpose of *National Farmers* by denying the tribal court the opportunity to explain the

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186. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 1998 U.S. App. LEXIS 405, \*8 (8th Cir., Jan. 14, 1998)

tribal interest in a case before federal review. Nevertheless, as noted above, the Eighth Circuit has held the tribal court has no further jurisdiction.<sup>187</sup>

#### (4) Justiciability

Doctrines of standing, ripeness, and mootness are treated in constitutional law as issues arising from the Constitution's requirement that the federal courts adjudicate only "cases or controversies." Unlike federal courts, tribal courts are not mandated by the tribal constitutions, at least the "boilerplate" constitutions prepared by the BIA as models and adopted by many tribes organizing governments complying with the Indian Reorganization Act. Thus many tribal courts are created by tribal ordinance and some of these ordinances may not contain a "case or controversy requirement." In the past twenty years, many tribes have adopted new constitutions,<sup>188</sup> often addressing the role of tribal courts in the constitutional system. Some tribes' constitutions, like that of the Ho-Chunk Nation, create tribal courts and contain a case or controversy requirement.<sup>189</sup> Given the many differences in the statutory and constitutional role of the tribal court in the tribal system, attorneys should be careful before raising justiciability questions in tribal court. Several cases in the sample raised issues of ripeness or mootness.<sup>190</sup> In *Coeur d'Alene Tribe v. AT&T Corp.*,<sup>191</sup> the tribal court rejected a ripeness argument made by the defendant on the ground that there was no case or controversy under the tribal constitution.

Standing doctrines, particularly, have made their way into tribal court, probably because these doctrines also embody prudential and process concerns appealing to the tribal judiciary.<sup>192</sup> For example, as noted above, the Winnebago Supreme Court in *Rave v. Reynolds* borrowed freely from federal common law with respect to standing but only after noting that the federal law applied only by analogy and could vary to suit the needs of the tribe.

187. *Id.*

188. See *St. Regis Mohawk Tribe v. Basil Cook Enter.*, 23 Indian L. Rep. 6172 (St. Regis Tribal Ct. 1996) (noting tribe had adopted a new constitution in 1995); *Coalition for Fair Gov't II v. Lowe*, 23 Indian L. Rep. 6181 (Ho-Chunk Tribal Ct. 1996) (noting tribe enacted its present constitution on September 17, 1994).

189. See *infra* note 256.

190. See, e.g., *Coeur d'Alene Tribe v. AT&T Corp.*, 23 Indian L. Rep. 6060 (Coeur d'Alene Tribal Ct. 1996) (ripeness); *Colville Confederated Tribes v. Coleman*, 23 Indian L. Rep. 6188 (Colville Ct. App. 1996) (dismissing issue resolved through stipulation as moot).

191. 23 Indian L. Rep. 6060, 6066 (Coeur d'Alene Tribal Ct. 1996).

192. See *Rave v. Reynolds*, 23 Indian L. Rep. 6150, 6158 (Winnebago Sup. Ct. 1996) (noting that because the tribe has adopted an adversary process, it is appropriate to adopt standing requirements which ensure that issues will be fully developed by parties who have a stake in the outcome). Standing doctrines are often invoked merely to establish that the plaintiff has standing. See, e.g., *Palmer v. Millard*, 23 Indian L. Rep. 6094, 6097 (Colville Ct. App. 1996) (relying on *Warth v. Selden*, 422 U.S. 490 (1975) in finding the owner of dogs destroyed by the tribal police had standing to seek equitable relief for a violation of tribal civil rights).



Moreover, the court appealed to indigenous traditions of consensus decision-making as a basis for an arguably broader conception of standing than might be countenanced in federal court in holding that voters, citizens, and an association of concerned citizens could challenge a tribal election.<sup>193</sup>

As noted above, the application of federal standing doctrines in a particular tribal context may be unnecessary and may unduly restrict the opportunity for someone to air grievances. The Colville Tribal Court has applied federal standing doctrine in a case in which a less restrictive standard might have more properly fit the tribal context. In *Colville Confederated Tribes v. Timentwa*,<sup>194</sup> Judge Collins held that the defendant lacked standing to raise legal arguments in defense of the people who had signed agreements promising to assure that he would appear in court for his trial. The court applied United States Supreme Court precedents as persuasive, though not binding precedent.<sup>195</sup> The court held that the defendant's attorney had not made any showing that the defendant would suffer an immediate injury if the judgment of forfeiture was entered against his assurance signers.<sup>196</sup> Whether the defendant's arguments on the merits of why the signers should not have to forfeit bail, the court might well have permitted defendant's counsel to raise the issue on behalf of his relations had the court not adopted the restrictive standards of federal standing doctrine in which third parties can rarely raise the rights of others not before the court.<sup>197</sup>

193. See *Rave*, 23 Indian L. Rep. at 6157. The court also argued in the alternative that even if federal standing doctrine were applicable in the Winnebago court, federal cases permitted expanded third-party standing in challenges to election procedures. *Id.* at 6159.

194. 23 Indian L. Rep. 6011 (Colville Tribal Ct. 1995) (Collins, J.) Without discussion, the Court applied the federal doctrine, merely stating that because the court must apply the laws of the Colville Tribes, it can only do so through the adjudication of cases or controversies. *Id.* at 6189.

195. *Timentwa*, 23 Indian L. Rep. at 6012. Although the discussion in Hoffman is not entirely clear, a later opinion by the Colville Court of Appeals panel of which Judge Collins was a member, stated that the tribal courts are not bound by the "limitations applicable to the federal courts through article III of the United States Constitution." *Colville Confederated Tribes v. Coleman*, 23 Indian L. Rep. 6188 (Colville Ct. App. 1996).

196. Apparently there was some discussion in court about the parties' relationship, but the opinion does not clarify the nature of the relationship. *Timentwa*, 23 Indian L. Rep. at 6012.

197. The court seemed to be concerned not to encourage defendants to enter into "unenforceable suretyship agreements" with PAA signers. This concern could be that the tribal code requires the PAA signers to be personally liable, without any recourse against the defendant on the theory that such a personal stake would impel them to work very hard to get the defendant to appear. See *id.* On the other hand, it is possible the court's reference is an elliptical reference to the tribe's statute of frauds, for such statutes typically contain a requirement that suretyship contracts be in writing to be enforceable and it is clear from the discussion that there was no written agreement between the defendant and the PAA signers. If this is the court's reasoning then it is misguided, because an agreement between a surety and the principal debtor for reimbursement is not within the typical statute of frauds provision as a "promise to answer for the debt of another."



*c) Federal Law as the Rule of Decision*

Tribes have asserted jurisdiction over cases involving interpretation of federal statutes on the theory that absent explicit congressional language making federal courts the exclusive forums, tribal courts are just as able, or sometimes better situated, to interpret federal law as federal and state courts. This does not mean the plaintiff always obtains a forum for a case based on federal law. As mentioned above, the Colville Tribal Court dismissed a tort claim against tribal police officers operating under a 638 contract on the grounds that the FTCA provided the exclusive remedy.<sup>198</sup> In *Estate of Tasunke Witko v. G. Heileman Brewing Co.*,<sup>199</sup> the Rosebud Sioux Supreme Court upheld the trial court's dismissal of a claim against the off-reservation defendants based on the Federal Indian Arts & Crafts Act because the federal law does not create a private cause of action, but instead relies on administrative enforcement. In *Dempsey v. Department of Public Health & Human Services*<sup>200</sup> the Confederated Salish and Kootenai Tribal court applied federal common law to decide that it had no authority to review state administrative proceedings dealing with Medicaid overcharges, even though the physician was an enrolled member of the tribe providing medical services to many tribal members. The lower court had upheld jurisdiction on the grounds that the tribal court had authority to interpret and enforce the contract the physician had entered into with the Medicaid program under *Williams v. Lee* and its progeny, because a state administrative determination would "[I]nfring[e] on the right of reservation Indians to make their own laws and be ruled by them."<sup>201</sup> Justice Wheelis, writing for the court of appeals, reversed the lower court on the grounds that the Medicaid statute was a "governing Act of Congress,"<sup>202</sup> creating a comprehensive system of rights and remedies premised on enforcement by a single state agency. The fact that the physician had signed a contract binding him to federal and state law, including state administrative rules, also weighed against tribal jurisdiction. In so doing, the court adopted an approach to preemption of tribal law followed in some, though not all federal circuits and criticized by some commentators as not required by Supreme Court precedents. Whether the decision in *Dempsey* is correct, it is a thoughtful opinion, and with greater attention given to the applicability of federal laws of general application to

198. See *supra* note 7 and text.

199. 23 Indian L. Rep. 6104 (Rosebud Sioux Sup. Ct. 1996).

200. 23 Indian L. Rep. 6101 (Confederated Salish & Kootenai Tribes Ct. App. 1996).

201. *Williams v. Lee*, 358 U.S. 217, 220 (1959) (holding state court lacks jurisdiction over an action for debt incurred at a trading post operated by a non-Indian brought against a Navajo tribal member).

202. *Id.* at 223.

Indian reservations,<sup>203</sup> tribal court opinions taking the contrary view may well emerge.

On the other hand, two tribal courts in the sample have firmly rejected arguments that because a particular federal law is complicated or has never been invoked in tribal court, tribal courts lack adjudicatory jurisdiction. First, the estate of Tasunke Witko alleged that the marketers of Crazy Horse malt liquor engaged in false advertising in violation of the Lanham Act, a federal law that regulates trademarks.<sup>204</sup> The Rosebud Sioux Supreme Court, while noting that the resolution of the plaintiffs' standing to raise a Lanham Act violation had not yet reached fruition, nevertheless held that the Estate had alleged sufficient facts to survive a motion to dismiss.<sup>205</sup> Second, the Coeur d'Alene Tribal Court interpreted the Indian Gaming Regulatory Act (IGRA) despite a claim by the defendant that the IGRA vests exclusive jurisdiction in the federal courts. This case, discussed earlier in the context of jurisdiction, held that the Tribe's national lottery did not violate the IGRA, for it was conducted pursuant to a tribal-state compact approved by the Secretary of the Interior and a tribal ordinance of which the National Indian Gaming Commission approved.<sup>206</sup> The Court also considered and rejected AT&T's argument that it was justified in withholding service under a federal statute requiring common carriers to withhold service to facilities violating Federal, state, or local law. In particular, AT&T argued that the national lottery violated a federal criminal law sanctioning "betting or wagering."<sup>207</sup> The court disagreed, interpreting the federal criminal statute as designed to control betting on sports events and thus harmonizing the law with IGRA.

Finally, the Indian Civil Rights Act is a federal statute applicable in tribal court.<sup>208</sup> Nevertheless, in interpreting this federal law, the courts increasingly look to tribal tradition, as noted above. In addition tribal civil rights cases are also based on tribal constitutions and civil rights acts. These cases are discussed separately below.

203. For treatments of this issue, see Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991).

204. 15 U.S.C. § 1125(a) (1994).

205. See *Estate of Tasunke Witko v. G. Heileman Brewing Co.*, 23 Indian L. Rep. 6104, 6113 (Rosebud Sioux Sup. Ct. 1996).

206. See *Coeur d'Alene Tribe v. AT&T Corp.*, 23 Indian L. Rep. 6060, 6068 (Coeur d'Alene Tribal Ct. 1996).

207. *Id.* (citing 18 U.S.C. §§ 1084(a), (d) (1994)).

208. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (holding that Congress has the authority to do so, but the Indian Civil Rights Act does not waive tribal sovereign immunity for suits against the tribe).



*IV. The Hard Cases: Sovereign Immunity, Civil and Political Rights, and Non-Indian Parties*

*A. Sovereign Immunity*

Sovereign immunity is a mixed constitutional, statutory and common law rule in federal courts. The doctrine is premised on the need to protect government coffers from what could be ruinous damage suits. In the pithy words of Judge Quinn of the Ho-Chunk Tribal Court, "It is the legislative and executive branches that deal with the nation's finances on a daily basis. It is not long ago that the only thing standing between the nation and bankruptcy was sovereign immunity."<sup>209</sup> Tribal courts' analysis of sovereign immunity, while a matter of tribal law, is infused by an appreciation for the federal common law regarding this doctrine. Nevertheless, tribes differ in the extent to which they adopt various federal common law doctrines. To oversimplify the analysis, I will describe this process as involving three steps. First, it is necessary to determine to what extent the tribe both claims sovereign immunity and waives it by the tribe's constitution, by tribal ordinance, or as a matter of tribal common law.<sup>210</sup> It is important to understand that some tribes extend sovereign immunity further than the federal government. For example, the Cheyenne River Sioux Tribe Law & Order Code § 1-8-4 extends the tribe's sovereign immunity to officers and employees, while the federal doctrine is understood as limited to the government or agencies of the government. As a result, parties can sue federal officers acting in their individual capacities for money damages in certain circumstances.<sup>211</sup> Recent federal court cases have held that tribes have the authority on their own to waive sovereign immunity,<sup>212</sup> although in *Jones v. Chitimacha Tribe*, Chief Judge Dela Houssaye opined that tribes may not waive sovereign immunity without congressional authorization, but found that authorization in the Indian Gaming Regulatory Act.<sup>213</sup> Although supported by 1940 opinion of the

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209. *Kingsley v. Ho-Chunk Nation*, 23 Indian L. Rep. 6113, 6117 n.3 (Ho-Chunk Tribal Ct. 1996) (Quinn, J.).

210. *Smith v. Confederated Salish & Kootenai Tribes*, 23 Indian L. Rep. 6256, 6257 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (holding tribe possesses common law immunity).

211. See, e.g., *Butz v. Economou*, 438 U.S. 478 (1978) (holding federal executive officers lack absolute sovereign immunity from lawsuit in their individual capacities).

212. See *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 772 (D.C. Cir 1986) (collecting cases from four circuits agreeing that tribes can waive sovereign immunity).

213. *Jones v. Chitimacha Tribe of Louisiana*, 23 Indian L. Rep. 6225, 6226-28 (Chitimacha Ct. App. 1996). After finding congressional authorization for a tribal waiver, the court held that the tribal-state compact contained an express waiver of sovereign immunity up to the limits of the tribe's liability coverage. Although the tribe's constitution contained strict language that "[n]othing in these Codes shall be construed as consent of the Tribe to be sued," *id.* at 6226, the Court held that the tribal-state compact, which had been ratified by the tribal council and the general membership in an election (as is the practice with all tribal ordinances), was sufficient



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Supreme Court,<sup>214</sup> this conclusion is not inevitable. Rather, most tribal courts assume that the tribe's inherent sovereignty includes the authority to waive sovereign immunity and certainly, permitting suits in tribal court would seem consistent with tribal policies of strengthening tribal courts and promoting self-determination in general.

Next, to determine what actions come within the waiver, one must study the tribal statutes carefully to determine to what extent the tribe has waived its sovereign immunity from suit in tribal court. Some tribal requirements are stricter than federal requirements. For example, the Cheyenne River Sioux Tribe Law and Order Code requires "a resolution or ordinance specifically referring" to sovereign immunity.<sup>215</sup> These statutory waivers are typically construed strictly<sup>216</sup> and are often regarded as jurisdictional.<sup>217</sup> Some tribes like the Fort Berthold Tribe, specifically waive sovereign immunity for Indian Civil Rights Act cases, but limit that waiver to injunctive or declaratory relief.<sup>218</sup> If a tribe has adopted a tort claims act, for example, it may have also adopted the many exceptions contained in federal or state tort claims acts. Like many states, tribal sovereign immunity ordinances may also limit damages. A frequent limitation is to the limits of the tribe's insurance policy.<sup>219</sup> The Mashantucket Pequot Tribe has adopted a provision limiting

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to waive immunity for claims arising out of Class III gaming. The Court also read the compact broadly to encompass not only persons injured at the casino but anyone whose injuries arise out of the operation of the casino, but nevertheless turned to Louisiana law providing immunity to vendors serving liquor for injuries caused by intoxicated patrons.

214. See *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940).

215. See, e.g., *Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs*, 23 Indian L. Rep. 6045, 6047-48 (Cheyenne River Sioux Ct. App. Ct. App. 1996) (quoting CHEYENNE RIVER SIOUX TRIBAL LAW & ORDER CODE § 1-8-4 and holding that the tribal employment ordinance does not waive sovereign immunity to review employment commission's decisions because the ordinance does not specifically use the term "sovereign immunity").

216. See *Kizer v. Walker River Hous. Auth.*, 23 Indian L. Rep. 6214 (Inter-Tribal Ct. App. Nev. 1996) (holding that a "sue and be sued" clause in a tribal ordinance creating a housing authority did not waive tribal sovereign immunity). This interpretation appears to be the consensus view. *Id.* at 6214-15.

217. See, e.g., *Jenkins v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6015 & n.1, 6016 (Mashantucket Pequot Tribal Ct. 1993) (quoting tribal waiver ordinance and relying on federal and state law requiring strict construction of waivers of immunity). The tribe must raise sovereign immunity as an affirmative defense, however, or be held to have waived it. See *Creapeau v. Ho-Chunk Nation-Rainbow Casino*, 23 Indian L. Rep. 6078, 6080 (Ho-Chunk Tribal Ct. 1996) ("The issue of sovereign immunity was not raised as an affirmative defense and thus was waived.").

218. *Hall v. Tribal Bus. Council*, 23 Indian L. Rep. 6039, 6043 (Fort Berthold Dist. Ct. 1996) (Pommersheim, J.) (quoting THREE AFFILIATED TRIBAL CONST. art. IV, § 3(b) "grant[ing] the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 U.S.C. § 1301 [sic], including the award of injunctive relief only"); see also *Palmer v. Millard*, 23 Indian L. Rep. 6094 (Colville Ct. App. 1996) (holding Tribal Civil Rights Act waives sovereign immunity for injunctive and declaratory relief).

219. See, e.g., *Jones v. Chitimacha Tribe*, 23 Indian L. Rep. 6225 (Chitimacha Ct. App.

damages to the actual damages suffered plus one-half of the actual damages for pain and suffering.<sup>220</sup>

Second, if the tribal council has not waived sovereign immunity, it is necessary to determine whether the *tribal court* has adopted any of the federal common law ameliorating doctrines, such as the *Ex parte Young*<sup>221</sup> doctrine permitting suits against federal officers seeking purely injunctive or declaratory relief and not affecting title to land, or *Bivens* actions for constitutional torts applied in Indian Civil Rights Actions.<sup>222</sup> The Ho-Chunk Tribal Court has held that while the tribal constitution provides that officers and employees are immune for actions taken in the scope of their duties, equitable relief is available for actions taken beyond the scope of their duties.<sup>223</sup> Many, but not all,<sup>224</sup> of the tribal courts studied follow the *Ex parte Young* doctrine, including the Winnebago Supreme Court in *Rave v. Reynolds*.<sup>225</sup> The *Rave* opinion contains an extensive review of tribal court cases and argues that tribes should distinguish between sovereign immunity, which does not normally attach to tribal officers, and official immunity, which

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1996) (tribal-state compact limits damages to limits of insurance policy); *Kingsley v. Ho-Chunk Nation*, 23 Indian L. Rep. 6113, 6117 & n.3 (Ho-Chunk Tribal Ct. 1996) (noting limitation to \$2000 for back pay in employment cases and urging the legislature to increase the amount in light of the tribe's changed circumstances).

220. See *Towpasz v. Mashantucket Pequot Gaming Enter.*, 23 Indian L. Rep. 6032 (Mashantucket Pequot Tribal Ct. 1994) (quoting Mashantucket Pequot Tribal Ordinance 011092-01, § 5(d) and noting that because plaintiffs medical expenses were limited to \$57, his pain and suffering damages, if proven, would be negligible).

221. 209 U.S. 123 (1908).

222. *Smith v. Confederated Salish & Kootenai Tribes*, 23 Indian L. Rep. 6256, 6257 (Confederated Salish & Kootenai Tribes Ct. App. 1996) (holding that tribal officers and employees can be sued for money damages for ICRA violations but have a good faith immunity, and relying on federal cases regarding official immunity in cases alleging constitutional torts). This case illustrates that the market works to provide incentives against tribal actions affecting a great deal of non-members. When the Lake County representative provided the one vote needed to defeat the tribe's efforts to obtain retrocession of jurisdiction from the State of Montana, the tribe removed its tribal bank accounts from local banks and authorized the tribe to participate in a voting rights/redistricting lawsuit. In addition, the tribal council countenanced distribution of a list of tribal businesses and the chairman made radio advertisements entreating consumers to support tribal businesses. Although Smith was a member of the tribe, this was not widely known. Although she asked that her name not be included, her name was published on the list. Unfortunately, as might be expected in the case of a highly allotted reservation, the tribal businesses lost customers. She brought suit against the tribe, but by the time the appellate court heard the appeal the economic sanctions had been lifted. Apparently the tribal initiative had worked perfectly perversely: non-Indians boycotted the tribal businesses.

223. *Simplot v. Ho-Chunk Nation Dep't of Health*, 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996).

224. See *Lovermi v. Miccosukee Tribe*, 23 Indian L. Rep. 6090 (Miccosukee Tribal Ct. 1996) (dismissing suit for wrongful termination against tribe, officers, and agencies without discussing *Ex parte Young* exception with regard to tribal officers).

225. See *Rave v. Reynolds*, 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996) (announcing an emerging consensus among tribal courts and collecting cases).



provides a defense for officers to limit or avoid money damages in certain circumstances.<sup>226</sup> One suspects Chief Justice Clinton's background as a Federal Courts professor impelled him to attempt to straighten out a thorny and confusing area of Indian law. In addition, the court has gone beyond the federal doctrine, by permitting declaratory and injunctive relief against tribal agencies as well as officers, criticizing the United States Supreme Court's refusal to extend the doctrine to agencies as unduly formalistic.<sup>227</sup>

The third inquiry is whether Congress has abrogated the tribe's sovereign immunity from lawsuit. Some courts, like the Intertribal Court of Appeals of Nevada sitting in a case arising from the Walker River Paiute Tribe, have asserted that the ICRA by its own force becomes a part of the tribe's constitution and abrogates tribal sovereign immunity, at least for declaratory and injunctive relief in tribal court.<sup>228</sup> Many tribes have waived sovereign immunity for injunctive or declaratory relief in civil rights cases.<sup>229</sup>

## *B. Political Cases: Civil and Political Rights*

### *1. Civil Rights*

Of the eighty-five cases submitted to the *Indian Law Reporter*, twenty-two<sup>230</sup> raised civil rights questions. In eleven cases the tribal courts agreed

226. *Id.* at 6161-64.

227. *Thompson v. Cheyenne River Sioux Tribe Bd. of Police Comm'rs*, 23 Indian L. Rep. 6045, 6049 (Cheyenne River Sioux Ct. App. 1996). The opinion contains a very scholarly exegesis on tribal sovereign immunity; the fact that two law professors with expertise in Indian law sit on the court of appeals may account for this scholarly tone.

228. *Kizer v. Walker River Hous. Auth.*, 23 Indian L. Rep. 6214, 6215 (Inter-Tribal Ct. App. Nev. 1996); *cf.* *Hall v. Tribal Business Council*, 23 Indian L. Rep. 6039, 6043 (Fort Berthold Dist. Ct. 1996) (relying on constitution's waiver of sovereign immunity for ICRA cases).

229. *See, e.g., Palmer v. Millard*, 23 Indian L. Rep. 6094, 6097 (Colville Ct. App. 1996) (noting that the tribal code waives sovereign immunity only for due process or equal protection claims).

230. *Coeur d'Alene Tribe v. AT&T Corp.*, 23 Indian L. Rep. 6060 (Coeur d'Alene Tribal Ct. 1996) (determining that exercise of long-arm jurisdiction under tribal statute does not violate due process); *Cholka v. Ho-Chunk Gaming Comm'n*, 23 Indian L. Rep. 6075 (Ho-Chunk Tribal Ct. 1996) (affirming fine imposed upon employee for violating gaming statute, but reversing his suspension because the Commission had failed to give him proper notice of hearing and of the nature of his violation in violation of the tribal constitution's due process clause, and ordering the Commission to distribute a copy of the Gaming Ordinance (containing employment policies) to every employee lounge of every class II and class III gaming establishment so as to provide notice in the future); *Coalition for Fair Gov't II v. Lowe*, 23 Indian L. Rep. 6181 (Ho-Chunk Tribal Ct. 1996) (granting preliminary injunction restraining the election board from holding a special election to fill the seats of three tribal council members removed from the general council, noting probability of success on the merits of the allegation that removal violated the Constitution's requirement of notice and an opportunity to respond to charges of malfeasance before removal); *Colville Confederated Tribes v. Wiley*, 23 Indian L. Rep. 6037 (Colville Tribal Ct. 1996) (granting defendant's motion to dismiss a misdemeanor charge of possession of alcohol in an area where alcohol was prohibited on the grounds that defendant was prejudiced due to the insufficiency of the citation given him; citation did not state the essential elements of the charge).



more specific provisions such as the rights of free speech and association. Some tribal courts continue to resolve these issues by reference solely to Supreme Court precedents without a discussion of the applicability of these precedents to the tribe's particular context,<sup>237</sup> but there is a definite trend by tribal courts to assert that the tribe has leeway in interpreting these provisions.<sup>238</sup>

*Hall v. Tribal Business Council*<sup>239</sup> is illustrative. In *Hall*, the Fort Berthold District Court noted that in the context of Indian land, tribal member applicants for grazing unit leases have a due process right "to be treated culturally and legally with dignity and appropriate fairness," traditions that "are central to the history of the Three Affiliated Tribes."<sup>240</sup> Because these traditions create a legitimate expectation for all tribal members that they will be eligible for grazing leases, the *Hall* court held that this tradition created a property interest triggering the fair procedures required by the due process clause.<sup>241</sup>

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(1943) (Jackson, J.) (invalidating a state board of education rule requiring students to salute the flag as violating the First and Fourteenth Amendments to the U.S. Constitution).

237. See *Walker River Paiute Tribe v. Jake*, 23 Indian L. Rep. 6204, 6206 (Walker River Tribal Ct. 1996) (holding that since the warrant and probable cause provisions of the ICRA are based on the fourth amendment to the U.S. Constitution, Supreme Court precedent requiring that defendant be promptly brought before a neutral magistrate for a probable cause determination is binding on tribal courts).

238. Of the tribal courts studied who reached this question, the courts of the Colville, Cheyenne River Sioux, Three Affiliated Tribes of the Fort Berthold Reservation, Rosebud Sioux, Winnebago, and Ho-Chunk tribes concluded that the tribal courts need not follow the U.S. Supreme Court precedents "jot-for-jot."

239. *Hall v. Tribal Bus. Council*, 23 Indian L. Rep. 6039 (Fort Berthold Dist. Ct. 1996).

240. See *id.* at 6042.

241. *Id.* The Burger and Rehnquist Courts tightened up procedural due process analysis considerably by requiring a finding that the petitioner has been deprived of a constitutional or state-created liberty or property interest in order to be entitled to any procedural due process. See *Board of Regents v. Roth*, 408 U.S. 564 (1972) (requiring property interest to be a legitimate claim of entitlement grounded in state law); *Paul v. Davis*, 424 U.S. 693 (1976) (holding that reputation alone is not a sufficient liberty interest unless damage to reputation has a tangible result, such as loss of property). Certainly tribal courts need not be as strict and could, for example, adopt a much more flexible procedural due process analysis permitting consideration of whether procedures are fair whenever a petitioner asserts a relationship with the government such that denial of fair procedures might interfere with her liberty interest broadly defined. The Supreme Court's concern not to turn every public employment decision into a federal case should not prevent tribes from being open to procedural due process claims in tribal courts. Other tribal courts have adopted the "liberty-property" requirement. See *Rave v. Reynolds*, 23 Indian L. Rep. 6150, 6168 (Winnebago Sup. Ct. 1996) (holding that candidates disqualified by caucuses held in violation of tribal election rule had no expectancy interest under tribal law in a position on the ballot, relying on federal cases requiring establishment of interference with liberty or property interest); *Simplot v. Ho-Chunk Nation Dep't of Health*, 23 Indian L. Rep. 6235, 6240 (Ho-Chunk Tribal Ct. 1996) (adopting *Roth* analysis, but finding personnel manual created expectations of continued employment qualifying as a property right).

Even in cases in which the tribal court ultimately decides, to adopt the Supreme Court's precedents, it generally will note that it is not bound to follow this precedent but chooses to do so because the case before it fits the precedent. In *Clown v. Coast to Coast*, the Cheyenne River Sioux Tribe held that the proceedings in the trial court, when taken as a whole, violated plaintiff's due process rights in violation of the ICRA.<sup>242</sup> The court noted that although the procedures in tribal civil cases where parties represent themselves may be less formal than otherwise and may be based on an inquisitorial, rather than adversarial format, parties must still be treated fairly and equally and be given a full, fair and meaningful opportunity to be heard.<sup>243</sup> The defendant debtor, a member of the tribal council, had represented himself *pro se*, as had the plaintiff. The court of appeals noted that the trial court had become too embroiled in questioning the defendant and concluded that the number of errors effectively deprived the plaintiff of due process rights. In dicta, the *Clown* Court established a laundry list of guidelines applicable to subsequent cases to protect *pro se* litigants.<sup>244</sup>

Finally, in some opinions, tribal courts put the burden on counsel to object to the Supreme Court precedents. Generally, these courts will apply the Supreme Court precedents if counsel does not argue that the court should interpret a tribal civil rights clause differently from the Supreme Court's interpretation of the federal constitution. Such was the approach of the Winnebago Court of Appeals in *Rave*.<sup>245</sup>

Civil rights cases most often involved due process issues, with a few cases raising equal protection issues and one a free speech and assembly issue. *Simplot v. Ho-Chunk Nation Department of Health*<sup>246</sup> is particularly noteworthy, because the Nation's Department of Health dismissed the plaintiffs, non-Indians, based upon an oral reorganization plan that had apparently issued from the Tribal President's office. The non-Indian employees argued that abolishing their positions while leaving the positions of Indian colleagues intact violated procedural due process and equal protection. Chief Trial Judge Butterfield granted summary judgment for the plaintiffs, holding that the Department denied the plaintiff employees due process when it did not follow any of its own policies with regard to reorganizations, did not inform the plaintiffs about bumping rights, and barred the employees from pursuing an administrative process.<sup>247</sup> The court ordered

242. *Clown v. Coast-to-Coast*, 23 Indian L. Rep. 6055 (Cheyenne River Sioux Tribal Ct. 1993).

243. *Id.* at 6058.

244. *Id.* at 6058-59. The guidelines included requirements that the court explain the nature of the procedural course of the proceedings, indicate to the parties their right to question witnesses, present their own case, and to have the court itself question witnesses. *Id.*

245. See generally, *Rave v. Reynolds*, 23 Indian L. Rep. 6021 (Winnebago Tribal Ct. 1995).

246. 23 Indian L. Rep. 6235 (Ho-Chunk Tribal Ct. 1996).

247. *Id.* at 6243. The reorganization had been ordered by the tribal president. Since the



the plaintiffs to be reinstated, their sick leave and seniority restored, and awarded each of them the damages permitted (\$2000) under the limited waiver of sovereign immunity in the tribe's employment ordinance. Significantly, Judge Butterfield ordered the payment of these damages out of the President's budget. Judge Butterfield also pointedly noted that if the employees were successful in proving racial discrimination other monetary relief may be available.<sup>248</sup>

## 2. Political Cases

I use the term "political cases" broadly, to include cases adjudicating the rights of tribal members as citizens, such as voting rights, and those involving the structure of government, or clashes between branches of government, but not to sweep in all cases that may be political in the sense that the court's ruling may be controversial.

The opinions studied contained many political cases, with the main opinions discussing: (1) the authority of the judiciary to review legislative acts; (2) the separation of powers between the legislature and the courts; and (3) election disputes. These opinions indicate that to the extent tribes have incorporated separation of powers into their constitutions or judicial ordinances, tribal courts are addressing questions about the appropriate role of the tribal councils and the courts and asserting the power of judicial review.

Judicial review is a relatively new phenomenon in tribal courts.<sup>249</sup> Most tribal constitutions did not contain provisions separating and dividing powers, but created a council system of government modeled more on municipal governments than state or federal governments.<sup>250</sup> Under this system, the Council may have executive, judicial and legislative powers.<sup>251</sup> The Tribal Chair is an elective position, but is also the chair of the council, taking part

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employees' salaries were covered by 638 contracts, the court held that lack of funds could not have been the reason for the layoff. *Id.* at 6242. The trial had been bifurcated, with the racial discrimination claims set to be resolved in the next phase of the trial. *Id.* at 6236.

248. In Phase II of the trial dealing with the discrimination claim, the court will determine the extent to which the Department of Health waived sovereign immunity for racial discrimination claims in its 638 contract with the Indian Health Service. *Id.* at 6243.

249. The first case asserting judicial review was *Halona v. MacDonald*, 1 Navajo Rptr. 189 (1978), in which the Navajo Court asserted judicial review even though the tribe has no written constitution. See Alvin J. Zions, *After Martinez: Indian Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1, 20-25 (1979) (discussing the background and aftermath of this path-breaking case).

250. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 16, at 36-37 (noting the tribes' reliance on the dictates of the BIA and the concern about lack of resources to maintain separate departments).

251. See Zions, *supra* note 249, at 10-33 (describing central role of tribal council and noting that the BIA constitutions provided for creation of tribal judiciaries only if the council so decided).



in enacting legislation. Tribal judges are usually appointed by the councils, although they are elected in some tribes. Critics of tribal courts often point to the fact that tribal courts may lack the authority to invalidate tribal legislative or executive action. The trend in tribal court development, clearly favored by the Congress and the Bureau of Indian Affairs, is to insulate tribal judges from reprisals through contracts for a term, terminable only for cause, and providing for judicial review of legislative acts.<sup>252</sup>

Several of the reported cases addressed the duty of the court to interpret the law. In *Thompson v. Cheyenne River Sioux Tribe Bd. of Police Commissioners*,<sup>253</sup> the trial court had remanded to the Police Commission to obtain Tribal Council interpretation of an ambiguous ordinance. The question was whether the ordinance's barring employment of police officers with arrest records applied to detention officers. The court of appeals reversed, holding the remand violated separation of powers principles of the Tribal Constitution. The Court noted that the tribal courts should not avoid their obligation to decide the law because statutory interpretation is the very "essence of the judicial function."<sup>254</sup> Even without such a statute, however, tribes have taken a leaf from Justice Marshall's opinion in *Marbury v. Madison*<sup>255</sup> to interpret the tribal constitution,<sup>256</sup> tribal statutes,<sup>257</sup> or tribal traditions<sup>258</sup> as

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252. These criticisms have come from within and without. For example, in 1978 a comprehensive study of tribal courts by the National American Indian Court Judges Association reported that the constitutions of only three out of 23 courts surveyed provided for separation of powers. INDIAN COURTS AND THE FUTURE, *supra* note 52, at 40. The Report called for greater independence of the tribal judiciary. *Id.* at 115. The 1991 Report of the Civil Rights Commission also concluded that an independent judiciary was crucial to the development and acceptance of tribal courts by Indian people as well as outsiders. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 16, at 44-51. It is notable that this Commission, widely regarded as hostile to tribal justice systems, specifically urged Congress not to impose separation of powers or judicial review on the tribal governments because of the need for flexibility among tribes and the lack of funding for tribal judiciaries. *Id.* at 51.

253. 23 Indian L. Rep. 6045 (Cheyenne River Sioux Ct. App. 1996).

254. *Id.* at 6051. The appellate court also voiced separation of powers concerns, noting that the tribal court's deference to the Council could be viewed as an attempt to coerce the Council into taking action, which would interfere with the proper sphere of the Tribal Council's authority.

255. 5 U.S. (1 Cranch) 137 (1803).

256. See Coalition for Fair Gov't II v. Lowe, 23 Indian L. Rep. 6181, 6184 (Ho-Chunk Tribal Ct. 1996). The Ho-Chunk Tribal Court nowhere cited *Marbury v. Madison*, but relied on the tribal constitution's supremacy clause and a clause providing that the General Council of the tribe has authority to reverse decisions of the judiciary in non-constitutional cases only as imposing upon the courts the "responsibility of interpreting the constitution." The Ho-Chunk Tribal Court also relied on a classic Marshallian argument from consequences by stating: "[T]o [the] interpretation urged by the defendant would essentially destroy the constitution by holding that the constitution means whatever the general council [sic] says it means." *Id.*; cf. *Marbury*, 5 U.S. at 178-180 (listing the parade of horrors resulting if the Congress could enact arbitrary unconstitutional laws). The Ho-Chunk Constitution does contain clear authority for judicial review, however. See *Simplot v. Ho-Chunk Nation Dep't of Health*, 23 Indian L. Rep. 6237 (Ho-Chunk Tribal Ct. 1996) (quoting Ho-Chunk Nation Constitution, art. VII, § 6(b)

providing for judicial review.

Although tribal courts in some opinions merely flexed their muscles,<sup>259</sup> so to speak, by noting that the judiciary possessed the power to invalidate tribal ordinances, two of the cases, *Colville Confederated Tribes v. Meusy*,<sup>260</sup> and *Rave v. Reynolds*,<sup>261</sup> invalidated tribal ordinances, although the later case was overturned on appeal,<sup>262</sup> and one imposed procedures for distributing grazing unit leases on the Tribal Council.<sup>263</sup> In *Meusy*, the tribal court invalidated a legislative response to an earlier tribal court opinion, *Colville Confederated Tribes v. Tatshama*,<sup>264</sup> refusing to grant deferred prosecution to criminal defendants on the grounds that the court could not create deferred prosecution, a creature of statute, without violating the Colville Constitution's

("[t]he Trial Court shall have the power to declare the laws of the Ho-Chunk Nation void if such laws are not in agreement with this Constitution."); see also *Colville Confederated Tribes v. Meusy*, 23 Indian L. Rep. 6223, 6224 n.3 (Colville Tribal Ct. 1996) (relying on the court's constitutional authority to "interpret and enforce the laws" as providing for judicial review and asserting "if, after careful research and consideration an entire law, or a portion thereof, is found to be constitutionally invalid, this court will not hesitate to render an opinion to that effect").

257. See, e.g., *Rave v. Reynolds*, 23 Indian L. Rep. 6150, 6160 (Winnebago Sup. Ct. 1996) (quoting tribal code provision granting courts authority to review legislative actions alleged to violate the Constitution or the ICRA).

258. See e.g., *Colville Confederated Tribes v. Meusy*, 23 Indian L. Rep. 6223, 6224 n.3 (Colville Tribal Ct. 1996) (citing an earlier Colville tribal court case establishing court had authority to review tribal statutes even before the tribal Constitution had been amended to provide for separation of powers and citing *Marbury v. Madison*). The Navajo Court adopted the principal of judicial review in *Halone v. McDonald*, known as the *Marbury v. Madison* of the Navajo Nation. See Ziontz, *supra* note 249, at 20-25.

259. See e.g., *Watts v. Sloan*, 23 Indian L. Rep. 6033 (Navajo Sup. Ct. 1995). In deciding that the two-year tort statute of limitations should apply for legal malpractice and dismissing the claim as untimely, the Navajo Supreme Court noted that the tribal council has provided that a cause of action for legal malpractice against an attorney employed by the Navajo Nation may lie only when authorized by a Council committee, and noted pointedly that "there may be a problem with a political body addressing the legal question of whether a cause of action should lie." *Id.* at 6034.

260. 23 Indian L. Rep. 6223 (Colville Tribal Ct. 1996) (invalidating the Tribe's deferred prosecution ordinance because by dictating that the Court shall grant deferred prosecutions when they are presented by the tribe, the ordinance is an unconstitutional violation of separation of powers principles in the Colville Constitution).

261. 23 Indian L. Rep. 6021 (Winnebago Tribal Ct. 1995) (invalidating tribal election on grounds tribal ordinance providing for "one person/one caucus" violated Winnebago Constitution's right of free speech and assembly).

262. *Rave v. Reynolds*, 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996) (holding tribal ordinance may not be wise but does not violate the tribal constitution) (*Rave* I).

263. See *Hall v. Tribal Business Council*, 23 Indian L. Rep. 6039 (Fort Berthold Dist. Ct. 1996) (holding the distribution violated the due process provision of the ICRA and ordering the tribal council to hold a special session to consider the plaintiffs' appeals of the denials of their permits and that tribal members with an interest in obtaining permits be barred from participation).

264. 23 Indian L. Rep. 6211, 6212 n.8 (Colville Tribal Ct. 1996).



separation of powers provisions.<sup>265</sup> After the tribal council responded by providing for deferred prosecution, the court held that the council had gone too far in the other direction by requiring the court to grant deferred prosecution when requested by the tribal prosecutor because the resolution did not permit the court any discretion in an inherently judicial arena and thus authorizes the tribal council to determine the outcome of a case. The court thus invalidated the tribal resolution as impermissibly intruding on the authority of the judiciary under the Colville Constitution.<sup>266</sup>

Opinions of tribes with separation of powers provisions in their constitutions addressed other separation of powers principles.<sup>267</sup> Several opinions referred to the political question doctrine, a doctrine requiring federal courts to abstain from deciding issues committed by the text of the constitution to a coordinate branch of government for final decision. This argument was raised in two election cases, *Rave v. Reynolds*,<sup>268</sup> and *Coalition for Fair Government II v. Lowe*,<sup>269</sup> and a case challenging the removal of a tribal officer, *Frost v. Southern Ute Tribal Council*.<sup>270</sup> Like their federal counterparts, tribal courts considering this doctrine have rejected its application to prevent the court from adjudicating cases with political issues. Furthermore, the issue of whether a particular issue in fact raises a political question doctrine issue requires an interpretation of the tribal constitution peculiarly within the court's province.<sup>271</sup>

265. *Id.*

266. *Meury*, 23 Indian L. Rep. at 6225.

267. The Mississippi Choctaw Criminal Court was asked to create a legislative immunity for acts of council members within council chambers in a case in which a council member had been indicted for unauthorized possession of casino documents which had, apparently, been given to council members to examine in a council meeting on the condition that they would be immediately returned after review. The court refused to create an immunity and held that the law barring theft of official documents applies to all members of the tribe. See *Mississippi Band of Choctaw Indians v. Ben*, 23 Indian L. Rep. 6119 (Miss. Choctaw Crim. Tribal Ct. 1996). The court does not discuss the tribal constitution, however, but relied on the absence of any provisions in the law granting immunity, thus showing a hesitation to overstep the judicial role).

268. 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996).

269. 23 Indian L. Rep. 6181 (Ho-Chunk Tribal Ct. 1996).

270. 23 Indian L. Rep. 6135 (Southern Ute Tribal Ct. 1996).

271. See *Coalition for Fair Gov't II v. Lowe*, 23 Indian L. Rep. 6181 (Ho-Chunk Tribal Ct. 1996) (rejecting the argument that the General Council, the tribe's legislative body, comprised of all tribal members, has the paramount power over all branches and the sole right to determine what constitutes malfeasance for purposes of removing a council member from office, noting that the Ho-Chunk Constitution gives the judiciary sole power to interpret the constitution). The Ho-Chunk Tribal Court rejected the political question doctrine as a "prudential rule established by the U.S. Supreme Court to govern its dealings with the U.S. Constitution [and] not binding on the Ho-Chunk Nation's interpretation of the Ho-Chunk Constitution." *Id.* At 6185. But see *Frost v. Southern Ute Tribal Council*, 23 Indian L. Rep. 6135, 6136 (Southern Ute Tribal Ct. 1996) (denying motion for temporary restraining order to prevent council from instituting removal proceedings, but noting that if in removal hearing the council accords the council member appropriate procedures, the court will not review the merits as the question is "entirely within the



The most interesting political cases, however, are those arising in the context of election disputes or allegations of impropriety against tribal officers.

*Rave v. Reynolds*<sup>272</sup> has been mentioned several times in this survey. These cases involved a challenge to a tribal council election in which a tribal council member, who was also a candidate for an upcoming election, made a motion for and voted in favor of disqualifying other candidates for the same election. In the first case, a special (pro tem) court invalidated a section of a tribal ordinance which stated that "[n]o one person shall attend or vote at more than one Caucus,"<sup>273</sup> as violative of the Winnebago Constitution's guarantee of free speech and assembly. The court also established a conflict of interest standard for tribal council members who are candidates in upcoming elections. Most significantly, the Court declared invalid the election result for having involved a possible conflict of interest and ordered a new election.<sup>274</sup> The day after the Court issued its order, the courthouse was destroyed by fire.

The Winnebago Supreme Court reversed. The Supreme Court's discussion of tribal sovereign immunity has been noted above.<sup>275</sup> On the merits, the Court applied an intermediate standard of review to assess the argument that the "one vote-one caucus" rule violated the freedom of association clause of the Indian Civil Rights Act. Under this analysis, the court concluded that the rule, although open to abuse and unwise, fell short of violating the Winnebago constitution and further held that the Council Member's participation in the vote to disqualify the candidates from the tainted caucus did not violate the procedural rights of the removed candidates under the due process clause. An innovation employed by the Supreme Court was to provide a syllabus of this complicated opinion, thus making the points in the opinion more accessible to the tribal community.

*Coalition for a Fair Government II v. Lowe*<sup>276</sup> involved an attempt to remove several council members during a very short-held quorum of the Ho-Chunk Tribe. The Tribe's General Council is comprised of all eligible voters,

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discretion of the tribal council").

272. 23 Indian L. Rep. 6021 (Winnebago Tribal Ct. 1995), *rev'd*, *Rave v. Reynolds*, 23 Indian L. Rep. 6150 (Winnebago Sup. Ct. 1996).

273. *Id.* at 6024 (quoting Winnebago Tribal Ordinance No. 5, § 1(E) (1994)).

274. *Id.* at 6025.

275. *See supra* note 214 and accompanying text. The Winnebago Supreme Court held that the lower court did not have jurisdiction to declare the election result invalid because of the elected council member's burglary conviction because the Tribal Code provided for the writ of *quo warranto* as the exclusive method of removing a tribal officer not seated in conformity with tribal law. Since the 30 days had passed within which the writ could be filed, the tribal court could rule on the legality of council actions, but could not order the removal of a tribal official. *Rave*, 23 Indian L. Rep. at 6160. The Court also interpreted amendment XV of the Tribal Constitution as not disqualifying someone from serving on the tribal council who had been convicted of a crime before election to office. *Id.* at 6171-72.

276. 23 Indian L. Rep. 6181, 6182 (Ho-Chunk Tribal Ct. 1996).

of whom 20% must be present in order to constitute a quorum. Apparently it has always been difficult for the Council to maintain a quorum and since the percentage was raised from 10 to 20% in the 1994 Constitution, a quorum has rarely been achieved. According to the court, no General Council has held a quorum for more than one hour, until the meeting at which a vote was taken to remove three members of the Council.<sup>277</sup> The Ho-Chunk Supreme court granted a preliminary injunction to postpone the special election called to fill the council members' seats, finding that the ousted council members had a likelihood of success on the merits that their removal violated due process.<sup>278</sup>

In *Frost v. Southern Ute Tribal Council*,<sup>279</sup> the tribal court denied a council member's application for a motion for a temporary restraining order to prevent the tribal council from beginning removal proceedings against him. The council member argued that he could only be removed for commission of a felony after taking office, which had not occurred and that the council's enacting regulations governing notice and procedures to be applied in removal cases *after* he was served with notice of removal violated the *ex post facto* provision of the ICRA and his right to due process. The Southern Ute tribal court rejected these arguments, relying first, on language in article V of the Southern Ute Constitution providing for discretionary removal of a council member upon the affirmative vote of four tribal council members, and, second, that enacting procedures for removal after he was given notice did not violate the guarantee against *ex post facto* laws in the ICRA or otherwise deny him due process.

### 3. The Rights of Non-Indian Parties

As noted above, critics of tribal courts make the basic assumption that non-Indians, in particularly white people, will not get a fair trial in tribal courts. One method by which Indian tribes seek to establish their legitimacy in the eyes of non-Indians is by adopting Western structures and processes and by treating outsiders fairly in whatever process is applied.

As this paper demonstrates, most tribal courts are largely indistinguishable in structure and process from state and federal courts. Some tribes have adopted courts that are in almost every respect identical to state courts for cases primarily involving non-Indians. The gaming tribes in the sample have chosen this path not only because of the great number of non-Indian participants and the envy and distrust of some neighboring communities, but also as a way to gain trust and confidence from surrounding jurisdictions. While adopting many of the state court system rules and structures, however, these tribes have created court systems that serve tribal interests by limiting damages (common in many state courts) and by refusing to adopt Anglo court

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> 23 Indian L. Rep. 6135 (Southern Ute Tribal Ct. 1996).



procedures that are not deemed helpful, such as the jury system for civil trials.

Tribes operating Westernized courts may also operate alternate systems of justice. Robert Porter urges tribes to focus more energy on recreating traditional court systems but to retain westernized court systems for cases involving non-Indians.<sup>280</sup> Some tribes have begun creating or recreating traditional court systems, such as the Navajo Peacemaker court. The Mohegan Tribe is in the process of setting up a Council of Elders, for example. In addition many informal nonjudicial dispute mechanisms exist in tribes and operate without burdening or invoking the formal tribal court system.

The second way to gain legitimacy is to treat outsiders fairly. My survey of these eighty-five cases indicates that tribal court judges work hard to make the tribal judicial system fair for all parties appearing before them. There have been and will be cases in which non-Indian parties are mistreated by the process; tribal judges are not immune from the rule that all judges are human. In this admittedly limited sample, however, the tribe does not always win against the individual, and the tribal member does not always defeat the non-Indian.

It would probably surprise Mr. Gamache and Senator Gorton that non-Indians are plaintiffs or defendants in eighteen of the cases studied and probably parties in nineteen others. Yet these non-Indian parties were treated fairly. In *Simplot v. Ho-Chunk Nation*, the court ordered non-Indian employees reinstated because their termination violated the Indian Civil Rights Act. In *Bartell v. Navajo Nation*, the court's ruling favored the insurance company defendant by limiting the damages that could be assessed. Non-Indians collect debts owed by Indian debtors in tribal courts, even when those debtors are members of the tribal council, *Clown v. Coast to Coast*. Tribal people also win, such as a journalist who was awarded \$200,000 in damages for permanent injuries suffered in an automobile accident, *Bick v. Pierce*.

### Conclusion

As with many other issues in Indian Law, the public opinion of tribal courts can be distorted by ignorance. Although federal and state courts often err in decision making, these errors are often overlooked and explained away by the old adage — hard cases make bad law. While the verdict in the O.J. Simpson trial was decried by many as an extreme injustice, no one argued that the California judicial system should be abolished.

Condemnation before adjudication, however, comes easy for critics of tribal courts as exemplified by Senator Gorton's and Mr. Gamache's biased and unsubstantiated reactions to tribal courts and their decisions. As demonstrated

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280. Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).



through this relatively small sample of tribal court cases, the tribal courts, although forced to engraft Western legal principles onto their consensual form of decision making, have been highly successful in doing so. In part, this is because they are sensitive to the potential loss of their independent adjudicatory systems if they were to overstep the boundaries placed upon them by the Congress and the courts, and in part because they have had to become adept at melding the traditions and customs of their cultures with those legal principles guiding the majority culture. Unlike their critics, tribal courts do not dismiss the well-reasoned opinions of the majority culture's courts but choose, instead, to use these Western principles with their own customary and traditional norms.

This ability to combine the principles of the majority and minority cultures is one that the dominant society should respect and honor. Unfortunately, this respect is not possible without these opinions being available to scholars, legislators, courts, and majority and minority communities. Not only will a wider distribution and coverage of tribal court opinions serve to eradicate misconceptions, it may also serve to allow for a critical dialogue with these opinions without eradication of the courts themselves.

ATTACHMENT VIII.

**“SOLUTIONS”**

SOLUTION #1: FUNDING FOR TRIBAL COURTS

SOLUTION #2: IMPLEMENT THE RECOMMENDATIONS OF THE  
TRIBAL / STATE / FEDERAL WORKGROUP  
CENTER FOR STATE COURTS  
(INCLUDES OVERRULING OLIPHANT)

SOLUTION #3: LIMITING PLENARY POWER

SOLUTION #4: OVERRULING LONE WOLF v. HITCHCOCK

## COURT JUDGES ASSOCIATION



P.O. BOX 3120  
Mashantucket, CT 06339-3126  
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## SOLUTION #1

## Funding for Tribal Courts

## PUBLIC LAW 103-176 (H.R. 1268)

Enclosed is the "INDIAN TRIBAL JUSTICE ACT" Public Law 103-176 (H.R. 1268) for your information and use as passed by the United States Congress and signed by President Bill Clinton on December 3, 1993.

This is the Tribal Court legislation authorizing for fiscal years 1994, 1995, 1996, and 1997, 1998, 1999, and 2000.

- \$50 Million for base funding for Tribal Courts;
- \$7 Million for training, enhancement for Tribal justice, technical assistance, etc.,
- \$500,000 for administrative expenses for Tribal Judicial Conferences;
- \$500,000 for administration expense for the Office
- \$400,000 for survey (one-time only)



Public Law 103-176  
103d Congress

An Act

Dec 3, 1993  
(H.R. 126S)

To assist the development of tribal judicial systems, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Indian Tribal  
Justice Act.  
25 USC 3601  
note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Indian Tribal Justice Act".

25 USC 3601.

SEC. 2. FINDINGS.

The Congress finds and declares that—

(1) there is a government-to-government relationship between the United States and each Indian tribe;

(2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;

(3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;

(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;

(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;

(7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this Act;

(8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and

(9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this Act.

25 USC 3602

SEC. 3. DEFINITIONS.

For purposes of this Act:

(1) The term "Bureau" means the Bureau of Indian Affairs of the Department of the Interior.

(2) The term "Courts of Indian Offenses" means the courts established pursuant to part 11 of title 25, Code of Federal Regulations.

(3) The term "Indian tribe" means any Indian tribe, band, nation, pueblo, or other organized group or community, includ-

(6) Provide funds to Indian tribes and tribal organizations for the continuation and enhancement of traditional tribal judicial practices.

(d) NO IMPOSITION OF STANDARDS.—Nothing in this Act shall be deemed or construed to authorize the Office to impose justice standards on Indian tribes.

(e) ASSISTANCE TO TRIBES.—(1) The Office shall provide technical assistance and training to any Indian tribe or tribal organization upon request. Technical assistance and training shall include (but not be limited to) assistance for the development of—

(A) tribal codes and rules of procedure;  
(B) tribal court administrative procedures and court records management systems;

(C) methods of reducing case delays;

(D) methods of alternative dispute resolution;

(E) tribal standards for judicial administration and conduct; and

(F) long-range plans for the enhancement of tribal justice systems.

(2) Technical assistance and training provided pursuant to paragraph (1) may be provided through direct services, by contract with independent entities, or through grants to Indian tribes or tribal organizations.

(f) INFORMATION CLEARINGHOUSE ON TRIBAL JUSTICE SYSTEMS.—The Office shall maintain an information clearinghouse (which shall include an electronic data base) on tribal justice systems and Courts of Indian Offenses, including (but not limited to) information on staffing, funding, model tribal codes, tribal justice activities, and tribal judicial decisions. The Office shall take such actions as may be necessary to ensure the confidentiality of records and other matters involving privacy rights.

#### SEC. 102. SURVEY OF TRIBAL JUDICIAL SYSTEMS.

(a) IN GENERAL.—Not later than six months after the date of the enactment of this Act, the Secretary, in consultation with Indian tribes, shall enter into a contract with a non-Federal entity to conduct a survey of conditions of tribal justice systems and Courts of Indian Offenses to determine the resources and funding, including base support funding, needed to provide for expeditious and effective administration of justice. The Secretary, in like manner, shall annually update the information and findings contained in the survey required under this section.

(b) LOCAL CONDITIONS.—In the course of any annual survey, the non-Federal entity shall document local conditions of each Indian tribe, including, but not limited to—

(1) the geographic area and population to be served;

(2) the levels of functioning and capacity of the tribal justice system;

(3) the volume and complexity of the caseloads;

(4) the facilities, including detention facilities, and program resources available;

(5) funding levels and personnel staffing requirements for the tribal justice system; and

(6) the training and technical assistance needs of the tribal justice system.

(c) CONSULTATION WITH INDIAN TRIBES.—The non-Federal entity shall actively consult with Indian tribes and tribal organiza-

Confidential  
information

25 USC 3612.

Contracts

Supreme Court, as is true of the state courts, the certiorari power of the Supreme Court could be expanded to permit constitutional cases to be brought up to the Supreme Court from tribal court, as they are from state courts.

I urge your committee to avoid unnecessarily constricting the power of the tribal courts, where to do so would deprive the tribes of an important aspect of their sovereignty.

Respectfully submitted this \_\_\_ day of March, 1998

Very truly yours,

Witherspoon, Kelley, Davenport  
& Toole

By:  
Leslie R. Weatherhead

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formula which establishes base support funding for tribal justice systems in carrying out this section.

(2) The Secretary shall assess caseload and staffing needs for tribal justice systems that take into account unique geographic and demographic conditions. In the assessment of these needs, the Secretary shall work cooperatively with Indian tribes and tribal organizations and shall refer to any data developed as a result of the surveys conducted pursuant to section 102 and to relevant assessment standards developed by the Judicial Conference of the United States, the National Center for State Courts, the American Bar Association, and appropriate State bar associations.

(3) Factors to be considered in the development of the base support funding formula shall include, but are not limited to—

- (A) the caseload and staffing needs identified under paragraph (2);
- (B) the geographic area and population to be served;
- (C) the volume and complexity of the caseloads;
- (D) the projected number of cases per month;
- (E) the projected number of persons receiving probation services or participating in diversion programs; and
- (F) any special circumstances warranting additional financial assistance.

(4) In developing and administering the formula for base support funding for the tribal judicial systems under this section, the Secretary shall ensure equitable distribution of funds.

25 USC 3614.

#### SEC. 104. TRIBAL JUDICIAL CONFERENCES.

The Secretary is authorized to provide funds to tribal judicial conferences, under section 101 of this Act, pursuant to contracts entered into under the authority of the Indian Self-Determination and Education Assistance Act for the development, enhancement, and continuing operation of tribal justice systems of Indian tribes which are members of such conference. Funds provided under this section may be used for—

- (1) the employment of judges, magistrates, court counselors, court clerks, court administrators, bailiffs, probation officers, officers of the court, or dispute resolution facilitators;
- (2) the development, revision, and publication of tribal codes, rules of practice, rules of procedure, and standards of judicial performance and conduct;
- (3) the acquisition, development, and maintenance of a law library and computer assisted legal research capacities;
- (4) training programs and continuing education for tribal judicial personnel;
- (5) the development and operation of records management systems;
- (6) planning for the development, enhancement, and operation of tribal justice systems; and
- (7) the development and operation of other innovative and culturally relevant programs and projects, including (but not limited to) programs and projects for—
  - (A) alternative dispute resolution;
  - (B) tribal victims assistance or victims services;
  - (C) tribal probation services or diversion programs;
  - (D) juvenile services and multidisciplinary investigations of child abuse; and

(2) diminish in any way the authority of tribal governments to appoint personnel;

(3) impair the rights of each tribal government to determine the nature of its own legal system or the appointment of authority within the tribal government;

(4) alter in any way any tribal traditional dispute resolution forum;

(5) imply that any tribal justice system is an instrumentality of the United States; or

(6) diminish the trust responsibility of the United States to Indian tribal governments and tribal justice systems of such governments.

Approved December 3, 1993.

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**LEGISLATIVE HISTORY—H. R. 1265 (S. 521):**

**HOUSE REPORTS:** Nos. 103-205 (Comm. on Natural Resources) and 103-363 (Comm. of Conference).

**SENATE REPORTS:** No. 103-SS accompanying S. 521 (Select Comm. on Indian Affairs).

**CONGRESSIONAL RECORD,** Vol. 139 (1993):

July 21, S. 521 considered and passed Senate.

Aug. 2, H. R. 1265 considered and passed House.

Aug. 6, considered and passed Senate, amended.

Nov. 19, House and Senate agreed to conference report.

ATTACHMENT VIII.

**“ON COMMON GROUND”**

IMPLEMENTING THE RECOMMENDATIONS OF THE  
TRIBAL / STATE / FEDERAL WORKGROUP  
CENTER FOR STATE COURTS

INCLUDES OVERRULING OLIPHANT



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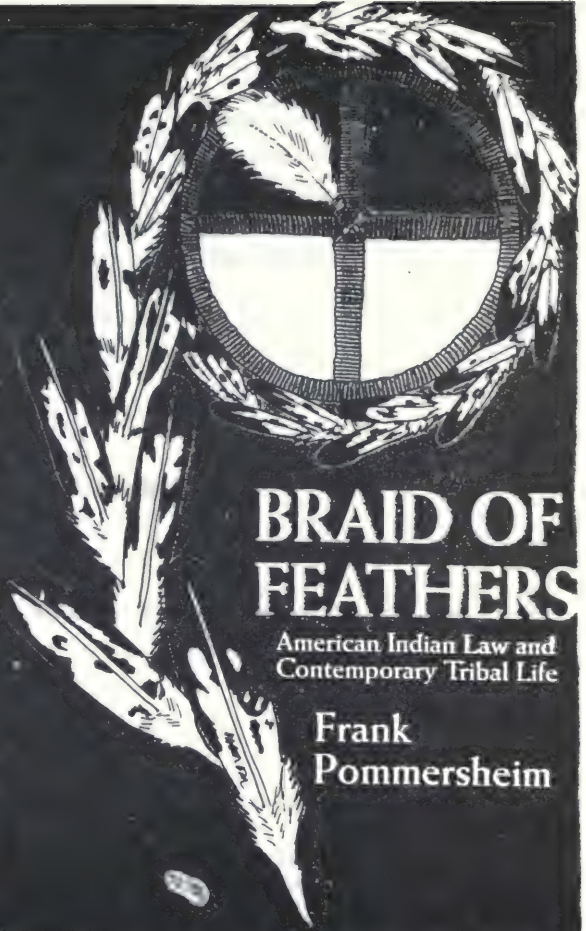
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Pommersheim

BRAID OF FEATHERS

California



# BRAID OF FEATHERS

American Indian Law and  
Contemporary Tribal Life

Frank  
Pommersheim

few.

the best of both worlds. Such a synthesis would recognize the importance of language, of narrative, and of story, as well as the meaning of justice from the indigenous point of view.

Deeply informed by the author's experience living and working on the Rosebud Sioux Indian Reservation in South Dakota for ten years, *Braid of Feathers* finally offers a "geography of hope"—one that recognizes the legacy of prejudice and exploitation but looks forward to a real enactment of the old ideals of freedom and democratic pluralism. That hope lies in the West, where Native Americans control a significant amount of land, water, and natural resources, and where a new ethic of development and preservation is emerging within the dominant society.

Pommersheim challenges Indians and non-Indians to forge an alliance at the local level based on respect and reciprocity—to create solidarity, not undo difference. In the words of Lakota Chief Sitting Bull: "It is not necessary that eagles should be crows."



Frank Pommersheim is Professor of Law at the University of South Dakota School of Law. He also serves as an Associate Justice on the Rosebud Sioux Tribal Court of Appeals and the Chief Justice on the Cheyenne River Sioux Tribal Court of Appeals.

Jacket illustration by Barbara Sokolow, Rosebud Sioux Tribe

few.

## Conclusion: A Geography of Hope



### LOOKING FORWARD AND LOOKING BACK

Law has played and will continue to play, for better or worse, a pervasive role in the lives of all people, but particularly Indian people, who live or do business on the reservation. This historical and quotidian reality has been largely characterized by federal dominance, substantial uncertainty, and fierce jurisdictional competition. Within this law-saturated context, two issues are paramount in this period of rapid change and development. The first is the ultimate distribution of (jurisdictional) power among the federal, tribal, and state sovereigns in Indian country; the second is the nature of the values embedded in the laws that govern on the reservation and their effect on the quality of contemporary tribal life.

Resolution of these issues plays out on many fronts and involves both looking forward and looking back. At the federal level, Congress and the federal courts have seldom demonstrated a consistent grasp of the theoretical and practical implications of tribal sovereignty. They need to improve their understanding and clarify their roles. At the congressional level, such clarification might include the passage of a statute that specifically and explicitly recognizes tribal sovereignty and reaffirms its centrality in Indian law jurisprudence. A corollary is the need for Congress to recognize the deleterious effect of the plenary power doctrine on

limit  
Plenary  
Power



Indian tribes and to take appropriate action to curb its extravagant uses. Such congressional action is not likely to occur in the immediate future, but it needs to be kept in sight as an important goal that is based on continuing efforts to extend understanding and the webs of belief about tribal sovereignty. There can be little hope for enduring advances until there is a better understanding of the history and meaning of sovereignty within the halls of Congress.

In the federal courts, including the U.S. Supreme Court, there is the need to reanimate, especially on the civil side, the notion of tribal sovereignty found in such cases as *Worcester v. Georgia*,<sup>1</sup> *Williams v. Lee*,<sup>2</sup> and *White Mountain Apache Tribe v. Bracker*.<sup>3</sup> The *Montana*,<sup>4</sup> *Brendale*,<sup>5</sup> and *Bourland*<sup>6</sup> cases mark the almost complete erosion of sovereignty doctrine in which all that remains is a sterile subsoil of politics and expediency. This conceptual amnesia is specifically noted by Justice Blackmun in his concurring and dissenting opinion in *Brendale*:

[T]o recognize that *Montana* strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands is not to excise the decision from our jurisprudence. Despite the reversed presumption, the plain language of *Montana* itself expressly preserves substantial tribal authority over non-Indian activity on reservations, including fee lands, and, more particularly, may sensibly be read as recognizing inherent tribal authority to zone fee land.<sup>7</sup>

Reassertion of the sovereignty doctrine can be greatly augmented, in part, if the courts pay close attention to the articulation of tribal sovereignty as it emanates from tribal court jurisprudence. This emerging jurisprudence contributes significantly in advancing the tribal voice as part of the judicial dialogue on the parameters and contemporary meaning of tribal sovereignty.

These efforts in the legal arena should perhaps culminate in a specific constitutional amendment that recognizes the permanent and enduring nature of tribal sovereignty and its roots in treaties and in the government-to-government relationship of Indian tribes with the federal government. Such an amendment would be an appropriate capstone to the tribal struggle to preserve sov-

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ereignty and the (ultimate) majoritarian commitment to ensure the highest form of legal recognition and participation for Indian tribes within this republic. Constitutional recognition of tribal sovereignty through a constitutional amendment would enable tribal sovereignty to take a more central position within the national (and state) legal and political structures established by the Constitution; it would also provide needed certainty which has been sorely lacking in recent years.

This goal of furthering tribal sovereignty may also be advanced, odd as it may seem, by hearkening back to the judicial hermeneutics of Chief Justice Marshall in the seminal Indian law cases. Chief Justice Marshall's opinions (as discussed in chapter 2 and elsewhere) did assist in the process of colonization, for example, with their articulation of the doctrine of discovery and the guardian-ward relationship. In addition, these opinions voiced some of the most negative stereotypes of Indians as "un-Christian and uncivilized savages." However, these opinions are counterbalanced by strong, if somewhat paradoxical, progressive comments. Chief Justice Marshall is morally and ethically engaged in these opinions, and he often realizes that many of his assertions are extravagant and blatantly false. For example, he notes in *Worcester* the "existing pretensions" of the doctrine of discovery and the scurrilous attempt of the State of Georgia to dismantle and annul tribal rights of self-government. Chief Justice Marshall does recognize tribal sovereignty and the particular need for the federal government to protect these "domestic dependent nations" from jurisdictional encroachment by the states.

Chief Justice Marshall also knew that the Supreme Court was a young and fragile institution incapable of fully containing the congressional, executive, and public sentiment supporting ruthless expansion. Much of this inhospitable context to tribal sovereignty is captured by President Andrew Jackson's statement, in the aftermath of the *Worcester* case which held that Georgia's laws did not apply on the Cherokee Reservation, that "Chief Justice Marshall has made his decision; now let him enforce it."<sup>3</sup> Indeed, shortly after the *Worcester* decision Congress passed and the President signed the legislation that culminated in the infa-

March 21, 1998  
 Remarks, "American Indian Law and Policy Symposium"  
 University of Oklahoma College of Law, Norman, Oklahoma

OVERRULING LONE WOLF v. HITCHCOCK

by John R. Wunder  
 University of Nebraska-Lincoln

It is perhaps appropriate to introduce my remarks with a personal note. I grew up in a small Iowa town a few miles from the Mesquakie Indian Settlement. I come from a family of lawyers and teachers. My college education, at the University of Iowa, combined law and history into graduate and law degrees. I also helped set up Colorado Legal Services and represented Navajos on the Western slope in court cases challenging sugar beet regulations. I am also a eighth generation grandson of Roger Williams, the founder of Rhode Island. I mention it only because I recently read a passage from a just published book, Separating Church and State: Roger Williams and Religious Liberty by Timothy L. Hall. In this work, Hall tries to understand Roger Williams and his assertions of Native people's land rights. Wrote Williams in the early seventeenth-century, "It is a sinful opinion among many that Christians have [a] right to heathens' lands." This was a direct repudiation of the Governor of Massachusetts Bay, John Winthrop. Threatened with expulsion, Williams could not keep quiet. "We have not our land by patent from the King," elaborated Williams. "[T]he Natives are the true owners of it. . . . [W]e ought to repent of such a receiving [of] it by patent." So it is with the blood of Roger Williams that I address you today.



In 1952, 300 lawyers, civil rights leaders, and academics gathered at Howard University. They had come to celebrate the twentieth anniversary of the publication of the Journal of Negro Education. It was this journal that had helped begin the ground work for what would be a monumental Supreme Court decision. At this gathering, a symposium entitled, "The Courts and Racial Integration in Education," African Americans debated strategies. How was the best way to obtain the integration of public schools and overrule the infamous opinion, Plessy v. Ferguson (1896)? Thurgood Marshall was there; he listened and he debated. He found a great deal of dissonance, but most everyone was united in what was the goal. Not all believed it could be attained.

So here we are in 1998, a group of lawyers, leaders and the learned gathered at a parallel celebration, that of the twentieth-fifth anniversary of the publication of the American Indian Law Review, a journal of great importance to Native Americans and their legal warriors as they strive for the reclamation of their rights, their sovereignty, and their freedoms. We must mark this occasion. I wish to raise a challenge to all of us in this room and to those outside with common interests. That challenge is to begin the planning and the intellectual underpinning for the overruling of another infamous Supreme Court decision, one given by the same court that gave us Plessy v. Ferguson and U.S. v. Ju Toy (1905), wherein the Supreme Court upheld a customs official's decision to deny the return entrance into the United States of a Chinese American citizen because of his race. The decision I challenge you to challenge is, of course, Lone Wolf v. Hitchcock (1903) arguably the single greatest impediment to the full realization of Indian sovereignty.

ORAL TESTIMONY OF

WILLIAM J. LAWRENCE, J.D.

PUBLISHER OF THE *NATIVE AMERICAN PRESS/OJIBWE NEWS*  
BEMIDJI, MINNESOTA

AND

MEMBER OF THE RED LAKE BAND OF CHIPPEWA INDIANS  
RED LAKE, MINNESOTA

BEFORE THE COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE

CONCERNING S. 1691  
"THE AMERICAN INDIAN EQUAL JUSTICE ACT"

PRESENTED ON APRIL 7, 1998  
AT THE COMMITTEE HEARING HELD IN SEATTLE, WASHINGTON

Mr. Chairman, members of the Committee, good afternoon. My name is Bill Lawrence.

I am here in Seattle on my own time and at my own expense. I am not on any federal or tribal payroll.

I have worked 30 years in Indian affairs at the tribal, state, federal and private levels. For the past 10 years I have been the owner and publisher of the *Native American Press/Ojibwe News*, a weekly newspaper published in Bemidji, Minnesota.

The greatest injustice the federal government has imposed on Indian people during the 20th century is to make us citizens, but deny us most of the basic rights of citizenship.

In 1968, Congress recognized this injustice and enacted the Indian Civil Rights Act. But in 1978 the U.S. Supreme Court in the poorly considered *Santa Clara v. Martinez* decision ruled, in effect, that it is up to each tribal government to decide if and to what extent reservation Indians have any civil rights.

Democracy is not simply the existence of free and fair elections, which I would argue often do not exist in tribal elections. Democracy is also defined by limiting the power of the government by such things as the rule of law, separation of powers, checks on the power of each branch of government, equality under the law, impartial courts, due process, and protection of the basic liberties of speech, assembly, press, and property. These do not exist on Indian reservations.

A given tribal government may claim these protections do exist, but closer analysis usually reveals that claim to be a charade. And where one tribal government may extend some rights to its citizens, the next regime may not be so kind and can instantly reverse or ignore

any tribal law or tribal constitutional protection they want, in the name of self-determination, and with the defense of sovereign immunity.

James Madison, a founding father and signer of the U.S. Constitution, said that government with no separation of powers and no checks and balances is the very definition of tyranny. That is what we have on America's Indian reservations.

Tribal government opposition to a free press in Indian Country is very strong. Over half of Minnesota's tribal governments do not allow the *Native American Press/Ojibwe News* to be sold on their reservations, and tribal interests have harassed and attempted to intimidate our advertisers and retail outlets. The paper has been confiscated from newsstands on numerous occasions.

We are currently in state court fighting charges of trespass against one of our reporters for attending a meeting of the Minnesota Chippewa Tribe at a casino on the Mille Lacs reservation. He was arrested, handcuffed, and put in jail until the meeting they did not want him reporting on was adjourned. The state recognizes and enforces tribal police actions such as this.

Tribal sovereign immunity gives Indian people less rights and more poverty, discord, government corruption and abuse of power.

With the Indian Gaming Regulatory Act, which has overlaid a multi-billion dollar cash industry on top of an unaccountable government, the abuse of power has taken on new ferocity.

Federal Reserve Chairman Alan Greenspan said recently, [quote] "The guiding mechanism of a free market economy ... is a bill of rights, enforced by an impartial judiciary" [end quote]. There can be no denying that the lack of civil rights, the lack of legitimate courts, and the lack of government accountability is the single biggest reason there is so little economic activity on America's reservations.

I first exposed the abuses of the Red Lake tribal court in 1972 in a law review article. Even after the U.S. Commission of Civil Rights put the BIA on notice of these abuses, the BIA's only response was to increase funding to the tribal court, with no attempt to correct the problem.

Since then I have personally been the victim of the Red Lake Tribal Council's use of the sovereign immunity defense on several occasions.

On three separate occasions I have tried to get tribal financial statements which, according to our Constitution, are supposed to be available to tribal members. Tribal officials would order hearings to be postponed seconds before they were scheduled to occur, switch judges without notice, deny a right to a jury, change from a scheduled pre-trial hearing to a full trial without notice, deny an opportunity to call witnesses, and come to the first day of trial with a typed decision already in hand. Needless to say, I was denied my right to see tribal financial statements.



In 1994, three tribal members asked me to represent them in Red Lake tribal court in an election dispute. Despite my legal background and eligibility in every way, the tribal council denied me a license to represent people in my own tribal court. They were afraid I would take cases against the council for violating people's rights.

The 1990 U.S. Civil Rights Commission Report was published without one word about the abuses in the Red Lake courts, in spite of the fact that their investigation resulted in a 31-page description of civil rights problems at Red Lake. They left it out of the final report because the Red Lake government didn't want it made public.

Former Washington Congressman Lloyd Meeds wrote a well-thought-out dissent to the 1977 American Indian Policy Review Commission Final Report, in which he said:

[quote] If Indian governments are to exercise governmental powers as licensees of the United States, it is imperative that they be fully answerable for the improper exercise of those powers. Tribal sovereign immunity should ... not be allowed to interfere with Federal court enforcement of federally protected civil rights. [end quote]

And a 1989 report of the Senate Select Committee on Indian Affairs made this accurate observation:

[quote] Since Congress has the ultimate responsibility for federal Indian policy, we in the Senate and House must accept the blame for failing to adequately oversee and reform Indian affairs. Rather than becoming actively engaged in Indian issues, Congress has demonstrated an attitude of benign neglect. ...[B]y allowing tribal officials to handle hundreds of millions in federal funds without stringent criminal laws or adequate enforcement, Congress has left the American Indian people vulnerable to corruption. [end quote]

Let it be said right now that sovereign immunity has nothing to do with Indian culture or tradition. It is a concept that developed in the Roman empire and was used by European monarchs to protect them from challenge or criticism. Tribal sovereign immunity has essentially told a generation of tribal leaders that once they are in office they are above the law and can do whatever they please. The only culture that tribal sovereign immunity is protecting is a culture of corruption, oppression, and unaccountability.

In closing, I would like to quote a great American, the late Dr. Martin Luther King. He said, "Injustice anywhere is a threat to justice everywhere."

Thank You.

**BIO**

**William J. Lawrence**  
1106 Paul Bunyan Drive, NE  
Bemidji, MN 56601  
(218) 751-1655 (office)

William J. Lawrence is publisher of the *Native American Press/Ojibwe News (Press/ON)*, which he founded in 1988. It is the only independent, non-governmental Indian weekly newspaper in Minnesota and one of only a few in the nation. *Press/ON* is known as a "Voice of the People" in exposing tribal corruption and promoting tribal accountability. Lawrence was nominated in 1998 for a Pulitzer Prize in Journalism for Editorial writing.

Lawrence is also President of the Tribal Accountability Legal Rights Fund, a new non-profit corporation organized to promote the rights of Indian and non-Indian citizens interacting with tribal governments and businesses.

Lawrence graduated in 1962 from Bemidji State University in Bemidji, Minnesota with a Bachelor of Arts in Business Administration, and in 1972 from the University of North Dakota, School of Law in Grand Forks, North Dakota with a Juris Doctor Degree. He served three and a half years in the U.S. Marine Corps as a commissioned officer, including a tour of duty in Vietnam in 1965-66, and attained the rank of captain.

As a member of the Red Lake Band of Chippewa Indians, Lawrence has worked to improve the lives of Indian people much of his career, including as Business Manager for the Fort Mojave Indian Tribe in Needles, California; as Superintendent of the Colorado River Agency for the Bureau of Indian Affairs in Parker, Arizona; as the Director of Economic Development and Planning for the Red Lake Reservation in Red Lake, Minnesota; and as Administrator of Indian Education with the Minnesota Department of Education.

He also worked as a Senior Contract Representative at Honeywell, Inc. in Minneapolis, Minnesota, and a Marketing Manager at Phelps Tackle Co. in Bemidji, Minnesota.

Lawrence has been elected to school boards in Bemidji, MN and Mohave Valley, AZ. He is the father of three adult children, and has one grandchild. Lawrence has a private pilot's license, with over 1,200 hours of pilot in-command time, and has been an avid hunter, outdoorsman, and runner for 40 years.

**TESTIMONY  
OF  
COLONEL CALEB H. JOHNSON, HOPI TRIBAL COUNCIL MEMBER  
BEFORE THE COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE  
CONCERNING TRIBAL SOVEREIGN IMMUNITY  
PRESENTED ON  
APRIL 7, 1998  
SEATTLE, WASHINGTON**

Good afternoon, Mr. Chairman and members of the Committee, I am Caleb H. Johnson, a member of the Hopi Indian Tribe in the State of Arizona. I am now serving my third (two year) term on the Hopi Tribal Council as a representative from the Village of Kykotsmovi. I was a certified candidate for Chairman of the Tribe in its election of late 1997.

I am a graduate from UCLA, and also have a Master's Degree from Princeton Theological Seminary. I have served in the US Army for 28 years, on active duty and in the Reserves, and retired as a full Colonel in 1989 at Fort Huachuca, Arizona with full military honors.

Before I make my comments, let me make it absolutely clear that I am not speaking on behalf of the Hopi Tribal Council. Instead, I am here as an individual citizen of the United States whose rights of "due process" have been violated by the Hopi Tribal Court.

I am here to testify to the fact that I have filed a Complaint against the Hopi Election Board in the U.S. District Court of Arizona for the violation of my rights under the Indian Civil Rights Act of 1968. My Complaint against the Hopi Election Board results from their conduct of the previously mentioned Tribal Chairman election. Severe irregularities occurred in the conduct of the election - so severe that I went from being the leading vote-getter to not even making it into the run-off election. A copy of my Complaint is attached to my testimony and I request that it be included in the hearing record.

In discussing my Complaint with my Legal Counsel, Mr. Richard M. Grimsrud, I have been advised that it will most likely be dismissed due to the doctrine of sovereign immunity claimed by the Hopi Tribal Government. The fact of the matter is, that if that should occur, then



I will have no legal remedy. Despite the fact that the Fifth Amendment of the U.S. Constitution guarantees that "no person shall be deprived of life, liberty, or property without due process of law."

When I was in Vietnam from June 1968 to June 1969, with the 17th Combat Aviation Group in I Corp, some 400 to 500 military personnel were dying each month defending the U.S. Constitution and its Bill of Rights. It is rather ironic when I consider my situation today, that the Indian Civil Rights Act was enacted into law in that same year but that I am here today being denied my civil rights, some 30 years later. What this situation tells me is that "something" is absolutely wrong and that "something" needs to be corrected expeditiously.

I have no knowledge of how Tribal Courts operate in other Indian Tribes, but I do know how it operates in the Hopi Tribe. My Complaint makes it very clear that the Tribal Court deliberately delayed stamping my Complaint "filed" until 30 days had passed so that the Court would dismiss it as not being filed on a "timely" basis. I am also very confident that the Legal Counsel for the Election Board will argue before the Federal District Court that my Complaint be dismissed because of the doctrine of sovereign immunity of the Hopi Tribe, leaving me again without any legal remedy for the violation of my rights of "due process" under the Indian Civil Rights Act of 1968.

It is for these reasons that I am here today to support Section 7 of Senator Gorton's legislation, which would waive tribal sovereign immunity so that actions may be brought in federal court under the Indian Civil Rights Act.

In addition, I would like to make two recommendations for your consideration. First, I recommend that the word "original" be inserted before the word "jurisdiction" on page 10, line 14 of the bill. Second, I recommend that this Section be enacted into law by the Congress and the President of the United States, who is my Commander in Chief.

In conclusion, I am deeply grateful to Senator Gorton who made it possible for me to bring this matter to your attention.

Thank you and God bless the United States.



CHAPLAIN (COL) JOHNSON, CALEB H. US ARMY, RET.

P.O. Box 40  
Kykotamovi, AZ 86039  
520-734-9214

U.C.L.A. BA  
Princeton, MDIV  
Vietnam 1968-1969

704 N. Kinsley Ave.  
Winslow, AZ 86047  
520-289-4162

5 May 1998

Chairman Ben Nighthorse Campbell  
UNITED STATES SENATE  
Committee on Indian Affairs  
Washington, DC 20510-6450

Dear Sir:

I am herein returning the official transcript of my recent testimony before your Committee on April 7, 1998 at Seattle, WA. In addition, I enclose documents, Exhibit A through I to be included in the printed record.

Exhibit A is the Complaint that I filed in the US District Court which you ordered to be included in the record.

Exhibit B is the motion to dismiss the Complaint.

Exhibit C is my motion to remand my complaint to the Hopi Tribal Court.

Exhibit D is a motion to dismiss my motion.

When I returned from Seattle, Washington, Tribal Officials began to make the effort to get me out of the Hopi Tribal Council because I testified before your Committee. The following Exhibits demonstrate this effort.

Exhibit E is a letter from a Justice Elbridge Coochise which was used to attack me in our village meeting on 8 April 1998 by the Vice-Chairman.

Exhibit F is a letter from my attorney in response to the letter of Coochise.

Exhibit G is a statement of the Tribal Chairman and Vice Chairman against me.

Exhibit H is my letter in response to them.

Exhibit I is a petition signed by 10 Tribal Councilmen against me. I have not responded to this.

I would request to have these documents included in the record to illustrate what happens to those of us who testify before your Committee.

Thank you and I remain,

Sincerely,

CALEB H. JOHNSON, Chaplain (COL) US Army Retired

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 (602) 774-7539  
 Telex 9 085368

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF ARIZONA

CALEB H. JOHNSON, )  
 Plaintiff, )  
 vs. )  
 HOPI ELECTION BOARD, )  
 Defendant. )

No. CIV 98-0261 PHX PGR

COMPLAINT

Plaintiff CALEB H. JOHNSON, for his Complaint herein  
 against Defendant HOPI ELECTION BOARD, by and through his  
 attorney undersigned, alleges as follows:

JURISDICTION AND VENUE

1. In this action for declaratory and injunctive relief  
 to redress the deprivation of rights secured to Plaintiff,  
 jurisdiction of this Court is invoked pursuant to 25 USC  
 §1302, 28 USC §§1331, 1344, and 2201.

2. The jurisdiction of this Court is invoked to secure  
 the protection of and to redress deprivation of rights secured  
 by the U.S. Constitution, 42 USC §1983, and, in particular,



1 25 USC §1302, which is popularly known as the Indian Civil  
2 Rights Act.

3 3. The deprivation of these rights as more specifically  
4 alleged below and occurred within the State of Arizona. .

5 PARTIES

6 4. Plaintiff CALEB H. JOHNSON is a 65-year old male,  
7 who is a member of the Hopi Tribe of Native Americans and  
8 the Hopi Tribal Council and was a certified candidate for  
9 Chairman of that Tribe in its election of late 1997.  
10 Plaintiff is a resident of Kykotsmobi on the Hopi Reservation  
11 in Navajo County, Arizona, who graduated from UCLA, has a  
12 Masters of Divinity degree from the Princeton Seminary, and  
13 retired as a Colonel of the U.S. Army with the Legion of  
14 Merit in 1989 after serving 28 years, 1 of which was in  
15 Vietnam.

16 5. Defendant HOPI ELECTION BOARD is a duly-comprised  
17 agency of the Hopi Tribe of Native Americans which is  
18 authorized to conduct elections for tribal office within  
19 the Hopi Tribe. Defendant conducted the Hopi Tribal Elections  
20 of late 1997 and, in the process, Plaintiff alleges it  
21 deprived him of various rights secured by law.

22 TRIBAL COURT PROCEEDINGS

23 6. Plaintiff was a certified candidate for the Hopi  
24 Tribal Chairman in its primary election held on Nov. 19,  
25 1997. While he won the vote of reservation residents counted  
26 that day, he allegedly did so poorly in the absentee ballots

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1 which were counted by Defendant on Nov. 24, 1997, that he  
2 dropped to last place among the three candidates for Chairman  
3 and, thus, was eliminated from the final runoff election for  
4 the position to be held Dec. 2, 1997.

5 7. On Nov. 28, 1997, Plaintiff delivered a written  
6 contest of Defendant's aforesaid counting of the absentee  
7 ballots for Chairman, clearly within the six (6) days within  
8 which such a challenge must be made under Section 9(10) of  
9 Hopi Tribal Election Ordinance No. 34.

10 8. On Dec. 2, 1997, Defendant HOPI ELECTION BOARD  
11 faxed to Plaintiff c/o his undersigned attorney a final denial  
12 of his contest of the aforesaid election because of alleged  
13 irregularities in Defendant's 11/24/97 counting of absentee  
14 ballots in the 11/19/97 Hopi primary election. See the  
15 original of the aforesaid fax attached hereto as Exhibit  
16 'A'(1-2).

17 9. Hopi Ordinance 34, governing Hopi Tribal Elections,  
18 provides in Section 11(3) that "Any decision of the Election  
19 Board may be appealed to the Hopi Tribal Court within thirty  
20 (30) days of such decision."

21 10. On Dec. 24, 1997, Plaintiff by his attorney  
22 undersigned attorney dispatched by certified mail to the  
23 Hopi Tribal Court a verified appeal of the Defendant ELECTION  
24 BOARD's 12/2/97 decision denying his contest of the primary  
25 election and the undersigned's application for readmission  
26 to the Hopi Tribal bar. See attached hereto as Exhibit 'B'

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1 a copy of the "Domestic Return Receipt" for it.

2 11. The Hopi Tribal Court received Plaintiff's appeal  
3 and the undersigned's application for readmission to the  
4 Hopi Tribal bar on Dec. 29, 1997 (see Exhibit 'B') or within  
5 the 30 days provided by Section 11(3) of Hopi Ordinance 34  
6 to appeal any decision of the Defendant HOPI ELECTION BOARD.

7 12. On the morning of Wednesday, Jan. 7, 1998, the  
8 Hopi Tribal Court called the undersigned attorney's office  
9 and requested him to verify his active membership in the  
10 Arizona State Bar by faxing it a copy of his Bar card, which  
11 he promptly did that day. See attached hereto as Exhibit  
12 'D' the original of undersigned's 1/7/98 fax transmittal.  
13 The undersigned herein avows that he had no previous messages  
14 from the Tribal Court though he was in his office and checked  
15 for messages on his voice mail on Dec. 31, 1997, Jan. 2,  
16 1998, and Jan. 5 and 6 of 1998.

17 13. Apparently after receiving Exhibit 'C' verifying  
18 the undersigned's active Arizona Bar status on 1/7/98, the  
19 Hopi Tribal Court stamped in Plaintiff's appeal as "filed"  
20 on that date Jan. 7, 1998, which would be beyond the thirty  
21 (30) day time period within which to appeal a decision of  
22 the Defendant HOPI ELECTION BOARD as set forth in Section  
23 11(3) of Hopi Ordinance 34. See original of first page of  
24 returned "file copy" of Plaintiff's Tribal Court appeal  
25 attached hereto as Exhibit 'D'.

26 14. On Wednesday, Jan. 7, 1998, Defendant HOPI ELECTION



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1 BOARD through its authorized agent publicly advised Plaintiff  
 2 and other members of the Hopi Tribal Council during an  
 3 afternoon hearing on the removal of the former Chairperson  
 4 of Defendant and her allegations of irregularities in the  
 5 election's absentee voting that Defendant's rejection of  
 6 Plaintiff's challenge to the Primary Election "had not  
 7 appealed to the Tribal Court" in a timely fashion. See  
 8 verbatim transcript of pertinent part of 1/7/98 Hopi Tribal  
 9 Council meeting attached here to as Exhibit 'E'(10).

10 15. At the Hopi Tribal Council meeting of Wednesday,  
 11 Jan. 21, 1998, Defendant's authorized agent again publicly  
 12 advised Plaintiff and the other members of the Tribal Council  
 13 that there had been no timely contests to the 1997 Hopi  
 14 Election, and, therefore, Wayne Taylor was inaugurated as  
 15 the new Chairman of the Hopi Tribe on Feb. 5, 1998 since  
 16 there was allegedly no timely challenge made to his election  
 17 process. See pertinent parts of verbatim transcript of  
 18 1/21/98 Hopi Tribal Council meeting attached hereto as Exhibit  
 19 'F'(10, 15).

#### 20 STATEMENT OF THE CASE

21 16. Upon information and belief, on or about Oct. 29  
 22 and 30, 1997, supporters of Wayne Taylor, another candidate  
 23 for Tribal Chairman in that election, took absentee ballots  
 24 secured from Defendant for that Primary Election to Flagstaff  
 25 and Phoenix and passed them out to supporters of Candidate  
 26 Taylor before the Primary, in contravention the letter and

1 intent of Hopi Tribal Council Resolution #127-96 prohibiting  
2 the establishment of off-reservation precincts and that same  
3 legislative intent as affirmed by the Hopi Tribal Council  
4 for this last election by Resolution #110-97.

5 17. The Constitution of the Hopi Tribe provides in  
6 Article IV, Section 11 that

7 A primary election shall be held on the first  
8 Wednesday in November of 1969 and on the first Wednesday  
9 in November in each fourth year thereafter,

10 but, on or about Nov. 3, 1997, Defendant HOPI ELECTION BOARD  
11 stipulated to a Hopi Tribal Court Order which without any  
12 amendment of the Hopi Constitution directed the primary  
13 election to be held on the third Wednesday in November of  
14 1997.

15 18. In addition, on or about Nov. 24, 1997 when the  
16 absentee ballots for the 11/19/97 Hopi Primary were counted  
17 under the Settlement Order in Coin v. Hopi Election Board  
18 (Hopi Tribal Ct. #97 CV 000282), Tommy Canyon, a member of  
19 the Hopi Election Board, made marks on 53 or 54 of those  
20 absentee ballots which the machine counting the votes had  
21 rejected as improperly marked.

22 19. Mr. Canyon then reinserted in the machine these  
23 53 or 54 absentee ballots which had been improperly marked,  
24 and the machine counted these ballots marked over by Mr.  
25 Canyon as part of the total Primary Election results. See  
26 a true copy of a 12/1/97 Affidavit by Patsy Ross (the original  
of which was presented that date to the Defendant

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1 Election Board) attached hereto as Exhibit 'G'(1-2).

2 20. This action by a member of the Hopi Election Board  
3 in remarking these absentee ballots violated the intent of  
4 Section 9(8) C3C of the Hopi Tribal Election Ordinance No.  
5 34 governing Hopi election procedures which, in pertinent  
6 part, provides that, "(s)hould a portion of a ballot be  
7 improperly marked, it shall not exclude from the tally the  
8 part which is correctly marked." The clear intent of this  
9 provision is that these 53 or 54 improperly-marked absentee  
10 ballots cast in the Chairman's contest in the 11/19/97 Primary  
11 Election should not have been counted in that race.

12 21. These 53 and 54 absentee ballots, which were then  
13 improperly marked by the Election Board and improperly counted  
14 as part of the Primary Election results, could have changed  
15 the outcome of the election, since Plaintiff JOHNSON ended  
16 up in the primary with 52 votes less than Candidate Ferrell  
17 Secakuku, who then faced Candidate Taylor in the final  
18 election for Tribal Chairman on Dec. 3, 1997.

19 22. On November 28, 1997, Plaintiff JOHNSON delivered  
20 a letter of that same date to the Defendant HOPI ELECTION  
21 BOARD making a challenge to the Nov. 19, 1997 Primary Election  
22 on the basis of the irregularity in counting absentee ballots  
23 as set forth above. See a true copy of this letter attached  
24 hereto as Exhibit 'H'(1-2).

25 23. On or about Dec. 1, 1997, the HOPI ELECTION BOARD  
26 rejected Plaintiff's challenge to that alleged irregularity



1 in the 11/24/97 counting of absentee ballots in the Primary  
 2 [see the original of this letter attached hereto as Exhibit  
 3 'I'(1-3)], and, on or about Dec. 2, 1997, it reaffirmed its  
 4 denial of Plaintiff's challenge. See a true copy of this  
 5 letter attached hereto as Exhibit 'A'(2). This potentially  
 6 fraudulent remarking of absentee ballots amounted to unlawful  
 7 discrimination against Plaintiff in violation of his rights  
 8 of due process and equal protection guaranteed by the US  
 9 Constitution and 25 USC §1302.

10 24. Plaintiff caused to be delivered an appeal of this  
 11 denial of his election contest to the Hopi Tribal Court in  
 12 a timely fashion on Dec. 29, 1997, but the Hopi Tribal Court  
 13 denied him of his rights guaranteed by the Indian Civil Rights  
 14 Act (25 USC §1302) by not accepting it for filing until Jan.  
 15 7, 1998, when it was no longer timely under Section 11(3)  
 16 of Hopi Ordinance 34.

17 WHEREFORE, Plaintiff prays that this Honorable Court  
 18 set this case for a trial by jury and enter an Order:

19 A. Declaring that the Hopi Tribal primary election  
 20 of 11/19/97 for Chairman was not conducted by Defendant  
 21 according to due process of law as the Hopi Constitution  
 22 and Election Ordinance, and deprived Plaintiff of equal  
 23 protection of the laws;

24 B. Enjoining Defendant HOPI ELECTION BOARD from  
 25 accepting the results of the runoff election on Dec. 3, 1997  
 26 which excluded Plaintiff from the ballot;

1 C. Directing Defendant HOPI ELECTION BOARD to hold  
2 a new election between the certified candidates for Hopi  
3 Tribal Chairman including Plaintiff as soon as is practicable;

4 D. Award Plaintiff his costs and reasonable attorney's  
5 fees incurred herein; and

6 E. Such other and further relief as may be just and  
7 proper under the circumstances.

8 RESPECTFULLY SUBMITTED this 2nd day of March, 1998.

9 LAW OFFICE OF RICHARD M. GRIMSRUD

10   
11 Richard M. Grimsrud  
12 Attorney for Plaintiff  
13  
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LAW OFFICE  
OF  
RICHARD M. GRIMSRUD  
P.O. Box 609  
Flagstaff, Arizona 86002  
(505) 774-7339

1 STATE OF ARIZONA )  
 2 County of Coconino ) VERIFICATION

3 CALEB H. JOHNSON, being first duly sworn, upon his  
 4 oath, deposes and says: that he is the Plaintiff in the above-  
 5 captioned cause, and he read the foregoing Complaint; that  
 6 all the allegations therein are true to the best of his  
 7 knowledge and belief.

8 DATED this 2 day of March, 1998.

9  
 10   
 11 Caleb H. Johnson

12 SUBSCRIBED AND SWORN to before me this 2 day of

13 March, 1998, by CALEB H. JOHNSON.

14  
 15   
 16 Notary Public

17 My Commission Expires:  
 18 12-31-00



Franklin J. Hoover  
 State Bar No. 015110  
 Assistant General Counsel  
 The Hopi Tribe  
 P.O. Box 123  
 Kykotsmovi, Arizona 86039  
 (520) 734-3000

RECEIVED APR 30 1998

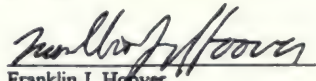
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF ARIZONA

CALEB H. JOHNSON,	)	
	)	
Plaintiff,	)	No. CIV 98-361 PCT PGR
	)	
v.	)	MOTION TO DISMISS
	)	
HOPI ELECTION BOARD,	)	
	)	
Defendant.	)	
_____	)	

The defendant, Hopi Election Board, by the undersigned attorney, hereby moves this Court pursuant Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. This motion is fully supported by the attached Memorandum of Points and Authorities.

Respectfully submitted this 29<sup>th</sup> day of April, 1998.

  
 Franklin J. Hoover  
 Assistant General Counsel  
 The Hopi Tribe

Attorney for Defendant

Franklin J. Hoover  
 State Bar No. 015110  
 Assistant General Counsel  
 The Hopi Tribe  
 P.O. Box 123  
 Kykotsmovi, Arizona 86039  
 (520) 734-3000

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF ARIZONA

CALEB H. JOHNSON,	)	No. CIV 98-361 PCT PGR
	)	
Plaintiff,	)	MEMORANDUM OF POINTS
	)	AND AUTHORITIES IN
v.	)	SUPPORT OF THE
	)	DEFENDANT'S MOTION TO
HOPI ELECTION BOARD,	)	DISMISS
	)	
Defendant.	)	
_____	)	

The Hopi Election Board, defendant, by the undersigned attorney, respectfully submits the following Points and Authorities in support of its Motion to Dismiss.

INTRODUCTION

Caleb H. Johnson, a member of the Hopi Tribe and an unsuccessful candidate in a primary election for Chairman of the Hopi Tribe held in November, 1997, seeks federal court adjudication pursuant to the Indian Civil Rights Act, 25 U.S.C. §1302, of an intra-tribal dispute concerning the results of that election. Plaintiff's Complaint, para. 2, pages 1-2, para 4, page 2, and para. 6, pages 2-3. Mr. Johnson alleges that the Hopi Election Board, an agency of the Hopi Tribe,

inappropriately counted certain absentee ballots cast in the primary election for Tribal Chairman. Plaintiff's Complaint, paras. 18-21, pages 6-7. Mr. Johnson alleges that the Hopi Election Board's counting of these ballots violated the Hopi Tribe's Election Ordinance and deprived him of his rights to equal protection and due process under both the Indian Civil Rights Act and the U.S. Constitution. Plaintiff's Complaint, para. 23, pages 7-8. Mr. Johnson also generally alleges, but does not specify, violations of 42 U.S.C. §1983. Plaintiff's Complaint, para. 2, page 1.

Mr. Johnson seeks declaratory and injunctive relief declaring that the primary election for Chairman of the Hopi Tribe held on November 11, 1997, violated the Hopi Constitution and the Hopi Election Ordinance and ordering the Hopi Election Board to hold a new election for that office. Plaintiff's Complaint at pages 8-9.

This Court should dismiss Mr. Johnson's action because federal courts do not have subject matter jurisdiction over actions brought under the Indian Civil Rights Act, other than actions for habeas corpus, and because Mr. Johnson has failed to state any claim for violation of either the U.S. Constitution or 42 U.S.C. §1983.

#### ARGUMENT

#### I. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION TO HEAR MR. JOHNSON'S INDIAN CIVIL RIGHTS ACT CLAIMS.

Mr. Johnson's action seeks declaratory and injunctive relief against the Hopi Election Board to redress alleged violations of the Indian Civil Rights Act, 25 U.S.C. §1302. Plaintiff's Complaint, para 2, pages 1-2. Mr. Johnson has also filed a complaint in Hopi Tribal Court seeking the same relief against the Hopi Election Board. Plaintiff's complaint at para. 10, page 3. Even if Mr. Johnson's Complaint is liberally interpreted as a complaint seeking declaratory and



injunctive relief against officers of the Hopi Tribe for alleged violations of federal law pursuant to Ex Parte Young, 209 U.S. 123, 52 L.Ed.714, 28 S.Ct. 441 (1908), the Court still lacks subject matter jurisdiction over Mr. Johnson's claims.

In Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L. Ed. 2d 106, 98 S.Ct. 1670 (1978), the U.S. Supreme Court held that the Indian Civil Rights Act, 25 U.S.C. §1302, does not authorize actions in Federal Court for declaratory or injunctive relief against either an Indian tribe or its officers. The Court held that actions brought directly against an Indian tribe under the Act are barred by sovereign immunity. Santa Clara Pueblo, supra, at 58-59. The Court also went on to hold that federal courts do not have jurisdiction over actions brought against tribal officials under the Act, which might not be barred by sovereign immunity, because the Act does not implicitly create federal causes of action for declaratory or injunctive relief. Santa Clara Pueblo, supra at 72.

The Court in Santa Clara Pueblo noted that, in addition to imposing certain restrictions on the powers of tribal governments similar to those found in the Bill of Rights, the Indian Civil Rights Act was intended to promote the goals of tribal sovereignty and self-determination. Santa Clara Pueblo, supra, at 62. The Court reasoned that implying a federal cause of action for declaratory or injunctive relief under the Act would frustrate those goals by intruding on tribal sovereignty, undermining the authority of tribal forums, and imposing a serious financial burden on Tribes (noting specifically that the costs of litigation in federal courts, located far from the reservations, exceeds the costs of tribal court litigation). Santa Clara Pueblo, supra, at 64-65. The Court in Santa Clara Pueblo noted that federal remedies were not required to enforce the Act, because tribal forums, both judicial and non-judicial, are available to vindicate rights created by the Act and because those tribal forums may often be in a better position than federal courts to

evaluate issues arising under the Act. Santa Clara Pueblo at 66, 71.

Since Santa Clara Pueblo, it has been well-settled that federal courts do not have subject matter jurisdiction over actions brought under the Indian Civil Rights Act, except actions for habeas corpus (which Congress expressly authorized in 25 U.S.C. §1303). R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), *cert. den.* 472 U.S. 1016 (1985); Boe v. Fort Belknap Indian Community, 642 F.2d 276 (9th Cir. 1981); Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980). Accordingly, after Santa Clara Pueblo, federal courts have uniformly dismissed for lack of subject matter jurisdiction actions brought under the Indian Civil Rights Act alleging violations of due process and equal protection in tribal election disputes, allowing such disputes, instead, to be resolved exclusively through tribal forums, as Santa Clara Pueblo requires. Boe v. Fort Belknap Indian Community, *supra*; Crowe v. Eastern Band of Cherokee Indians, 584 F.2d 45 (4th Cir. 1978); Learned v. Cheyenne-Arapaho Tribe, 596 F.Supp. 537 (W.D. Okla. 1984); Runs After v. United States, 766 F.2d 347 (8th Cir. 1984); Sahmaunt v. Horse, 593 F. Supp. 162 (W.D. Okla. 1984); Wheeler v. Swimmer, 835 F.2d 259 (10th Cir. 1987); *see also* Goodface v. Grassrope, 708 F.2d 335, 338 fn.4 (8th Cir. 1983).

In Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), the Tenth Circuit attempted to carve out a narrow exception to the Santa Clara Pueblo holding in a case where non-Indians alleged Indian Civil Rights Act violations by a tribe that deprived them of real property and where no tribal forum existed to address their claims. The Ninth Circuit has rejected the Dry Creek Lodge exception and, instead, has held that "the Santa Clara Pueblo holding 'foreclosed any reading of the [Act] as authority for bringing civil actions in

federal court to request...forms of relief [other than habeas corpus]. " R.J. Williams Company, supra, quoting Snow v. Quinalt Indian Nation, 709 F.2d 1319, 1323 (9th Cir. 1983). The Tenth Circuit has also limited the application of the Dry Creek Lodge exception to the particular facts of that case to avoid conflict with the Santa Clara Pueblo holding. Olguin v. Lucero, 87 F.3d 401 (10th Cir. 1996); Enterprise Management Consultants v. United States, 883 F.2d 890 (10th Cir. 1989); White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984); Ramey Construction Co. v. The Apache Tribe of the Mescalero Apache Reservation, 673 F.2d 315 (10th Cir. 1982).

Even if the Ninth Circuit chose to adopt the Dry Creek Lodge exception, Mr. Johnson's claims would not fall within that exception. First, the Dry Creek Lodge exception would only apply to actions brought by non-Indians who, although impacted by the actions of tribal officials, cannot participate in the election of those officials. Dry Creek Lodge, supra at 687; Sahmaunt v. Horse, supra at 164. Mr. Johnson is not only a member of the Hopi Tribe, but also a member of the Tribe's governing body, the Hopi Tribal Council. Plaintiff's Complaint, para. 4, page 2. Not only can he participate in the election of Tribal Officials, he is such a tribal official.

Secondly, the Dry Creek Lodge exception would only apply to matters outside of internal tribal affairs. Dry Creek Lodge, supra, at 687; Sahmaunt, supra, at 164. Because this case involves a purely intra tribal election dispute, the exception would not apply. Dry Creek Lodge, supra, at 687; Sahmaunt, supra, at 164.

Finally, the Dry Creek Lodge exception would only apply if tribal remedies are non-existent. White v. Pueblo of San Juan, supra, at 1312; Olguin v. Lucero, supra at 404. In this case the Hopi Tribe's Election Ordinance, Hopi Tribal Ordinance #34 (copy attached as "Exhibit A") provides for both administrative and judicial review of election contests. Mr. Johnson alleges that



he has completed the administrative phase of his election contest (by submitting the contest to and receiving a response from the Hopi Election Board) and that he has filed a complaint with the Hopi Tribal Court seeking a judicial determination of that contest. Plaintiff's Complaint at pages 2-5. The Hopi Tribal Court, has, in the past, heard and decided similar election contests brought pursuant to the Election Ordinance. Day v. Hopi Election Board, 16 Indian L. Rep 6057 (Hopi Tr. Ct. July 18, 1988) [holding that the Hopi Election Board's disqualification of a candidate for Vice -Chairman for failure to speak the Hopi language fluently did not violate the candidate's rights to equal protection under the ICRA]; Sekaquaptewa v. Hopi Tribal Election Board 13 Indian L. Rep 6009 (Hopi Tr. Ct. January 31, 1986) [striking down a voter registration requirement on Hopi constitutional grounds and upholding the Hopi Election Board's decision to count certain votes cast by unregistered voters]; *see also* Kavena v. Hopi Indian Tribal Court, 16 Indian L. Rep 6063 (Hopi Tr. App. Ct. March 21, 1989) [deciding a challenge to a Village referendum on Hopi constitutional grounds]. In this case, then, Tribal remedies for Mr. Johnson's claims exist, and such tribal remedies are exclusive. Sahmaunt, *supra*, at 165; White, *supra* at 1312.

In Santa Clara Pueblo the Court specifically noted that "Congress retains the authority expressly to authorize civil actions for injunctive or other relief to redress violations of §1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions." Santa Clara Pueblo, *supra*, at 72. Senator Slade Gorton of Washington introduced a bill in the U.S. Senate, S. 1691, which, among other things, would expressly give federal courts jurisdiction over civil actions seeking non-habeas corpus relief under the Indian Civil Rights Act and waive tribal sovereign immunity to such actions. (A copy of S.1691 is attached as "Exhibit

B"). Mr. Johnson personally testified in support of this bill on April 7, 1998, in a hearing before the U.S. Senate Committee on Indian Affairs held in Seattle, Washington. (A copy of Mr. Johnson's written testimony is attached as "Exhibit C").

Unless and until Congress affirmatively acts, as S.1691 proposes, to expressly give federal courts jurisdiction over Indian Civil Rights Act claims for declaratory, injunctive or other relief, the Santa Clara Pueblo holding, based on fundamental principles of tribal sovereignty and self-determination, will continue to require that claimants such as Mr. Johnson seek such remedies exclusively in tribal forums. Even application of the questionable Dry Creek Lodge exception to this case could not change that conclusion. The Court should dismiss Mr. Johnson's Indian Civil Rights Act claims for lack of subject matter jurisdiction.<sup>1</sup>

II. MR. JOHNSON HAS NOT STATED A CLAIM FOR VIOLATION OF THE U.S. CONSTITUTION BECAUSE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION DO NOT APPLY TO INDIAN TRIBES.

Mr. Johnson alleges that the Hopi Election Board, an agency of the Hopi Tribe, violated his rights to due process and equal protection under the U.S. Constitution by inappropriately counting certain absentee ballots in the primary election for Chairman of the Hopi Tribe.

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<sup>1</sup> Mr. Johnson also alleges that the Hopi Tribal Court violated his rights under the Indian Civil Rights Act (presumably due process) by waiting until his attorney was admitted to practice in that court before stamping as "filed" a complaint submitted by that attorney to initiate Tribal Court review of his claims against the Hopi Election Board. Plaintiff's Complaint, paras. 10-13 and 24, pages 3-4 and 8. However, neither the Hopi Tribal Court nor any individual officer of that Court is named as a defendant in this case, and Mr. Johnson does not seek any relief against the Hopi Tribal Court. Even if the Tribal Court or an officer of that Court could be joined in this case, the Court would still lack subject matter jurisdiction over that claim for the same reasons that the Court lacks jurisdiction over the claims against the Hopi Election Board.

Plaintiff's Complaint at para. 2, page 1, para 5, page 2, and para. 23, pages 7-8. Because Indian tribes, such as the Hopi Tribe, are separate sovereigns that existed before the U.S. Constitution, they are generally not subject to the U.S. Constitution's limitations on federal or state authority. Santa Clara Pueblo, *supra*, at 56.; Talton v. Mayes, 163 U.S. 376, 41 L.Ed. 196, 16 S.Ct. 986 (1896); R.J. Williams Company, *supra*, at 981; Trans-Canada Enterprises, *supra*, at 476-477; Barona Group of the Captain Grande Band of Mission Indians v. American Management & Amusement, Inc., 840 F.2d 1394 (9th Cir. 1987) Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Barta v. Oglala Sioux Tribe, 259 F.2d 533 (8th Cir. 1958) *cert. den.* 358 U.S. 932, 3 L.Ed.2d 304, 79 S.Ct. 320 (1959). Therefore, U.S. Constitutional provisions do not apply to an Indian tribe unless those provisions are made binding on tribes by the Constitution itself (such as the 13th Amendment's prohibition against slavery) or unless they are imposed on tribes by Congress. Trans-Canada Enterprises, *supra* at 476-477; Native American Church of North America v. Navajo Tribal Council, *supra*, at 134-135. The due process and equal protection clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution are not made binding on Indian tribes by the Constitution, nor have they been imposed on tribes by Congress. Barona Group of Captain Grande Band of Mission Indians, *supra*, at 1405; Trans-Canada Enterprises, *supra* at 476-477; Barta v. Oglala Sioux Tribe, *supra*; Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Martinez v. Southern Ute Tribe, 240 F.2d 915 (10th Cir. 1957) *cert. den.* 356 U.S. 960, 2 L.Ed.2d 1067, 78 S.Ct. 998 (1958); *see also* Santa Clara Pueblo, *supra*, at 57 and at 63 fn. 14 [noting that the restrictions upon the powers of tribal governments imposed by the Indian Civil Rights Act are "similar, but not identical to those contained in the Bill of Rights and the



Fourteenth Amendment.”]. Because Mr. Johnson is making due process and equal protection claims under the U.S. Constitution against an agency of the Hopi Tribe which, as a matter of law, is not subject to those provisions, Mr. Johnson has failed to state a claim for which relief can be granted and the Court should dismiss those claims.

III. MR. JOHNSON HAS NOT STATED A CLAIM FOR VIOLATION OF 42 U.S.C. §1983 BECAUSE THE HOPI ELECTION BOARD DOES NOT ACT UNDER COLOR OF STATE LAW.

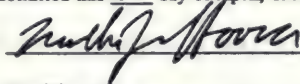
Mr. Johnson’s complaint generally alludes to violations of 42 U.S.C. §1983. Plaintiff Complaint, para. 2, page 1. This statute creates a federal right of action against persons who allegedly violate federal civil rights under the color of state law. Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989), *citing* Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 108, 1912-13, 68 L.Ed.2d 420 (1981) Even if Mr. Johnson’s Complaint is generously construed as alleging that individual members of the Hopi Election Board deprived him of federal civil rights in violation of 42 U.S.C. §1983, the Complaint would still fail to state a claim because all of the actions alleged on the part of the Election Board were actions taken under the color of tribal law. Plaintiff’s Complaint, paras. 16-23. pages 5-8. An action cannot be maintained under §1983 for alleged deprivation of civil rights under the color of tribal law because that section only applies to actions taken under the color of state law. Evans v. McKay, *supra* at 1347; R.J. Williams Co., *supra*, at 982; Toinetta v. Andrus, 503 F.Supp 605, 608 (W.D. N.C. 1980). The Court should dismiss Mr. Johnson’s §1983 action (if the Complaint can be construed as even alleging such an action) for failure to state a claim upon which relief can be granted.

CONCLUSION

The Supreme Court's holding in Santa Clara Pueblo clearly rejected and foreclosed federal court jurisdiction over Indian Civil Rights Act claims because implication of federal causes of action against either tribes or their officers would frustrate the Act's purposes of promoting tribal sovereignty and self determination. The right to elect political leaders without federal intervention is essential to the exercise of the right tribal self-determination. Wheeler v. Swimmer, supra at 262. Unless and until Congress acts affirmatively to intrude upon the Hopi Tribe's right of self-determination by authorizing federal court review of tribal election disputes under the Indian Civil Rights Act, as Mr. Johnson has urged it to do by testifying in support of S.1691, Mr. Johnson must seek resolution of his claims exclusively in Hopi tribal forums.

For the reasons set forth above, the Court should dismiss this case for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Respectfully submitted this 29<sup>th</sup> day of April, 1998.



Franklin J. Hoover  
Assistant General Counsel  
The Hopi Tribe  
P.O. Box 123  
Kykotsmovi, Arizona 86039

Attorney for Defendant

LAW OFFICE  
OF  
RICHARD M. GRIMSrud  
121 East Main Ave., Ste. 208  
P.O. Box 630  
Flagstaff, Arizona 86002  
(602) 774-7339  
State Bar # 005365

Attorney for Plaintiff

UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

CALEB H. JOHNSON,	)	
	)	
Plaintiff,	)	CIV 98-0361-PHX-PGR
	)	
vs.	)	MOTION TO HOLD CASE IN
	)	ABEYANCE AND REQUEST FOR REMAND
HOPI ELECTION BOARD,	)	TO TRIBAL COURT
	)	
Defendant.	)	

The Plaintiff CALEB H. JOHNSON, by and through his attorney undersigned, hereby moves that this Court hold this case in abeyance and requests that it remand this matter to the Hopi Tribal Court for a determination within ninety (90) days of the time that the Plaintiff serves a Summons on his Tribal Court matter upon the Defendant HOPI ELECTION BOARD. The Plaintiff has made this offer to the Defendant as per a true copy of a April 17, 1998 letter to its attorney which is attached hereto as Exhibit 'A' but the Defendant HOPI ELECTION BOARD has turned the offer down per a true copy of its attorney's letter to the

Exhibit C

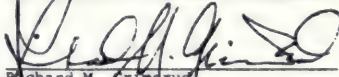


1 Plaintiff's attorney dated April 20, 1998, which is attached  
 2 hereto as Exhibit 'B'. However, Plaintiff has obtained a copy of  
 3 a letter from the Chief Judge of the Hopi Tribal Court indicating  
 4 that it was not going to automatically rule Plaintiff's Tribal  
 5 Court action as untimely filed as Defendant's attorney had  
 6 previously represented to the Hopi Tribal Council (see Exhibit  
 7 'E' and 'F' to the Plaintiff's federal court Complaint herein),  
 8 and Plaintiff is willing to have this matter heard by the Hopi  
 9 Tribal Court under these circumstances. See a true copy of the  
 10 Hopi Tribal Court's letter dated April 15, 1998 attached hereto  
 11 as Exhibit 'C' (1-3).

12 Accordingly, Plaintiff requests that this Court remand this  
 13 matter for a determination to the Hopi Tribal Court within ninety  
 14 (90) days of the time that he serves the Tribal Court Summons  
 15 upon the HOPI ELECTION BOARD and holds this matter in abeyance  
 16 until the end of that ninety (90) day period.

17 RESPECTFULLY SUBMITTED this 24th day of April, 1998.

18 LAW OFFICE OF RICHARD M. GRIMSRUD

19   
 20 Richard M. Grimsrud  
 21 Attorney for Plaintiff  
 22  
 23  
 24  
 25  
 26

1 True copy of foregoing mailed  
2 this 24 day of Apr., 1998, to:

3 Franklin Hoover  
4 Assistant General Counsel of the  
5 Hopi Tribe  
6 Office of the General Counsel  
7 5200 E. Courtland Blvd., Ste. A-15  
8 Flagstaff, AZ 86004  
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24  
25  
26

By: 

LAW OFFICE  
OF  
RICHARD M. GROSSER, JD  
P.O. Box 639  
Flagstaff, Arizona 86001  
(505) 774-7335

LAW OFFICE  
OF  
RICHARD M. GRIMSRUD

121 East Birch Ave., Ste. 205  
Mailing Address: P.O. Box 639  
Flagstaff, Arizona 86002

RICHARD M. GRIMSRUD

Area Code 520  
Telephone 774-7339  
FAX 774-7330

April 17, 1998

Franklin Hoover, Attorney  
Agent and Assistant General Counsel  
The Hopi Tribe  
Office of the General Counsel  
5200 E. Courtland Blvd., Ste. A-15  
Flagstaff, AZ 86004

Re: Johnson v. Hopi Election Board  
(USDC CIV 98-361 PCT PGR)

Dear Mr. Hoover:

Pursuant to my telephone conversation with you today, I discussed the fact with my client that you indicated the Election Board is going to be seeking sanctions against him or me in the form of attorney's and costs. In response to that threat, my client is willing to stipulate to agree to hold the Federal Court matter in abeyance pending a disposition by the Hopi Tribal Court on the matter of whether or not his appeal from the 12/02/97 final decision of the Election Board was timely filed in the Tribal Court.

Please let me know as soon as possible whether you wish to take us up on this offer.

Thank you for your cooperation.

Very truly yours,

LAW OFFICE OF RICHARD M. GRIMSRUD

Richard M. Grimsrud

RMG/srg

xc: Caleb Johnson

EXHIBIT 'A'





RECEIVED APR 21 1998

Wayne Taylor, Jr.  
ChairmanPhillip Quochoyewa  
Vice-Chairman

April 20, 1998

Richard M. Grimsrud, Attorney  
P.O. Box 639  
Flagstaff, Arizona 86002Re: Johnson v. Hopi Election Board, No. CIV 98-361 PCT PGR

Dear Mr. Grimsrud:

Thank you for your letter of April 17 in which you offer to hold the Federal Court action referenced above in abeyance pending Tribal Court disposition of the issue of whether or not Mr. Johnson's tribal court action was timely filed. If exhaustion of tribal court remedies were an issue in this matter, this offer might have been reasonable. However, as you must be aware, exhaustion of tribal court remedies is completely irrelevant to the Federal Court's jurisdiction over your client's action. Unless and until Congress amends the ICRA to give the federal courts jurisdiction over such claims, as your client recently urged it to do in testimony before the U.S. Senate Committee on Indian Affairs, there will be no reasonable basis for you to argue that such Federal jurisdiction exists. Congress and the federal courts, instead, have committed matters such as this exclusively to tribal forums. Attempting to litigate this matter in Federal court is a frivolous pursuit.

Again, the Tribe simply wants to give you and your client a reasonable opportunity to voluntarily dismiss this action before we proceed any further. Your offer to hold the Federal action in abeyance is not sufficient. The federal courts have no role to play in this matter, at all. Please contact me at your earliest convenience if your client's position changes.

Sincerely,


  
 Franklin J. Hoover  
 Assistant General Counsel  
 The Hopi Tribe
xc. Hopi Election Board  
Scott Canty, General Counsel

EXHIBIT 'B'

**CHIEF JUDGE:**

William McCalley

**CHILDREN'S JUDGE:**

Alene Delgarito

**ASSOCIATE JUDGE:**

Delfred Leslie

Marjorie Talsyumptewa

**HOPi TRIBAL COURT**

P.O. BOX 156

KEAMS CANYON, ARIZONA 86034

**TELEPHONE (520) 738-5171****FAX (520) 738-5589**

April 15, 1998

Hopi Tribal Council  
Post Office Box 123  
Kykotsmóvi, Arizona 86039

Thru: Mary A. Felter, Tribal Secretary

Dear Council Members:

The March 20th issue of the Tutuveni contained a letter from Councilman Caleb Johnson in which he explains a complaint he filed with the U.S. District Court. I believe it appropriate for me to set forth all the pertinent facts in this matter.

On December 29, 1997, the Hopi Tribal Court received a "Complaint (and Notice of Appeal)", case no. 98CV000005 from attorney Richard M. Grimsrud, who was not admitted to practice before the Hopi Tribal Court, on that date. Mr. Grimsrud, who was representing Councilman Johnson, enclosed with the complaint his application to be admitted to practice. However, I was on leave on that date. It is the Chief Judge's responsibility to approve or disapprove the admission to practice of attorneys and advocates to the Hopi Bar. I returned from leave on January 5, 1998 and approved Mr. Grimsrud's application on January 7, 1998, whereupon, the complaint which the Court received was stamped as filed.

It is not the practice of the Hopi Tribal Court to accept complaints from attorneys, until they are admitted to practice before it. That is not to say a complaint which is received by the Court within statutory time limitations, for appeal, (in this case from Election board), but not stamped filed until after the time limit has expired will necessarily be dismissed.



EXHIBIT C(1)

In any event the Court did not dismiss the complaint. It followed the normal procedure of returning to the attorney a filed copy of the complaint and a summons directed to the respondent (Hopi Election Board), and signed by the court clerks. This was done by mail on January 9, 1998.

It was then his obligation to serve the summons on the Election Board and return a notice of service to the Court. Since then, the Court has received nothing from either Mr. Grimsrud or Councilman Johnson regarding this matter.

In his letter to Tutuveni Mr. Johnson states "I decided to appeal to the U.S. District Court because legal counsel for the Election Board would have my appeal dismissed on the "timely" issue. There is no question that the Tribal Court would have dismissed my appeal on the "timely" issue."

The fact is the "timely" issue has not been put before the Court, and until it is there is no certainty as to what the Court's decision on the issue will be.

I am also advised that on April 7, 1998 the testimony of Councilman Johnson was presented before the Committee on Indian Affairs, United States Senate concerning Tribal Sovereign Immunity. In that testimony he states, among other things that:

"In discussing my complaint with my legal counsel, Mr. Richard M. Grimsrud I have been advised that it will most likely be dismissed due to the doctrine of sovereign immunity claimed by the Hopi Tribal Government.

-----

My complaint makes it very clear that the Tribal Court deliberately delayed stamping my complaint "filed" until 30 days had passed so that the Court would dismiss it as not being filed on a "timely" basis."

Neither the issue of timely filing or sovereign immunity has been raised by either of the parties in this case at this time. Until such time as these issues are raised and decided by this Court it is presumptuous, to say the least, for either Councilman Johnson or his attorney to make assumptions as to what the Court's decision on these issues will be.

Councilman Johnson has completely failed to follow up on the complaint he has filed in the Hopi Tribal Court. If the issues he is concerned about are raised in Tribal Court and are decided against him, he has the right to appeal the Court's decision to the Appellate Court of the Hopi Tribe. Until he has done all this his claim that he has been

'C'(2)



"deprived of life, liberty or property without due process of law", under either the Indian Civil Rights Act or the United States Constitution, is premature.

Sincerely,

*William McCulley*  
William McCulley,  
Chief Judge

cc: Chairman  
Vice Chairman  
General Counsel  
File

C'(3)

Franklin J. Hoover  
 State Bar. No. 015110  
 Assistant General Counsel  
 The Hopi Tribe  
 P.O. Box 123  
 Kykotsmovi, Arizona 86039

RECEIVED APR 30 1998

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF ARIZONA

CALEB H. JOHNSON,	)	No. CIV 98-361 PCT PGR
	)	
Plaintiff,	)	DEFENDANT'S RESPONSE TO
	)	THE PLAINTIFF'S "MOTION TO
v.	)	HOLD CASE IN ABEYANCE AND
	)	REQUEST FOR REMAND TO
HOPI ELECTION BOARD,	)	TRIBAL COURT"
	)	
Defendant.	)	

The Hopi Election Board, defendant, by the undersigned attorney, submits its response to the Plaintiff's "Motion to Hold Case in Abeyance and Request for Remand to Tribal Court."

INTRODUCTION

The Plaintiff, Caleb H. Johnson, commenced this action on March 3, 1998 to seek declaratory and injunctive relief under the Indian Civil Rights Act, 25 U.S.C. §1302, against the Hopi Election Board for alleged violations of Hopi tribal election laws during a primary election for Chairman of the Hopi Tribe held in November, 1997. Plaintiff's Complaint at pages 1, 7-9. The Hopi Election Board is filing, contemporaneously with this Response, a motion to dismiss Mr. Johnson's action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The Plaintiff, in the meantime, has filed a motion asking the Court to

hold this action in abeyance, to “remand” this matter to the Hopi Tribal Court, and to impose a time limit of ninety (90) days on the Hopi Tribal Court’s adjudication of this matter.

The only possible basis for this motion would be the “tribal exhaustion rule” enunciated by the Supreme Court in National Farmer’s Union Insurance Companies v. Crow Tribe of Indians, *infra*, and Iowa Mutual Insurance Co. v. LaPlante, *infra*. However, the “tribal exhaustion rule” does not apply to Indian Civil Rights Act claims such as Mr. Johnson’s and, even if it did, the rule would not contemplate the type of order sought by the Plaintiff’s motion.

I. THE “TRIBAL EXHAUSTION RULE” DOES NOT APPLY TO THIS CASE BECAUSE THE COURT DOES NOT HAVE JURISDICTION OVER MR. JOHNSON’S ACTION.

The “tribal exhaustion rule” provides that if a federal court is presented with a case over which it has subject matter jurisdiction (on the basis of either federal question or diversity jurisdiction), which challenges an Indian tribal court’s jurisdiction over a non-Indian party or otherwise involves an assertion of concurrent jurisdiction in an Indian tribal court, tribal court remedies, including tribal appellate court review, must be exhausted as a matter of comity before the federal court exercises jurisdiction over the matter. National Farmers Union Insurance Companies v. Crow Tribe of Indians 471 U.S. 845, 85 L.Ed.2d 818, 105 S.Ct. 2447 (1985); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 94 L.Ed.2d 10, 107 S.Ct. 971 (1987); A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986); Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992); El Paso Natural Gas Co. v. Netzsosie, 136 F.3d 610 (9th Cir. 1998). In such cases, a federal court must either dismiss or abstain from deciding the case, pending exhaustion of tribal remedies, unless one of the narrow exceptions to the exhaustion



rule applies.<sup>1</sup> El Paso Natural Gas Co. supra, at 613; National Farmer's Union Insurance Companies, supra, at 857. Exhaustion of tribal remedies is not a jurisdictional pre-requisite for a federal action. Iowa Mutual Insurance Co., supra at 16, fn. 8. The exhaustion rule, instead, only applies where a federal court already has subject matter jurisdiction over the action, but a party asserts that a tribal court has concurrent jurisdiction over the action. El Paso Natural Gas Co., supra at 613.

If a federal court does not have subject matter jurisdiction over the action, then it does not have the power to issue an abstention order pending exhaustion of tribal remedies. Stock West Corp. v. Taylor, supra, at 917. That is the case here. Mr. Johnson's action is an action for declaratory and injunctive relief brought under the Indian Civil Rights Act, 25 U.S.C. §1302. As explained more fully in the Hopi Election Board's motion to dismiss, the Court does not have subject matter jurisdiction over such an action. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L.Ed. 2d 106, 98 S.Ct. 1670 (1978). In Indian Civil Rights Act actions such as this, "it is not merely required that tribal remedies be exhausted prior to seeking federal jurisdiction, but rather that tribal remedies, if they exist, be considered 'exclusive.' " Barker v. Menominee Nation Casino, 897 F.Supp. 389, 396 (E.D. Wisc. 1995), quoting White v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir. 1984).

Because the Hopi Tribal Court has exclusive, not concurrent, jurisdiction over Mr. Johnson's Indian Civil Rights Act action, and because this court lacks subject matter jurisdiction

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<sup>1</sup> Exhaustion of tribal remedies is not required where "(1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) tribal court jurisdiction 'is patently violative of express jurisdictional prohibitions'; or (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction." El Paso Natural Gas Co. at 614-615 quoting National Farmers Union at 857 n.21.

over that action, the tribal exhaustion rule cannot apply to this action.

II. EVEN IF THE "TRIBAL EXHAUSTION RULE" APPLIED TO THIS ACTION, THAT RULE WOULD NOT PROVIDE ANY BASIS FOR THE TYPE OF ORDER SOUGHT BY THE PLAINTIFF.

The Plaintiff's motion asks this Court to "remand this matter for a determination to the Hopi Tribal Court within ninety (90) days after [the plaintiff] serves the Tribal Court Summons upon the HOPI ELECTION BOARD and holds [sic] this matter in abeyance until the end of that ninety (90) day period." The tribal exhaustion rule would provide no basis for an order from a federal court "remanding" a matter to a tribal court and further imposing a limited time frame on the Tribal Court's adjudication of the matter.

The tribal exhaustion rule is "based on considerations of comity and the long-standing policy of promoting tribal self-government and tribal self-determination." El Paso Natural Gas Co., supra, at 614, citing, National Farmers Union Insurance Companies, 471 U.S. at 856. Accordingly, the rule requires that a federal court either stay or dismiss a federal action until all available tribal remedies, including tribal appellate court remedies, are exhausted. Iowa Mutual Insurance Co., supra, at 17. Because the "tribal exhaustion rule" also addresses comity concerns between federal and tribal jurisdictions which "arise out of mutual respect between sovereigns," [El Paso, supra at 618, quoting Smith v. Moffett, 947 F.2d 442, 445 (10th Cir. 1991)] the rule does not authorize federal courts to "remand" matters to tribal courts or to impose procedural requirements, such as time limits, on tribal courts. Instead, the rule simply requires that a federal court "stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." National Farmers, Supra at 857.

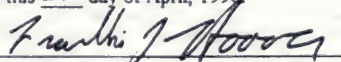
Even if the tribal exhaustion rule could be applied to this case, that rule would require the Court to either dismiss the case or abstain from deciding it, pending exhaustion of tribal remedies. The additional limitations and intrusions into tribal self-government sought by the Plaintiff's motion would not be authorized by that rule and, instead, would violate the fundamental principles of mutual respect between sovereigns upon which the rule is based.

### CONCLUSION

There is no basis for the Plaintiff's motion for an order "remanding" this matter to the Hopi Tribal Court for ninety days. Instead, this motion simply illustrates the fact that tribal forums are available to address Mr. Johnson's election challenge. Because the Indian Civil Rights Act does not authorize a cause of action for that election challenge in federal court, Mr. Johnson must pursue his claims exclusively in tribal forums.

For the reasons stated above, and for the reasons stated in the Hopi Election Board's Motion to Dismiss, the Court should deny the Plaintiff's "MOTION TO HOLD CASE IN ABEYANCE AND REQUEST FOR REMAND TO TRIBAL COURT" and, instead, dismiss this action.

Respectfully submitted this 29<sup>th</sup> day of April, 1998.



Franklin J. Hoover  
Assistant General Counsel  
The Hopi Tribe

Attorney for Defendant



JUSTICE ELBRIDGE COOCHIL

Consultant, specializing in Tribal Justice Systems, Training & Lobbying

564

FAX

TO: Philip COOCHYTEWA

FAX No. 520-734-9414

From: Coochil

Date: 4-7-98

RE:

No. Pages 4  
Incl. Cover

Phillip Coochytewa, Vice Chairman  
Hopi Nation

Re: Councilman Caleb Johnson's testimony

Enclosed is the written testimony of Hopi Councilman Caleb Johnson before the Senate Committee on Indian Affairs on April 7, 1998. His testimony supports the across-the-board waiver of tribal sovereign immunity of tribes as proposed by Senator Slade Gorton in S. 1691.

Both his oral and written testimony states he is a "Hopi Tribal Council Member", and serving his "third (two year) term on the Hopi Tribal Council as a representative from the Village of Kykotsmovi".

He does state he is not speaking on behalf of the Hopi Tribal Council.

However, if he is not, then why does he state he is a Hopi Tribal Council Member, plus he is now serving his third term? Any statement that he is not representing the Hopi Tribal Council is negated by including the above in his oral and written statement.

Another question that arises is how is his "due process" violated when the Hopi Tribal Court has not acted on his complaint? It has only been filed. The issue has not been addressed by the Hopi Court yet and the Court has not made a ruling on the complaint, nor has the counsel for the Election Board argued to dismiss the complaint on sovereign immunity grounds, nor has there been a hearing on the merits of the complaint. Mere speculation by parties on what may happen would not necessarily constitute denial of due process. The court may very well agree with him.

Additionally, if there is a problem in how the Hopi Tribal Court operates, he along with the other Tribal Council Members are certainly in the position to improve the court operation for the benefit of all people. It is his responsibility, as well as yours and the rest of the tribal council to address the deficiencies of the court. But, support a total waiver of the Hopi Nation's sovereign immunity will not resolve the problem but only

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Exhibit E



diminishes the tribe as a government of the people. This plays into Senator Gorton's initiative to abrogate tribes as governments and make American Indians be part of the mainstream society and tribes as Eagles, Moose or Elks Lodges.

My question is, is he a servant of the people, a representative of the village and the Hopi people, or only his self-interest, at the expense of our people. As a member of the Hopi Tribe, I am concerned when any individual supports diminishing or abrogating our Tribe.

LAW OFFICE  
OF  
RICHARD M. GRIMSRUD

RICHARD M. GRIMSRUD

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Area Code 520  
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April 14, 1998

Phillip Cuochytewa, Vice-Chairman  
Hopi Nation  
P.O. Box 123  
Kykotsmovi, AZ 86034

Re: Caleb Johnson's 4/7/98 testimony on U.S. Senate Bill 1691

Dear Mr. Cuochytewa:

My above client has asked me to respond to Elbridge Coochise's 4/7/98 letter to you regarding the above subject, because you are apparently relying on a number of inaccuracies in it. First, Mr. Coochise's opening paragraph emphasizes that Mr. Johnson's "testimony" supports the across-the-board waiver of tribal sovereign immunity. This is not true. I also enclose a transcript copy of his introductory remarks to his testimony as Exhibit 'A' (1-2), and you will note that he specifically said at the end of those remarks that "(i)t is for these reasons that I am here today to support Section 7 of Senator Gorton's legislation, which would waive tribal sovereign immunity so that actions may be brought in federal court under the Indian Civil Rights Act" to challenge tribal government actions that are violative of the constitutional rights of tribal members which are guaranteed under that Act. Mr. Johnson did not say he supported the other Sections of Sen. Gorton's proposed legislation removing tribal immunity on tort actions and re property issues, etc., and, partially for this reason, he went on to say "In addition, I would like to make two recommendations for your consideration. First, I recommend that the word 'original' be inserted before the word 'jurisdiction' on page 10, line 14 of the bill [I have also enclosed a copy of Senate Bill 1691 as Exhibit 'B' (1-10) hereto]. Second, I recommend that this Section be enacted into law..." Exhibit 'A' (2) hereto (emphasis added).

Secondly, I do not see how Mr. Johnson could have been any clearer in his testimony [in Paragraph 3 of his introductory remarks, he said, "Before I make my comments, let me make it absolutely clear that I am not speaking on behalf of the Hopi Tribal Council. Instead, I am here as an individual citizen of the United States..." Exhibit 'A' (1) hereto], that he was in no way testifying as a representative of the Tribal Council. As you

SK667 F

April 14, 1998

Phillip Cuochytewa, Vice-Chairman

Page 2

know, you, the Chairman, the rest of the Tribal Council, and its legal counsel met with Mr. Johnson and discussed his testimony on 4/6/98 before he left to give it. The conclusion of the Chairman and the Tribal Council after a full discussion of his proposed testimony and his reasons for giving it, unanimously decided that, because he had a right to testify about what happened to him in his attempted challenge to the Tribal election in the Tribal Court, no kind of action to prevent him from giving his proposed testimony would be taken.

Third and last, in the fourth paragraph of Mr. Coochise's letter, he complains, "Another question that arises is how is his 'due process' violated when the Hopi Tribal Court has not acted on his Complaint? The issue has not been addressed by the Hopi Court yet and the Court has not made a ruling on the Complaint, nor has the counsel for the Election Board argued to dismiss the Complaint on sovereign immunity grounds...()"

Here, Mr. Coochise clearly misconstrues Mr. Johnson's Complaint now pending in federal court, so a copy of it is also attached as Exhibit 'C' (1-10) hereto. You will note its ninth paragraph alleges that Hopi Election Ordinance 34, 11(3) requires that any appeal to the Tribal Court of a final decision on a challenge to a tribal election must be made "within thirty (30) days of that decision." Exhibit 'C' (3) hereto. You will further note that, despite the facts that Mr. Johnson's appeal to the Court challenging the Election Board's 12/2/97 decision was dispatched from Flagstaff by mail on 12/24/97 and received by the Tribal Court on 12/29/97 or well within the 30-day appeal period, the Tribal Court without good reason did not stamp Mr. Johnson's appeal as "filed" until 1/7/98 or well beyond the 30-day appeal period. See Exhibit 'C' (3-4) hereto. Finally, then, you will note that it is alleged that the counsel for the Hopi Election Board represented to the Tribal Council on that same Jan. 7, 1998 date (and again on Jan. 21st), that it had been determined that there had been no timely "appeal" made to the Tribal Court of the Election Board decision denying Mr. Johnson's challenge to the election. See Exhibit 'C' (4-5) hereto. If, in short, Mr. Johnson had been afforded "due process" by the Tribal Court, he asks, how could these representations by one of the parties to his appeal have been made with such certainty to the Council?

Accordingly, Mr. Johnson respectfully requests that you disregard Mr. Coochise's letter to you. It is not grounded in accurate

April 14, 1998  
Phillip Cuochoytewa, Vice-Chairman  
Page 3

knowledge about what is at issue in Mr. Johnson's federal complaint or what his position regarding tribal immunity really is, which is that a tribal government should not trammel on the constitutional rights of its members guaranteed by the Indian Civil Rights Act with immunity.

Thank you for your cooperation.

Very truly yours,

LAW OFFICE OF RICHARD M. GRIMSRUD

Richard M. Grimsrud

RMG/srg  
attachments

xc: 1. Wayne Taylor, Jr.  
2. Russell Mockta  
3. Caleb Johnson





## JOHNSON, CALEB HOLETSTEWA

CHAPLAIN (COL.) US ARMY, RET.

UCLA, BA.

PRINCETON, MDIV.

VIETNAM, 1969-1969

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21 May 1998

Senator Ben Nighthorse Campbell, Chairman  
Committee on Indian Affairs  
United States Senate  
Washington, DC 20510-6450

Dear Senator Campbell:

Thank you for your letter of May 8, 1998 asking me to respond to three questions as additional response for the hearing record.

However, I am very reluctant to comply as my testimony before your Committee on April 7, 1998 have been used against me by the Chairman and Vice-Chairman and 10 Council Representatives of the Hopi Tribal Council in an effort to remove me from the Tribal Council. A copy of their statements are enclosed for the record and your information.

As a result, the Kykotsmovi Board of Directors held a meeting on May 6, 1998 and decided to hold a meeting on May 26, 1998 at which time, they will provide me an opportunity to defend myself before they vote to remove from the Tribal Council.

If I am removed from the Hopi Tribal Council because of my testimony before your Committee, you can be assured that you will not have Tribal Officials come before your Committee in the future to testify as I have done.

Therefore, I would appreciate if you would write the Chairman and the Hopi Tribal Council and provide them with your Committee response in the event that I am removed because of my testimony before your Committee.

As a ranking Officer of the United States Army, retired, I am especially disappointed by the actions of these Tribal Officials. As a result, I am more convinced that Section 7 of S. 1691 be enacted into Law so that Tribal Officials such as these, will be held accountable for their actions. Things like this cannot be tolerated on Indian Reservations because it stifles the free expression of divergent views in the assembly which is the very lifeblood of a Democracy. Bond v. Floyd, 385 U.S. 116, 17b.Ed.2d 237, 87 Sup.Crt. 3391 (1966). Thank you for your attention and I remain,

Sincerely,

*[Signature]*  
COL. CALEB H. JOHNSON  
US Army, Retired

CC: Senator Slade Gorton

# HOP! NEWS

APRIL 17, 1998 • TUTUVENI • PAGE 19

Statement from Wayne Taylor, Jr., Chairman and Phyllis Quachyuan, Jr., Vice Chairman

## Hopi Tribal Chairman and Vice chairman decry tribal termination from within

KYKOTSMOVI, Ariz. (April 16)—Sadly, and to the great shame and misfortune of the Hopi Tribe, one of our own Council members has chosen to support passage of the Gorton anti-tribal sovereignty legislation. On April 7, 1998, Caleb Johnson, Council Representative from the village of Kykotsmovi, appeared as a witness for Senator Slade Gorton in a field hearing held in Seattle Washington regarding tribal sovereignty immunity.

In the hearing, Mr. Johnson recommended passage of the legislation to "waive tribal sovereign immunity so that actions may be brought in federal court under the Indian Civil Rights Act." Johnson told the Senate panel that his "rights of due process have been violated by the Hopi Tribal Court," and that he has filed a complaint against the Hopi Election Board in the U.S. District Court of Arizona "for the violation of my . . . rights." These charges apparently stem from Johnson's unsuccessful run for Tribal Chairman in 1997.

What Johnson failed to report to the Senate panel is that the Hopi Election Ordinance includes provisions for appeal of Election Board decisions to the Hopi Tribal Court and that he himself had failed to follow those provisions. In other words, Johnson could have taken this matter to Tribal court if he had chosen to do so. He chose to ignore available remedies and instead seeks review by a non-Hopi court of a purely Hopi internal matter.

We have a Hopi Tribal Court to decide these things, and we need not look to non-Hopis to decide such matters. The fact of the matter is that Mr. Johnson failed to file his challenge with the Tribal Court within the 30-day time period allowed by the Election Ordinance. He then failed to do anything to pursue Tribal Court action. Instead, he went directly to the United States District Court.

What is most troubling about Mr. Johnson's testimony in support of the Gorton legislation is his apparent willingness to put his own self interest ahead of the best interest of all Hopi people and Indian country in general. Ironically, by attempting to protect his own political interest, Mr. Johnson may well have denied himself the opportunity to ever become the Chairman of the Hopi Tribe, for it is the very government he seeks to destroy.

The Gorton legislation is a bill about the termination of Indian tribes in the U.S. In recent months, the Hopi Tribe, along with every other tribe in the country has been involved in a critical struggle to protect Indian tribal sovereignty from the latest, but perhaps most serious threat to tribal self determination in almost forty years.

Not since the termination era of the 1950s and 1960s when the United States Congress took away the land and sovereign rights of

many tribes in the country, have the Indian people of America been under such concerted attacks from those in Congress who would end the right of Indian tribes to govern themselves.

Senator Gorton's legislation aimed at ending tribal sovereign immunity is the leading example of the attack. The Gorton bill, if passed, would take away the right of the Hopi Tribe to decide when and to what extent the Tribe's immunity to unconsented lawsuits would be given up and when tribal resources will be subjected to judgments for money damages.

Senator Gorton would open the door wide to unlimited raids on the tribal treasury by individuals, corporations, and even the state, all determined to move Hopi financial resources and other resources into non-Hopi ownership. Under Senator Gorton's bill, anyone could sue the tribe and seek to take away a part of the Tribe's resources.

Perhaps, even more important, Senator Gorton's legislation would ultimately lead to the end of Indian tribal government. If the financial wealth and resources of tribes are taken away, then the promise of self-determination and the reality of tribal homelands would become nothing more than empty concepts, like springs without water.

Each day the Hopi Tribal government is faced with the challenge of protecting and advancing the right of the Hopi people to decide for themselves how their lives will be lived, how their resources will be managed and what rules they will live under. This basic human right is nothing less than the right of self government by self determination. In other words, the Hopi people, acting through their chosen representatives to the Tribal government, are able to decide matters free from outside interference.

What is most disheartening about Johnson's testimony for the Gorton bill is that the attack against Hopi self governance comes from within and against the official position of the Hopi Tribal Council. What, then, can we as Hopi people do?

In this new era of tribal termination, it is the Hopi people who must rise up and voice their concerns. We must join the collective voice of other tribes across the nation in favor of tribal survival and against the Gorton bill. It is also up to the Village of Kykotsmovi to decide whether Mr. Johnson is an advocate of their best interest and that of the Hopi people in general.

As the Chairman and Vice Chairman of the Hopi Tribe, let us remind every Council member that we are sworn to protect the sovereign rights of the Tribe and its people; this is our first and most important responsibility. None of us should ever turn our backs on that sacred responsibility. Anyone who betrays that responsibility and trust should no longer have a place in tribal government.

Sthibit G

## Ten Representatives of the Hopi Tribal Council sign

# Broken trust: Caleb Johnson should resign

KYKOTSMOVI, Ariz.—When Caleb Johnson appeared before the Senate panel to testify against tribal sovereignty and in support of Senator Slade Gorton's anti-sovereignty bill, he irrevocably broke the Hopi people's trust in him.

Trust is about a solemn relationship. It involves on one side the Hopi people who trust, and on the other side the people who are trusted. We extend our trust to only a few people. Typically only to those whom we know mean us no harm and who perhaps share similar ideas and beliefs.

The Hopi people, at the very least, should expect to be able to trust their Council Representatives to represent their best interests against the outside world and to support the Hopi Constitution and Protect the sovereignty of the Hopi Nation. We are each sworn to do so.

Because of Mr. Caleb Johnson's breach of trust, we as Hopi people, no longer have confidence in Mr. Johnson to represent Hopi Tribal interests.

We no longer have any assurance that Mr. Johnson will not hurt or betray the Hopi people in important matters including land and water issues.

We can no longer rely on Mr. Johnson nor believe in him to be truthful.

We can no longer depend on Mr. Johnson to carry out his Council responsibilities in the best interests of the Hopi people and to look out for our general welfare.

We can no longer trust Mr. Johnson to uphold tribal mandates even when they are memorialized by Council resolutions.

We no longer feel confident in speaking freely in Tribal Council meetings for fear that what we say may be revealed to those outside of Hopi land who would destroy our way of life.

Why? Because Mr. Johnson seeks to destroy and abolish the Hopi Tribal government and with it the self-governing rights of all Hopi people. He has inflicted his own version of tribal termination against his own people.

We each write our own history of trust. If we want others to trust us, we have to be "trustworthy." Trust is believing in someone to do the right thing, to have integrity and to tell the truth.

Mr. Johnson betrayed the Hopi people by making his self interest more important than the survival of the Hopi and other Indian tribes in the United States.

Mr. Johnson will predictably argue that he testified in favor of the Gorton legislation because his civil rights were allegedly violated in his bid for Chairman or because he is entitled to free speech. However, ignoring the Hopi Tribal Court's established judicial processes and attempting to undermine the Tribe by relying on the freedom to say what you want does not justify a Council Representative in choosing to speak in opposition to the official position of the Hopi Tribe. A position voted on in Tribal Council no less. A position opposed only by Mr. Johnson.

Nor does it justify joining individuals like Senator Slade Gorton who propose to do away with Indian reservations and their resources. There are higher principles at stake. Every one of us, as Council members, must always work for the good of the entire Tribe and this means looking past how we might be affected individually. The good of the people always outweighs the interest of the one. This is the Hopi way.

For Mr. Caleb Johnson to continue to serve as a Village Representative to the Hopi Tribal Council makes absolutely no sense in light of his position against tribal sovereignty. In trying to destroy the Hopi tribal government that feeds his hand, Mr. Johnson has no choice but to resign. It is the only right thing left for him to do. If he refuses to do the right thing, then the Village of Kykotsmovi should act immediately to remove Mr. Johnson from the Hopi Tribal Council.

...  
Signed by the following Representatives  
Arthur Batala, Mishongnovi  
Todd Honyama, Sr., Sipaulovi  
Rachel Sakiestewa-Scott, Kykotsmovi  
Michael Elmer, Upper Moencopi  
Marshall Namingha, Bacavi  
Lenora Lewis, Upper Moencopi  
Leon Koruh, Mishongnovi  
Norman Honaule, Kykotsmovi  
Yvonne Hoosava, Upper Moencopi  
Danny Honnaile, Kykotsmovi





CHAPLAIN (COL) JOHNSON, CALEB H. US ARMY, RET.

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U.C.L.A. BA  
Princeton, MDIV  
Vietnam 1966-1969

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30 April 1998

Dear Editor

In a recent issue of Tutuveni, April 17, 1998, there appeared a statement from Wayne Taylor, Chairman and Phillip Quochoytewa, Sr. Vice Chairman on my appearance before the Senate Committee on Indian Affairs in Seattle, Washington.

Before I comment, permit me to say that I take care on what I will say, due to my Complaint pending before the U.S. District Court in Arizona.

Let us first examine the word "Sovereign Immunity" and determine what it means, otherwise, we won't know what we are talking about. Sovereign Immunity is a legal doctrine that had its origins in Feudal England and it means that the King can do no wrong. Therefore, when the Chairman and Vice Chairman say that they swore to protect the sovereign rights of the Tribe, they may be claiming that the Hopi Tribal Government can do no wrong. You and I know that this in no way can be true. In fact, the Bible said in Romans 3:23 "for all have sinned and come short of the glory of God." My Bible tells me that only sovereign God can do no wrong, not any man.

Permit me to point out that the words "Sovereign or Sovereignty" does not appear in the Hopi Tribal Constitution which, we, representatives, to the Tribal Council all swore to protect. Therefore, I am at lost as to what these officials mean when they "remind every council member that we are sworn to protect the sovereign rights of the Tribe and its people." To me, it is presumptuous to say the least, for these officials to put words into the Hopi Tribal Constitution. As far as I know, the Tribal Constitution can be changed only through a referendum by the Hopi people.

They also allege that I have put my "own self interest ahead of the best interests of all Hopi people and Indian Country in general." My response to this allegation is simply this. Just exactly who is going to defend my interests if not myself? Do these officials intend to deny me the right to protect my interest? Will the Tribal Council or any of its members protect my interest?

I firmly believe that by defending my right of "due process" with my own financial resources, pursuant to the Indian Civil Rights Act of 1968, I am in effect protecting the rights of all Indians whose "due process" may have been violated or may be violated in the future by their own Tribal governments.

In addition, I think that we all act out of self interest. I only know of one person who did not act out of self-interest and that Person is Jesus the Christ who died for us all.

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As to "whether I have denied myself the opportunity to ever become the Chairman of the Hopi Tribe" that remains to be seen. I believe that this matter is up to the Hopi people and to Almighty God who determines our destiny by his providence. In addition, I do think there are Hopi people who admit that I am one, ordinary Hopi Indian who has the courage and the determination to challenge the Election Board on these "severe irregularities which occurred in the conduct of the recent elections." The fact of the matter is that I have challenged in U.S. District Court, the way these two officials were elected into office. Therefore, they have now joined together to attack me. Like any politicians, they are only protecting their own political self-interest.

Actually, S. 1691 is 10 pages long with 8 sections. My testimony make it absolutely clear that I only support Section 7 of that bill. Why it is alleged that I support the whole bill is beyond my understanding. Permit me to quote section 7:

"Sec. 7. Indian Civil Rights.

Title II of the Civil Rights Act of 1968 (commonly known as the "Indian Civil Rights Act") (25 U.S.C. 1301 et seq.) is amended by adding at the end of the following:

"Sect. 204. Enforcement.

The district courts of the United States shall have jurisdiction in any civil rights action alleging a failure to comply with rights secured by the requirements under this title. With respect to an Indian Tribe, to the extent necessary to enforce this title, the tribal immunity of that tribe (as that term is defined in section 2 of the American Indian Equal Justice Act) is waived."

I support section 7 because if this section is enacted into Law by the U.S. Congress and the President, then any common ordinary Indian like myself will have the opportunity to receive Justice in a Federal Court. In addition, Indian Tribal governments will be held accountable if they trammel on the Constitutional rights of their own people. If I understand the Indian Civil Rights Act, it applies only to Indians.

Finally, these officials state that "It is also up to the Village of Kykotsmovi to decide whether Mr. Johnson is an advocate of their best interests" etc., and that "anyone who betrays that responsibility and trust should no longer have a place in tribal government."

I regret that these officials of the Tribal government stated this for several reasons. As an elected official of the Village of Kykotsmovi, it is my opinion that this is an interference into our village domestic affairs. I am confident that we, in the Village of Kykotsmovi are fully capable of deciding with our votes who will be our officials. In addition, there may well be Federal Laws which may apply to those persons, no matter who they are, who willfully by intention or otherwise, intimidate or recommend reprisals against any person who testify before a Congressional Committee. In all fairness, I am going to request the Chairman of the Senate Committee on Indian Affairs to include the statement of the Chairman and Vice Chairman and my response to be included in the Hearing before the Committee.

Chaplain (COL) Caleb H. Johnson  
US Army Retired.

**TESTIMONY**  
**OF**  
**MR. ROLAND MORRIS SR.**  
**BOARD MEMBER**  
**CITIZENS EQUAL RIGHTS ALLIANCE**  
**OVERSIGHT HEARING**  
**BEFORE THE COMMITTEE ON INDIAN AFFAIRS**  
**UNITED STATES SENATE**  
**CONCERNING S. 1691 THE AMERICAN INDIAN EQUAL**  
**JUSTICE ACT**  
**PRESENTED ON**  
**APRIL 7, 1998**  
**SEATTLE, WASHINGTON**

Good afternoon Mr. Chairman and Members of the Committee. My name is Roland Morris Sr.. I am a board member of the Citizens Equal Rights Alliance (CERA) and president of All Citizens Equal, (ACE). Although opposition has labeled these groups harshly, both are grassroots, multi-racial groups dedicated to the promotion of equal rights for all citizens within Indian Country.

I am also a full-blooded Anishinabe American citizen. Originally from the Leech Lake band of Minnesota Chippewa, I now live in Montana. Thank you for the opportunity to appear before you to testify on the American Indian Equal Justice Act. It is my hope you will discern the truthfulness of my message by examining both my heart, as well as my words.

**I believe current federal Indian policy coupled with tribal government behavior is taking a bigger toll on tribal members then most people admit.**

I am Indian. When I step foot onto a reservation, State and Federal constitutional rights can be denied me. I become a second class citizen. On a reservation there is no guarantee the United States Constitution and the Bill of Rights will control. There are no guarantees the Civil Rights Acts or legislation against age or gender discrimination will be honored. There are no guarantees of the Veterans

Preference Act, no Civil Service classification to protect tribal government employees, no guarantees of the Americans with Disabilities Act, no guarantees against blanket nepotism or a fair and orderly process concerning access to reservation housing, and no guarantee of freedom of the press or freedom of speech. In other words, basic human rights other Americans take for granted, that allow people to live in dignity with their neighbors, are not guaranteed on Indian reservations under the present version of "sovereignty".

Secondly, Tribes are dependent on Federal government help. Through this dependency, many tribal governments have become corrupt with unchecked power and money. Because of corruption and unwillingness to let go of power and money; tribal government themselves, in some cases, are keeping their people in the bondage of poverty and oppression. It cannot be denied that current federal policy is such that tribal governments financially benefit from the general membership's poverty level staying just as it is. The plight of the average Native American is what keeps money flowing into the coffers of those in charge of Tribal government. Thus, tribal government needs to keep in control of its members, even to the extent of demanding from this Congress that the "tribe shall retain exclusive jurisdiction over any ...Indian child...", as is written in the Indian Child Welfare Act, which states further that tribal interests are "independent of the interests of the birth parents".

The Indian Civil Rights Act mandates that no Indian tribe in exercising powers of self government shall violate various basic civil rights. However, when there is no separation of powers within tribal governments and tribal sovereign immunity protects tribal government from civil rights claims, tribal members are left without recourse.

But many tribal members say nothing publicly. Cronyism, nepotism and ballot box rigging are all part of political reality on many reservations. Everyone seems to accept it as a given and because tribal government controls tribal jobs, HUD housing, tribal loans and land leases, many members are reluctant to speak out. Tribal government controls most everyone's strings, not to mention the judicial system. Getting on the bad side of the government can mean the loss of ones job or home. Some have even been threatened that their family members would lose their jobs.

Further disabling to membership outcry is the manipulation used to keep control. I have seen tribal governments pressure members to rally to their cause and political goals through misinformation, bullying, and even bribes. At a political rally two years ago, in order to portray a good show of force for the media, a tribal government gave its employees the day off and told the employees they were expected to attend the rally. In order to ensure the attendance, the tribal government offered transportation to the rally, free food, and distribution of the employees' pay checks.

At the recent Montana gatherings held by Senator Conrad Burns in reference to tribal jurisdiction, the tribal governments transported students from the colleges and high schools, offered free food and dance before the hearings, and inflamed the large group with speeches about genocide. Prior to the busses leaving one of the schools on its way to the hearing, a student was told that unless he planned to speak at the hearing, he wouldn't be allowed on the bus. Again, a show of angry force was



important for this media event, and it was highly unlikely that under those conditions many tribal members would get up and say anything in opposition to tribal government dogma.

Actual bullying usually occurs on more of a one-on-one scale. In one case, a tribal member had been essentially share-cropping with a white neighbor. The tribal member shared his tribally leased land; the neighbor shared his tractors and other heavy equipment. Together, they both benefited. However, this arrangement angered the tribal government, which without warning revoked the tribal member's lease on the land in question, threatened to revoke other land he leased, and threatened him with forced eviction from his HUD home. The government eventually allowed him to keep his home and other land, but permanently revoked the land he had shared with a non-member. This tribal member, having a large family, has no intention of taking another chance of losing his home by speaking out.

In another case, a person running for office in a recent tribal election was denied, by the tribal council, the right to advertise in the local tribal paper.

I have had many tribal members come to me in confidence and relate their concerns and fears. I have even had a former tribal council member come to me to discuss these issues. I see true elders feeling defeated. Many of those within tribal government won't listen to the elders. Seeing this disrespect is hurtful to me and it pains many other tribal members that this is the way things are.

It can be no wonder that Indian people are tired and depressed. Not only do many feel alienated from the United States Government and the rest of society, but many tribal governments can't be trusted either. This situation, having become a hopeless fact of life, along with poverty and other factors, has bred depression and loss of trust.

With the current epidemic of corruption on Indian Reservations, how could tribal members be better protected? It is clear to us that something needs to change. We can't continue to sit back and watch relatives despair. Let us work together as brothers and sisters to correct the problem.

Senator Gorton's bill, **The American Indian Equal Justice Act** is wonderful news for anyone, either tribal or non-tribal. By providing federal district courts jurisdiction over civil rights actions brought under the Indian Civil Rights Act, tribal governments will be held accountable for their actions. This bill will not hurt tribal members, it will only hurt corrupt tribal government.

While non-members all over the country are gathering to support this bill, this is actually one of the best things that can happen for tribal members. This bill will give members the right to sue tribal government when they deny member's rights.

If tribal government looks at the plus side of the bill, it'll see that it will improve the economy for everyone on the reservations. Industry would be willing to come and build businesses on the reservation. Our relationship with the so-called outside world would improve. If tribal government looks at the plus side of the bill, it'll see that it will



provide encouragement and hope for everyone on the reservations. Not only would people begin to feel less like pawns in the chess game of politics, but they would feel strength in the knowledge that their independent thoughts mattered and could be voiced without fear of punishment. Furthermore, if industry within the reservation improved, less people would have to depend on the government for assistance.

People will not feel as useless or trapped anymore.

Thank you.

**Roland Morris, Sr.**

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**TESTIMONY**

**OF**

**CRAIG D. GREENBERG, ESQ.**

**ATTORNEY - MINNEAPOLIS, MINNESOTA**

**BEFORE THE COMMITTEE OF INDIAN AFFAIRS**  
**UNITES STATES SENATE**

**CONCERNING S. 1691 THE AMERICAN INDIAN EQUAL JUSTICE ACT**

**PRESENTED ON**

**APRIL 7, 1998**

\*Admitted To Practice In California; International Association Of Practicing Lawyers

\*\*Transportation Lawyers Association; Association Of Transportation Practitioners

\*Real Property Law Specialist. Certified By The Minnesota Bar Association

## INTRODUCTION

Good morning, Mr. Chairman and Members of the Committee. Thank you for the opportunity to speak to you about these very important issues. I am an attorney in private practice with the law firm of Huffman, Usem, Saboe, Crawford & Greenberg, P.A. located in suburban Minneapolis, Minnesota. I sincerely appreciate that we are all approaching these issues with the utmost respect for not only Native American people, but diversity in general and constitutionally protected civil rights for all.

I graduated from highschool in St. Louis Park, Minnesota in 1980 and graduated in 1984 from Colorado College in Colorado Springs, Colorado with a B.A. degree in Business/Economics. I went to law school in St. Paul, Minnesota at the William Mitchell College of Law (i.e., the alma mater of The Hon. Warren Burger) and received my J.D. degree in 1987. I have been in private practice for more than 10 years in Minneapolis concentrating on business, employment and real estate matters. I am admitted to practice in the State of Minnesota, United States District Court in Minnesota and the United States Supreme Court.

I currently have one Indian law case pending at the United States Supreme Court entitled Gavle v. Little Six, Inc., (Docket #96-1215). The case is on appeal from the Minnesota Supreme Court decision reported at 555 N.W.2d 284 (Minn. 1996). The Petition for Writ of Certiorari in the Gavle case was filed on January 30, 1997, yet in over a year, the Supreme Court has neither accepted nor rejected the case. A copy of the Petition is attached hereto. The facts in the Gavle are severe and concern civil rights, discrimination, employment and injury issues. However, the Gavle case also presents an example of how tribal sovereign immunity has been stretched to ridiculous extremes. In Gavle, a tribal corporation, Little Six, Inc. registered as a foreign corporation under Minnesota law and obtained authority to transact business in the State. In so doing, the tribal corporation irrevocably consented to be sued in Minnesota courts and agreed to be bound by State law. In addition, Little Six conducted much activity outside the boundaries of the reservation. Even with all of the clear evidence establishing a waiver of sovereign immunity, along with the off-reservation business activity, the Minnesota Supreme Court refused to allow Gavle's case to proceed because of sovereign immunity. However, the majority opinion of Minnesota Supreme Court clearly recognized the inherent problems with its own decision. While dismissing Gavle's case, the Minnesota Supreme Court said:

While the time may well come, or even be upon us now, that a tribal owned corporation, operated for profit as is LSI, (i.e., Little Six, Inc.) should as a matter of fairness and equity be subject to the same liabilities as a non-tribally owned corporation, it is not for this court to make that decision in absence of some change in Congressional policy or direction from the U.S. Supreme Court indicating that under such circumstances elimination of the tribal

corporation's sovereign immunity is appropriate.<sup>1</sup>

While we are extremely hopeful that the United States Supreme Court will end up hearing the Gavle case, we are here today to fully and unequivocally support a change in Congressional policy regarding tribal sovereign immunity. The time is now upon us for Congress to make these long needed changes.

My written testimony herein will focus upon: (I) My introduction and involvement in Indian law matters; (II) A brief description of some of the Indian law cases upon which I am currently working; (III) An analysis of the status of civil rights on Indian reservations based upon my legal experience; (IV) An analysis and comment on S. 1691; and (V) A short concluding statement.

#### **I. My Introduction and Involvement in Indian Law Matters.**

There is nothing in my personal background which has led to my involvement in this area of law. I have never lived on a reservation and I have never been personally wronged by a tribal government. However, as a lawyer, I have come to feel very strongly about the legal anomaly associated with tribal sovereign immunity. I have been dismayed by the real experiences of my clients and those whom have contacted me regarding legal representation.

While my practice consists of general business, corporate, employment law and real estate matters, I have unintentionally developed a practice representing individuals and businesses that have suffered damages from their contacts with Indian tribes and tribal businesses. While in law school, I had no education regarding Indian law matters and had no intention of pursuing the area of law. If someone had told me then that I would in the future become heavily involved in challenging the misapplication of tribal sovereign immunity and related Indian law issues, I would have surely scoffed. However, an early warning from a first year law professor now rings true: "*You will not find the law, the law will find you.*" In essence, without premeditation or any specific plan to seek out clients or develop an Indian law practice, these issues were thrust upon me during the Summer of 1993.

During August 1993, a client came to my office with what appeared to be a straightforward business case. In summary, my client had sold his suburban Minneapolis bus tour and travel business to a Native American owned casino in Minnesota and went to work as an employee of the casino under a long term employment agreement. The contract also contained a rather large severance package in the event my client's employment was terminated early. Within sixty (60) days after the consummation of the sale, the tribe shut down the newly acquired business and terminated all seventeen employees, including my client.

The casino and the tribe then proceeded to breach the contract by refusing to pay the

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<sup>1</sup> Petition For Certiorari, App. P.26.



required severance. After much research it became apparent that this particular casino had ulterior motives for shutting down my client's business. In plainest terms, the casino did not like the color of many of the customers my client's buses brought to this casino from Chicago, Milwaukee, Des Moines and other locations. The Complaint filed in this case alleged that the casino intentionally put the bus tour company out of business to stop the influx of Black American and Asian American customers. This allegation was supported by strong evidence, including an affidavit from a dissenting tribal council member who did not approve of such discrimination. In the litigation, the tribe attempted to hide behind its sovereign immunity defense, even though the contract at issue contained specific waiver of immunity language. The tribe brought a motion to dismiss the case which the trial court denied. The ruling was upheld by the Minnesota Court of Appeals. The case was eventually resolved after the Minnesota Court of Appeals ruling, the terms of which are under a confidentiality agreement.

The ruling in this initial case received some media attention. When word spread about this relatively rare case in which a State Court held a tribe and its casino operation accountable, my phone began to ring. I received calls from around the country from clients and lawyers with varied and wide-ranging problems. My telephone hasn't stopped ringing for almost four years. I have received 100's of calls from Indian and non-Indian claimants who were looking for representation with regard to every imaginable type of civil case against tribes and tribally owned or operated business. These cases included without limitation:

- (a) Sexual harassment;
- (b) Retaliatory termination;
- (c) Age discrimination;
- (d) Disability or medical condition discrimination;
- (e) Racial discrimination, including one case where a Native American casino employee was the target of racial slurs disparaging her tribe and its people because she was not a member of the tribe that owned that particular casino;
- (f) Gender discrimination;
- (g) Sexual preference discrimination;
- (h) Pregnancy discrimination;
- (i) Defamation;
- (j) Whistle-blower terminations;
- (k) Assault and battery;
- (l) Car accidents and numerous other personal injury cases;
- (m) Dram shop claims;
- (n) Wrongful death cases, including a civil case arising out of a murder;
- (o) False imprisonment;
- (p) Breach of contract;
- (q) Tribal membership issues;
- (r) Reservation property disputes, including wrongful condemnation by a tribe without compensation
- (s) Theft of employee tips by tribal council members;

- (t) Labor law violations, employment termination based upon unionization efforts;
- (u) Denial of due process and violation of constitutional guaranteed rights, including free speech and right to assembly, and
- (v) Tribal members denied information about their own tribes operations.

The vast number and variety of calls to my office, together with the abnormally severe and egregious nature of many of these cases, have lead me to an unavoidable conclusion. There is a severe systemic problem with tribal sovereign immunity. Abuse and corruption occur at an alarming rate because tribal sovereign immunity, and the associated sense of being "above the law," creates a "petri dish" habitat for numerous legal wrongs against tribal members, employees and patrons of tribal businesses. This is not the fault of Indian people, it is the fault of a governmental system which gives total immunity. Any other group of people, existing under the same rules would have the very same problems.

As a lawyer, I was initially shocked to learn that no State or Federal laws, rules or regulations applied on the reservations to protect employees and patrons of the Indian casino's and related businesses. This is a major hole in the Indian Gaming Regulatory Act. Equally surprising were court decisions such as Gayle, where courts seem to grant tribes and their businesses "super-sovereign" powers, by giving rights and immunities the Federal Government does not even enjoy. However, I was pleased, to find out that there were a very sizable percentage of Native American citizens who have been for years seeking serious changes in the current application of tribal sovereign immunity.

I was soon educated by my Native American friends that during the many years prior to the introduction of Indian gaming, generally, the people who were being denied basic constitutional rights, where in fact, tribal members themselves. Yet, since 1991, the contacts between non-tribal members and tribal governments and tribal businesses (i.e., casinos) have grown exponentially. The numerous and wide raging problems that non-tribal members have experienced in recent years have brought to light the longstanding problems encountered internally by tribal members with their own tribal governments. The positive outgrowth of these problems, if there can be one, is that Indians and non-Indians alike, are now working together to change a defective system.

Currently, it is very difficult for people to find legal representation when they have suffered an injury relating to a tribe or its business. There are many attorneys eager to represent tribal/casino interests, because large fees can be charged. However, some of my clients have called literally one hundred (100) law firms or lawyers before they found or where referred to me.<sup>2</sup> I am submitting this testimony in favor of S. 1691 with the knowledge that if the law is changed, my area of expertise in Indian law will fade away into mainstream legal practice. I will no longer be one of the few lawyers who will be willing to handle a case involving a tribe.

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<sup>2</sup> I do not advertise in the yellow pages under Indian law, although the category exists in the Minneapolis phone book.

Changing the law will also automatically reduce the frequency and severity of these cases. Accountability will lead to more peaceful and more prosperous tribal operations. In essence, I am respectfully requesting that you put me out of the Indian law business by passing S. 1691.

## **II. A Brief Description of a Few of the Cases Upon Which I am Currently Working.**

1. **Joseph Fairbanks.** Mr. Fairbanks is a good example of the many potential clients that have contacted me. Mr. Fairbanks is a 60-year-old Native American gentleman who works as a black jack dealer at a Minnesota casino. He has been working for four years without a promotion. However, 20-year-old employees with only a few months of experience are continually being promoted over Mr. Fairbanks. Mr. Fairbanks believes that he has a valid age discrimination case. He contacted me after being denied representation by countless attorneys. I met with Mr. Fairbanks and determined that based upon the current status of the law, he would have to pursue his claim in the tribal court for that tribe/casino. I was at one time, admitted to practice before this particular tribal court, but got so thoroughly disgusted with the lack of due process, game playing, rule changing and biased judges hired by the tribe, that I intentionally let my tribal court license lapse. Mr. Fairbanks was unable to find any attorney to represent him in tribal court. The only lawyers Mr. Fairbanks could find admitted in this tribal court represent the tribe. Mr. Fairbanks is now representing himself in tribal court and I have agreed to informally answer his questions on a pro bono basis. Mr. Fairbanks is outraged and cannot understand why the legal system is not protecting his rights. He is Native American yet he strongly favors a change in the way sovereign immunity is misapplied to deny people like their basic legal rights.

2. **Jill Gavle:** This case presents a very interesting question. Does tribal sovereign immunity for a corporation owned by a tribe extend to all business activities of a tribe, including those activities conducted off the reservation? Both the Minnesota Court of Appeal and Minnesota Supreme Court expressed concern about this issue, but ultimately said that the issue was for the United States Supreme Court or Congress. The legal claims in this case are based upon the defendants severe abuse of Ms. Gavle as their employee. The legal claims in the Gavle case present shocking abuses of a female employee both on and off the reservation, including, sexual harassment, racial and gender discrimination, pregnancy discrimination, assault, battery and defamation. The central facts of the case relate to incidents occurring at Mystic Lake Casino in Shakopee, Minnesota. The tribal corporation's Chairman pursued and eventually coerced Ms. Gavle into an unwanted sexual relationship. This highest ranking casino executive used his power and authority to exert pressure over Ms. Gavle who was at the time a 23-year-old security guard. Ms. Gavle became pregnant as a result of un-consensual sex with the executive. When other top executives found out about the pregnancy, Ms. Gavle's employment was immediately terminated, she was threatened with violence by casino executives, physically assaulted and literally chased out of town. The tribal corporation's Chairman beat Gavle and told her she no longer had a job and that she should leave the State of Minnesota. At a time when she was three months pregnant, Gavle packed up and fled Minnesota fearing for her life. The tribe and its business corporation, Little Six, Inc. claim



that Gavle's suit is completely barred by the tribal sovereign immunity defense.

3. **Karen Charland:** My office represents Karen Charland. Karen Charland is a 57-year-old grandmother and was a food and beverage employee of the Mystic Lake Casino. During June 1996, Ms. Charland was waiting in the casino parking lot after work to pick up her husband who was inside at the time. Someone, without provocation, shot her point blank in the side of the head. Ms. Charland miraculously survived, but suffered severe damages including the loss of her left eye, severe facial deformities, hearing loss, balance problems and intense emotional distress. Ms. Charland is of the opinion that she somehow was caught in the crossfire of a drug transaction. Surprisingly, the casino provided no security patrols or cameras in the particular parking lot in which Ms. Charland was shot, although they have 100's of cameras inside the casino to catch cheaters. In Ms. Charland's opinion, money and profit were valued ahead of her safety and well being as an authorized employee and visitor to the tribal casino. Recently, the casino requested a doctor's note from Ms. Charland inquiring as to when she could come back to work. Ms. Charland immediately delivered a doctor's note which said she was not yet able to work due to her numerous injuries. The casino responded by sending her a notice of employment termination. Real people are getting seriously hurt and they demand their constitutional rights. A charge of disability discrimination was recently filed with the EEOC<sup>3</sup> in this case, and Federal Court complaint will follow.

4. **The Family of Kim Teta.** I just recently began representing the family of Kim Teta, A 20-year-old woman who was recently found murdered in a trunk of a car in Minneapolis. Ms. Teta left behind a 2-year-old daughter. Newspaper reports indicate that Ms. Teta was last seen at Mystic Lake Casino during December 1997. She was found murdered a month later. The prime suspect is a member of the tribe that owns and operates the casino, who was also the father of her child. Ms. Teta has Native American ancestry. While criminal charges are expected, our office has been asked to look at a possible civil claim.

### **III. The Status of Civil Rights on Indian Lands.**

S. 1691 is an excellent and well thought out piece of legislation and it is long overdue. In modern society, it makes absolute sense to require responsibility and accountability for tribal governments and tribal officials. People are now venturing into tribal casinos as patrons and employees, without the slightest notion that they are leaving all of their rights at the door. In turn, tribal members whose views may not be in line with tribal leaders are denied every right that should be protected by the Constitution. It is ironic that we focus great attention (and sometimes our military strength) on combating human rights violations in other countries around the world, yet we allow and perpetuate a tribal governmental system where people can be seriously injured

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<sup>3</sup> The EEOC and the Minnesota Human Rights Department uniformly will accept the charges of discrimination in tribal cases to toll the statute of limitations on such cases, but always state that they have no jurisdiction to enforce civil rights violations on Indian reservations.



or have their constitutional rights violated without the protection of the Constitution or any recourse in an unbiased court system.

Congress has full authority to make the necessary and logical changes. However, the Courts have traditionally given past legislation an interpretation that is extremely narrow to the detriment of individual rights and in favor of the tribal government. For instance, Public Law 280, 28 U.S.C. § 1360 provides for State Court civil jurisdiction for matters arising between Indians and non-Indians. However, the Courts have concluded that because the definition of "Indians" did not specifically include "Indian Tribes," the grant of jurisdiction under Public law 280 does not apply to tribal governments or business entities controlled by tribal governments. Therefore, what is needed is clear and concise legislation which provides State and Federal Court jurisdiction, as well as a Congressional waiver of the tribal sovereign immunity defense in specified cases. S. 1691 as a whole, achieves this goal.

#### **IV. An Analysis of Select Provisions of S. 1691.**

Sections 4 and 5 of S. 1691 provide needed Federal and State Court procedures for those who sustain injuries on reservations and in particular at the recently built casino, hotel and resort complexes which actively invite outsiders to work, play and stay on Indian reservations. Limiting damages to only compensatory damages is a compromise position which mirrors Federal Tort Claims procedures. If the Federal government legally does not have complete immunity, how can tribes, as subservient sovereigns, enjoy such protection? The Federal government should not be able to give to anyone more power than it enjoys itself. Given State and Federal tort claims procedures, as well as the Foreign Sovereigns Act, 28 U.S.C. § 1605, which applies to true foreign nations, tribal owned businesses are the only business in the United States given total immunity for their business operations. The Foreign Sovereigns Act in pertinent part provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

(1) in which the foreign state has waived its immunity either explicitly or by implication....;

(2) in which the action is based upon commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with the commercial activity of the foreign state elsewhere....(emphasis added).

Sections 4 and 5 of S. 1691 provide a natural and consistent approach to tort claim procedures on Indian lands.

Section 7 of S. 1691 also provides much needed language to cure the basic problem with the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq. The legal problem is a classic "right without a remedy." The Indian Civil Rights Act provides civil rights, but fails to provide any specific remedy if an individuals rights are in fact violated. Why even bother pretending to provide civil rights protection on Indian reservations, if one cannot assert or in any way enforce those rights in an unbiased court of law. Section 7 of S. 1691 adequately resolves the illusory nature of the Indian Civil Rights Act.

I would take the proposed legislation one step further by correcting another inherent problem in the area of Indian civil rights. An extremely surprising anomaly in the law is found in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Indian tribes are expressly excluded from the definition of an employer bound by this anti-discrimination legislation. The constitutionality of applying civil rights legislation on a piecemeal basis is subject to attack. Particularly, when the same legislation presumably applies to and protects all citizens of the United States, regardless of race. If the statute is truly designed to promote color-blindness, then why do we build in a race-based exception? See Cohen v. Little Six, 543 N.W.2d 376 (Minn. App. 1995) (Randall, J. dissenting). Would we openly allow exceptions to Title VII for "Caucasian," "Black," "Jewish" or "Asian" employers? We definitely would not. Or conversely, would we openly legislate that Indians or Indian tribes have no protections under Title VII? Of course not! Then we must all ask ourselves what purpose is served by this exception.

## V. Conclusion.

There are no valid arguments against the provisions of S.1691. All Americans should be wary of any assertion that a segment of our population does not need civil rights protection. We should be equally wary of any tribal government which claims that the Constitution, due process and the rule of law will destroy their community or eliminate their self-determination. All you need to do is to look to Amish communities or newly transplanted Hmong communities to see that self determination is freely available to all. Does not our Constitution provide the right of self-determination to all citizens whether their ancestors have always been in this land or whether they just came to this country and gained citizenship? I know of no constitutional provision which dispenses with equal protection under the law based upon ancestry or an analysis of how long ones family has been in the United States. We must not forget one important fact. Since 1924, all Native Americans in the United States have been citizens of the United States. The legal fiction of tribal sovereign immunity took hold prior to 1924, when by act of Congress citizenship was established. The total immunity has been perpetuated beyond logic or reason.

The economic detriment arguments are equally unpersuasive. All other businesses in this country prosper knowing that they are accountable to their employees and patrons and that they must abide by Federal and State law. Insurance coverage is readily available. I suspect that the cost of standard insurance policies would be far less expensive that the lobbying and legal costs

currently incurred by tribes asserting the perpetuation of total immunity from civil lawsuits.

Tribal sovereign immunity creates a safe haven for violations of civil rights against tribal members, employees and patrons of tribal businesses. Lack of accountability leads to abuse. The introduction of Indian gaming, presumably as a mainstream economic activity designed to cater to non-tribal members, demands that we make select changes to the law to insure the peaceful and orderly resolution of tort and contract claims arising therefrom. The law must catch up with modern realities.

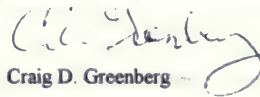
In similar fashion, civil rights must be applied equally, for all citizens, on each square inch of this country. The Constitution requires it.

As a member of the bar and as a United States citizen, I fully support S. 1691 and urge the Committee and Congress as a whole to approve the same and finally make civil rights and accountability in government the law of the land everywhere in the United States. Thank you.

Respectfully Submitted.

Very truly yours,

Huffman, Usem, Saboe, Crawford & Greenberg, P.A.



Craig D. Greenberg

encl.

No. \_\_\_\_\_

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In The  
Supreme Court of the United States  
October Term, 1996

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JILL GAVLE

*Petitioner,*

v.

LITTLE SIX, INC., A FOREIGN CORPORATION  
d/b/a MYSTIC LAKE CASINO, et al.

*Respondent.*

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On Petition For Writ Of Certiorari  
To The Minnesota Supreme Court

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PETITION FOR WRIT OF CERTIORARI  
AND APPENDICES

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## QUESTIONS PRESENTED FOR REVIEW

- A. Whether the defense of tribal sovereign immunity applies to a Native American owned corporation, which is separate and distinct from the tribe, when it conducts business off the reservation?
  - B. Whether a Native American owned corporation waives the tribal sovereign immunity defense, when the corporation appoints an agent for service of process and irrevocably consents to be sued in Minnesota courts for purposes of voluntarily obtaining a certificate of authority to transact business in the State of Minnesota?
-

## LIST OF PARTIES

Petitioner, Jill A. Gavle is an individual and a United States citizen living in the State of Minnesota (hereinafter "Gavle"). Respondent Little Six, Inc. (hereinafter "Little Six") is a for profit business corporation engaged in gaming and other enterprises on and off the Shakopee Mdewakanton Sioux Indian Community Reservation in the State of Minnesota. Three individually named defendants, Leonard Prescott, Allene Ross and William Johnson are not parties to the appeal or the decision of the Minnesota Supreme Court below.

## 1

**OPINIONS BELOW**

The opinion of the Minnesota Supreme Court is reported at 555 N.W.2d 284 (Minn. 1996) and reprinted at Appendix A. The opinion of the Minnesota Court of Appeals is reported at 534 N.W.2d 280 (Minn. App.1985) and reprinted at Appendix B. The order and decision of Scott County District Court in the State of Minnesota (Howe, J.), granting summary judgment for Respondent, is unreported and is reprinted at Appendix C.

**JURISDICTIONAL BASIS**

The judgment of the Minnesota Supreme Court was filed on October 31, 1996. This Court has jurisdiction under 28 U.S.C. § 1257(a). The petition herein was timely filed pursuant to 28 U.S.C. § 2101(c).

**STATUTES INVOLVED****U.S. CONST. art. VII:**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

**U.S. CONST. amend. XIV, § 1:**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1605, in pertinent part:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

(1) in which the foreign state has waived its immunity either explicitly or by implication. . . . ;

(2) in which the action is based upon commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with the commercial activity of the foreign state elsewhere. . . .

28 U.S.C. § 1360 ( Public Law 280) reads in pertinent part:

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State: . . . Minnesota. . . . All Indian country within the State, except the Red Lake Indian Reservation.

MINN. CONST. art I, § 4

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.

MINN. CONST. art. I, § 8:

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.



Minn. Stat § 303.06, Subd. 1 (1994):

Application for certificate of authority.

Subdivision 1. Contents. In order to procure a certificate of authority to transact business in this state, a foreign corporation shall make application therefore to the secretary of state, which application shall set forth:

(1) The name of the corporation and the state or country under the laws of which it is organized; . . .

(5) The address of its proposed registered office in this state and the name of its proposed registered agent in this state;

(6) That it irrevocably consents to service of process upon it as set forth in section 303.13, or any amendment thereto; . . .

Minn. Stat. § 303.02, Subd. 6 (1994):

Process. "Process" means any statutory notice or demand required or permitted to be served on a natural person or a corporation, and includes the summons in a civil action, and any process which may be issued in any action or proceeding in any court.

Minn. Stat. § 303.09 (1994):

Powers same as domestic corporation. After the issuance of a certificate of authority by the secretary of state and until cancellation or revocation thereof or issuance of a certificate of withdrawal, the corporation shall possess within this state the same rights and privileges that a domestic corporation would possess if organized for the purposes set forth in the articles of incorporation of such foreign corporation pursuant to which its certificate of authority is issued, and shall be subject to the laws of this state.

Minn. Stat. § 303.23, Subd. 1 (1994):

Certificate Issued By Secretary of State.

Subd. 1 Prima facie evidence; recording. Any certificate issued by the Secretary of State pursuant to the provisions of this chapter; and copies of the certificates certified by him, shall be prima facie evidence of the matters stated therein.

### STATEMENT OF THE CASE

Petitioner Jill Gavle is a female citizen of Minnesota who worked for Respondent Little Six, Inc. ("Little Six"), a for-profit business corporation formed under the laws of the Shakopee Mdewakanton Sioux Community, a federally recognized Indian tribe. Respondent managed Mystic Lake Casino in Prior Lake, Minnesota and operated other businesses in Minnesota and North Dakota. During 1991, Respondent voluntarily registered in Minnesota as a foreign corporation under Minn. Stat. § 303.01 et seq. (the Minnesota Foreign Corporations Act) and obtained a certificate of authority to transact business in Minnesota. The written application process under the Minnesota statute contained language whereby the Respondent "irrevocably" consented to service of process and agreed to be bound by the laws of the State of Minnesota.

As an employee, Petitioner Gavle worked as a security guard for Respondent both on and off of the trust lands and reservation upon which the Mystic Lake Casino complex was located. In particular, Petitioner frequently worked at Respondent's corporate headquarters located off the reservation. (App. 70-71). Many of the underlying facts also occurred off of the reservation. Petitioner's Complaint in State court alleged that she was subjected to assault, sexual harassment, racial discrimination, pregnancy discrimination and other actionable conduct by three corporate directors and officers of Respondent. When Petitioner became pregnant by defendant Prescott (i.e., Little Six's Chairman and top executive), she was threatened, harassed and her employment was terminated due to her pregnancy. She was also threatened and forced to leave the State of Minnesota so that her pregnancy would

remain a secret. Petitioner fled to the State of Arizona early in her pregnancy and eventually gave birth to a daughter while in Arizona.

On October 10, 1994, Petitioner commenced this action in Scott County District Court in the State of Minnesota, asserting employment related claims under state and federal law. Respondent brought a motion to dismiss Gavle's Complaint based upon the defense of tribal sovereign immunity, claiming that Little Six, Inc. was part of a federally recognized Indian tribe, that as a matter of federal law, was immune from Petitioner's claims. The District Court granted Little Six's motion for summary judgment and dismissed Petitioner's complaint. (App. 56).

On Petitioner's appeal, the Minnesota Court of Appeals affirmed, holding that the State court had jurisdiction over Respondent, but found no waiver of the tribal sovereign immunity defense. (App. 40). The Minnesota Supreme Court granted review.

On October 31, 1996, the Minnesota Supreme Court affirmed the dismissal of Petitioner's action against Respondent, finding again that the State court had jurisdiction in the action, but that Respondent's claims were barred by *tribal* sovereign immunity. (App. 1). There were two strong dissenting opinions accompanying the decision of the Minnesota Supreme Court. (App. 31-38).

## **I. REASONS FOR GRANTING THE WRIT**

### **A. The Opinion Of The Minnesota Supreme Court Is Inconsistent With This Court's Previous Opinions Interpreting The Application Of Tribal Sovereign Immunity To Tribal Businesses Operating Off The Reservation.**

#### **1. Assertion of Tribal Sovereign Immunity.**

The opinion below is inconsistent with this Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), in which the Court considered the question as to whether a ski resort owned and operated by an Indian tribe,



but which was located outside the boundaries of the reservation, would be subject to New Mexico's gross receipt's tax. The Court held that:

The upshot has been repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted by federal law. . . . But tribal activities conducted outside reservation boundaries present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' *Organized Village of Kake*, supra, 369 U.S., at 75, 82 S.Ct., at 571. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

*Mescalero*, 411 U.S. at 148-149. Petitioner in the instant case has merely sought to enforce contract, tort and human rights laws that are applicable to all persons and corporations in the State of Minnesota. Respondent, Little Six claims in substance, that the federal law doctrine of tribal sovereign immunity allows it to: (i) conduct commerce in the State of Minnesota in corporate form; (ii) injure its employees and other United States citizens in the course of its business dealings, and (iii) then avoid legal responsibility for its actions on the grounds of tribal sovereign immunity.

In *Organized Village of Kake*, 369 U.S. 60, 82 S.Ct. 562 (1962), this Court also stated that: " . . . Congress has to a substantial degree opened the doors of reservations to state laws. . . . ". It is difficult to reconcile the decisions of the lower courts herein, which have failed to enforce state laws against the egregious acts of a corporate entity committed both on and off the reservation. This is particularly true given the fact that Indian tribes are "domestic dependant nations". *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831) not superior sovereigns.

In *Oklahoma Tax Commission v. Chickasaw Nation*, \_\_\_ U.S. \_\_\_, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) this Court



determined that the rule that Indians and Indian tribes are generally immune from state taxation, does not operate *outside* "Indian country". While *Chickasaw Nation* is a state taxation case, in *Bryan v. Itasca County*, 426 U.S. 373, 383, 96 S.Ct. 2102, 2108 (1976), the Court, (commenting on Public Law 280, 28 U.S.C. § 1360<sup>1</sup>) indicated that civil contract and tort laws, (like those Petitioner is relying upon for protection herein) are even less intrusive to tribal interests than state taxation laws. Therefore, it follows, that tribal sovereign immunity should not operate outside the reservation to deprive Petitioner of her constitutional day in court, due process, as well as the equal protection of non-discriminatory civil laws provided by U.S. CONST. art. VII and U.S. CONST. amend. XIV, § 1.

In the instant case, the Minnesota Supreme Court has contradicted the teachings of *Mescalero* and has misapplied the non-discriminatory state corporate statutes, in a manner which creates super-sovereign business corporations. In realizing this unconscionable and unconstitutional result, the Minnesota Supreme Court itself stated in its opinion:

While the time may well come, or even be upon us now, that a tribal owned corporation, operated for profit as is LSI, should as a matter of fairness and equity be subject to the same liabilities as a non-tribally owned corporation, it is not for this court to make that decision in the absence of some change in Congressional policy or *direction from the U.S. Supreme Court* indicating that under such circumstances elimination of the tribal corporation's sovereign immunity is appropriate. (emphasis added).

*Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 296 (Minn. 1996). (App. 26). Based upon the foregoing, Petitioner now asks this

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<sup>1</sup> Public Law 280 provides civil jurisdiction to Minnesota courts, even on reservation lands. The issue still remains confused at best, as to whether Public Law 280 would provide a waiver of immunity as it relates to a for-profit business corporation, separate and distinct from the tribal government.

Court to provide the necessary direction to the lower courts to avoid the blatant unfairness, inequity and inconsistencies created by the decisions below. In *Puyallup Tribe, Inc. v. State of Washington*, 433 U.S.165, 97 S.Ct. 2616, 53 L.Ed.2d. 667 (1977) Justice Blackmun concurring stated:

I entertain doubts, however, about continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940). I am of the view that doctrine may well merit re-examination in an appropriate case.

*Puyallup Tribe, Inc.*, 433 U.S. at 178-79, 97 S.Ct. at 2624. (Blackmun, J., concurring). Petitioner's case is precisely the type of case demanding re-examination of the application of tribal sovereign immunity that Justice Blackmun must have been referring to in *Puyallup Tribe*. Justice Stevens more recently stated: "The doctrine of sovereign immunity is founded upon an anachronistic fiction. See *Nevada v. Hall*, 440 U.S. 410, 414-416 (1979). In my opinion all Governments – federal, state, and tribal – should generally be held accountable for their illegal conduct." (emphasis added). *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 514, 111 S.Ct. 905, 912 (1991) (Stevens, J. concurring). The lower court's decision carries this "anachronistic fiction" to a ridiculous extreme.

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 408 FN2 (Minn. App. 1995) (Randall, J. dissenting), citing, Oliver Wendell Holmes, *Path of the Law*, 10 Harv. L.R. 457, 469 (1897). The most important and critical consideration here is that if Respondent is not the tribe or arm of the tribal government (as determined by the Minnesota

Court of Appeals<sup>2</sup>), then arguments pertaining to the defense of *tribal* sovereign immunity are simply irrelevant. Chief Justice Keith of the Minnesota Supreme Court in his dissenting opinion below correctly noted:

However, this does not change the fact that LSI is a private corporation, registered to transact business in the State of Minnesota like any other private business, and certainly not an extension of the tribal government per se. Furthermore, LSI was not incorporated under Section 17 of the Indian Reorganization Act, which extends sovereign immunity to corporations formed by tribal governments to further the tribe's economic interests. See 25 U.S.C. §§ 476, 477 (1994). . . . As the Court of Appeals found, LSI "was created as a separate economic entity, not subject to governmental control, incorporated under tribal law and not merely as an authorized tribal activity." *Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995).

*Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 299 (Minn. 1996) (Keith, C.J., Dissenting) (App. 33-34). Based upon the foregoing, the lower courts have clearly departed from the teachings of this Court in cases ranging from *Cherokee Nation* to *Mescalero*.

## 2. The Foreign Sovereigns Act of 1976.

Within the question as to whether tribal sovereign immunity can be applied to off-reservation business activity, an issue is presented which has never been determined by this Court. It is an important issue which is growing on a daily basis due to the success, rapid expansion and diversification of tribal related businesses both on and off reservations. The Foreign Sovereigns Act of 1976 implemented a restrictive view of sovereign immunity for foreign sovereigns. The relevant provisions of 28 U.S.C. § 1605 (a) read as follows:

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<sup>2</sup> *Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995). (App. 47-48)



A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .

(2) in which the action is based upon commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with the commercial activity of the foreign state elsewhere. . . .

The definition of "foreign state" found in 28 U.S.C. § 1603 (b), includes an agency or instrumentality of a foreign state, which includes any entity which is a separate legal person, *corporate* or otherwise. . . . " (emphasis added.) There is no specific exception for sovereign Indian tribes or corporations owned by Indians under the Act. Native American tribes have a common-law immunity from suit similar to that accorded sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). However, Indian tribes are dependant and subservient sovereigns, existing only at the sufferance of Congress and are subject to complete defeasance. *States v. Wheeler*, 435 U.S. 313, 323 (1978). In this setting, the application of the Foreign Sovereigns Act of 1976 to off-reservation (or on reservation) business activity is unresolved.

Petitioner argued below, that the Foreign Sovereign Immunities Act of 1976, as an act of Congress, invalidated sovereign immunity for *all* business operations conducting business in the United States. In the face of the Foreign Sovereign Immunities Act of 1976, how is it that any tribe or tribal corporation can enjoy total super-sovereign powers for their off-reservation business activities in the United States, when true international sovereigns having more true sovereignty, have no such defense. The Minnesota Supreme court failed to address this issue. It is clearly contrary to the intent of Congress to allow immunity for business operations in the United States, whether they originate from Sweden, South Korea or a Sioux tribe.



Furthermore, given the fact that actions are allowed against foreign nations, the federal government, state governments and local governments; the decision below leads to an unconscionable and unintended result. If the lower court's decision is allowed to stand, Respondent corporation, and those businesses similarly situated, are exalted to the position of being the only business entities in the entire world that can totally avoid legal responsibility and liability for their business activities in the United States. There is simply no legal or equitable authority which allows such a ridiculous and unintended result. This was precisely the concern raised by Justice Stevens, concurring in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991), when he remarked that he was "not sure that the rule of tribal sovereign immunity extends to cases arising from the tribe's conduct of commercial activities off the reservation." 498 U.S. at 514, 11 S.Ct. at 912 (citing the Foreign Sovereign Immunities Act).

In the case of *In Re Greene*, 980 F.2d 590 (9th Cir. 1992), the Ninth Circuit Court of Appeals mentioned the Foreign Sovereign Immunities Act in passing, but never directly discussed whether the statute actually applied to tribes or corporations owned by tribes conducting business in the United States. *Id.* at 594. The court in *In Re Greene* commented that Congressional silence on the issue was instructive. However, despite the view expressed in *In Re Greene*, Congress knows how to except out Native American tribes from statutory provisions when it wants to do so. See, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994). (Indian tribes expressly excluded from definition of "employer".)<sup>3</sup> Based

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<sup>3</sup> The constitutionality of applying civil rights legislation on a piecemeal basis is subject to attack. Particularly, when the same legislation presumably applies to and protects all citizens of the United States, regardless of race. If the statute is truly designed to promote color-blindness, then why do we build in an exception that only sees the color red. See *Cohen v. Little Six*, 543 N.W.2d 376, 395 (Minn. App. 1995) (Randall, J. dissenting). Would we openly allow exceptions to Title VII for "caucasian", "black" or "asian" employers? Or conversely, would we

upon the foregoing, the Foreign Sovereign Immunities Act clearly is applicable to tribal related corporations which conduct business in the United States, whether on or off the reservation. The issue here appears ripe for determination by this Court.

### 3. The Interests of State of Minnesota:

This Court has often utilized balancing tests to analyze cases involving Native American issues. In the instant case, the State of Minnesota has a valid and overriding interest in protecting its citizens from the conduct of unscrupulous foreign corporations operating in the State. The State of Minnesota also constitutionally guarantees the right to have a jury trial in a Minnesota state court. See MINN. CONST. art I, § 4 (stating "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy"). The Minnesota Constitution also provides that:

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

MINN. CONST. art I, § 8. In the instant case, Petitioner Gavle seeks to enforce basic human rights protected under the U.S. Constitution, Minnesota Constitution, state human rights provisions, common law tort theories, contract law, employment law and other laws (including federal and state statutes) designed specifically to protect the safety and well-being of

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openly legislate that Indians or Indian tribes have no protection under Title VII? Furthermore, the argument that Indian tribes are political entities and not racial groups is contrary to fact. In order to be recognized as a member of any particular tribe, you must establish proper ancestry and blood quantum. This is clearly not equal protection, and is indicative of the ridiculous extremes to which tribal sovereign immunity has been stretched.

female employees and other minorities in the State of Minnesota. A non-tribal business corporation, operating off of the reservation, should have no sovereign immunity to assert, and we urge this Court to rule accordingly.

Under the two-stage balancing test of *Rice v. Rehner*, 463 U.S. 713, 720, 103 S.Ct. 3291, 3296, 77 L.Ed.2d 961 (1983), the State of Minnesota has a much stronger interest in insuring the protection of basic human rights for all citizens and in prohibiting law abiding business practices within the state. Clearly, Respondent can not argue that enforcing human rights statutes that promote racial equality would be inconsistent with their traditions or beliefs.

Justice Coyne of the Minnesota Supreme Court also strongly dissenting in the decision below, put it quite succinctly when she stated that:

Gavle complains of violation of the Minnesota Human Rights Act, Minn. Stat. ch. 363 (1994). The requirements of the Minnesota Human Rights Act are applicable to the state and its political subdivisions as well as private employers, and I can see *no earthly reason* for permitting a foreign corporation to depart the Shakopee Mdewakanton Sioux (Dakota) reservation and to violate with impunity the human rights of Minnesota citizens while transacting business in Minnesota. (emphasis added).

*Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 300 (Minn. 1996) (Coyne, J. dissenting) (App. 36-37). The lower courts have impermissibly converted the limited subservient sovereignty established for Indian tribes, on their own lands, into super-sovereignty for multi-million dollar casino conglomerates, providing the same with total immunity, whenever and wherever they enter the mainstream of commerce. This result is directly contrary to *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) wherein this court said "[w]e do not read the [language] as conferring super-sovereign authority to interfere with another jurisdiction's sovereign rights." *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct.at 2224. The overriding interests of the



State of Minnesota in protecting its citizens should be controlling in the instant case.

The decision of the lower court must be reversed to insure conformity with this Court's prior decisions.

**B. The Courts of Appeals and State Courts Are Irreconcilably Split On Whether The Sovereign Immunity Defense Applies to Off-Reservation Business Activities.**

The results of the opinion below are even more unconscionable given the undisputed fact that Little Six, Inc. voluntarily and of its own desire, agreed to be bound by the laws of the State of Minnesota and "irrevocably" consented to be sued in Minnesota courts. The Respondent executed written documents for purposes of obtaining a license to conduct business in Minnesota pursuant to the Minnesota Foreign Corporations Act Minn. Stat. § 303.01 et seq. (see App. 63-64).

One of the best discussions of the clearly unsettled nature of this issue, is found in the concurring opinion of Justice Rymer in *In Re Greene*, 980 F.2d 590 (9th Cir. 1992) in which he said:

... state supreme courts have addressed the commercial exception, but with ambiguous results. See e.g., *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104, 1109 (1989) (tribal sovereign immunity covers "tribal business" but not "non-tribal business," without definition); *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845, 850 (1988) (tribal sovereign immunity does not cover economic activities by the tribe off the reservation), cert. denied, 490 U.S. 1029, 1030, 109 S.Ct. 1767, 1768, 104 L.Ed.2d 202 (1989). See also *Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377, 382 (Minn. 1979) ("Generally, state courts may assume jurisdiction over disputes arising from commercial transactions between Indians and non-Indians if the transaction is not confined to the Indian Reservation."); *Atkinson v. Haldane*, 569



P.2d 151, 169-70 (Alaska 1977) (courts do not recognize "proprietary act/governmental function" test regarding tribal sovereign immunity); *North Sea Products, Ltd. v. Clipper Seafoods Co.*, 92 Wash.2d 236, 595 P.2d 938, 939, 942-43 (no commercial exception under existing law, but concurring justice suggests this rule is "unjust, unwise and unreasonable") (1979).

Although the United States Supreme Court has held that "without Congressional authorization the Indian nations are exempt from suit," *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940); see *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, 98 S.Ct. at 1677 (quoting *United States Fidelity & Guaranty*, 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940)), it has never directly considered the reach of tribal immunity in business ventures. Indeed Justice White dissented from the denial of certiorari in *Padilla*, 490 U.S. at 1030, 109 S.Ct. at 1768, urging that the Court should have heard the case "to resolve the conflict among state courts"; Justice Stevens, concurring in *Potawatomi Tribe*, remarked that he was "not sure that the rule of tribal sovereign immunity extends to cases arising from the tribe's conduct of commercial activities off the reservation." *Id.* 498 U.S. at \_\_\_, 11 S.Ct. at 912 (citing the Foreign Sovereign Immunities Act).

*Id.* at 900.

In the *Greene* case, the Ninth Circuit considered the sovereign immunity of a furniture business that was a "wholly-owned and managed enterprise of" the tribe therein. Unlike the facts of the instant case, the tribe had not created a separate and distinct corporation to operate its business. Based upon these facts, the court in the *Greene* case, upheld the tribal sovereign immunity defense.

Two lower courts clearly have considered similar issues regarding the tribal sovereign immunity defense raised by a corporate entity not formed under Section 17 of the Indian

Reorganization Act, (25 U.S.C. § 477) such as Respondent in the instant case. The two cases are *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) and *Dixon v. Picopa Construction Company*, 772 P.2d 1104 (Ariz. 1989).

In *Padilla*, the New Mexico Supreme Court considered the application of sovereign immunity to the "Pueblo of Acoma d/b/a Sky City Contractors" an *unincorporated* association that registered to do business in New Mexico and which was conducting business in the mainstream of commerce. Sky City Contractors, when sued for breach of contract, raised a sovereign immunity defense and the court struck it down. The *Padilla* court said:

The United States Supreme Court has held that the doctrine that 'no sovereign may be sued in its own courts without its consent' does not necessarily support a claim of immunity in another sovereign's courts. *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed. 416 (1979), *aff'g Hall v. University of Nevada*, 74 Cal. App.3d 280, 141 Cal.Rptr. 439 (1977) (Hall II). For reasons well articulated in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975), the doctrine of sovereign immunity does not find favor in the common law of this state. . . . Having found no provision under the supreme law of the land that prohibits a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct, we believe the exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct is solely a matter of comity.

*Padilla*, 754 P.2d at 850. The facts of the instant case are even more favorable to Petitioner than those in *Padilla*, because Respondent Little Six, Inc. is a separate *incorporated* entity not formed under Section 17 of the Indian Reorganization Act, and it additionally registered to transact business in Minnesota pursuant to Minnesota Foreign Corporations Act.

*Dixon v. Picopa Construction Company*, 772 P.2d 1104 (Ariz. 1989) is a case which is close to being "on all fours" with the instant case. In *Dixon*, the Arizona Supreme Court

considered the application of the sovereign immunity defense to the "Picopa Construction Company" which was a separate corporation formed under an ordinance passed by the Salt River Pima-Maricopa Indian Community. The facts of the instant case are even more favorable to Petitioner than those in *Dixon*, because, unlike Little Six, Inc. herein, Picopa Construction Company did not register with the Arizona Corporation Commission and did not appoint an agent for service of process in the state. *Dixon*, 772 P.2d at 1106. The *Dixon* court held that Picopa Construction Company was not entitled to assert sovereign immunity. The Arizona Supreme Court explained:

Congress's provision for allowing Indian tribe's to segregate themselves into governmental and commercial corporate units, . . . arguably implies that "Congress did not intend all commercial activity" undertaken by Indian entities be immune from suit. Thus Congress itself recognized that immunity may have deleterious effects on a tribe's economic development. The court of appeals held that the mere act of incorporation did not waive tribal immunity. Although that statement is correct, in this instance it overlooks the real issue. The waiver issue does not arise until Picopa first establishes that it has immunity to waive. We hold that Picopa is not a subordinate economic organization within the meaning of White Mountain Apache<sup>4</sup> and S. Unique<sup>5</sup>, and hence may not assert immunity. *Further, on this record, as a separate corporate entity, Picopa is not entitled to assert immunity in its own right for its off-reservation commercial activities.* (emphasis added) (citations omitted).

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<sup>4</sup> Referring to *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971).

<sup>5</sup> Referring to *S. Unique v. Gila River Pima Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376 (Ariz. Ct. App. 1983), rev. denied (1984).



*Dixon*, 772 P.2d at 1111-1112. The analysis of the *Dixon* case is justifiable and sound under the facts of that case, as well as the parallel yet more persuasive facts of the instant case. Thus, the Minnesota courts decisions are at odds with *Dixon* and *Padilla*, as they allow Respondent to successfully assert the defense of *tribal* sovereign immunity for off-reservation business activity. Recognizing this, Chief Justice Keith in his dissenting opinion stated:

Like LSI, the Picopa Construction Company involved in the *Dixon* case had a board of directors separate from the tribal government and with exclusive administration control of the corporations day-to-day operations, was instituted as a for-profit business venture with the Community as the sole shareholder, was not organized under Section 17 of the Indian Reorganization Act, and was not intended to carry out the Community's governmental functions. *Id.* at 1107-11. I would follow the Arizona court's in *Dixon* and *Shelley*<sup>6</sup>, and require that a business incorporated under tribal law show itself to be an extension of the tribal government in order to take advantage of the tribe's sovereign immunity defense. In this case, it is clear that LSI does not meet this test.

*Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 300 (Minn. 1996) (Keith, C.J., dissenting) (App. 35).

The foregoing cases, including Justice White's recognition of the clear conflict among state courts, (*See, Padilla*, 490 U.S. at 1030, 109 S.Ct. at 1768) all arose before the creation of the entire Indian gaming industry resulting from the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.

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<sup>6</sup> *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971).



§§ 2701-2721 (1988)<sup>7</sup>. We have witnessed the mass proliferation of tribal casino gambling operations throughout the United States in the 1990's. Current estimates are that there are now over 250 Indian gambling casino operations in the United States. The number and size of these Indian gambling casino's are quickly expanding. Many have become destination resorts with the construction of large hotels, restaurants, shops and entertainment forums. This economic explosion has also resulted in the diversification of the business interests of tribes and tribal corporations, including the acquisition of off-reservation businesses operating in the main stream of commerce in the United States. Respondent, Little Six itself owned and operated a construction company in North Dakota and a supply company in Minnesota.

The undeniable corollary of this proliferation is that, compared to 1989 when Justice White urged the Court to hear *Padilla* "to resolve the conflict among state courts", there are hundreds of thousands more United States citizens who today, visit, patronize and are employed by Native American owned businesses both on and off reservation lands. The relatively minor conflicts that existed in 1989, have expanded and have continued to grow at an exponential rate along with the multi-billion dollar Indian gambling industry across the nation.

The practical and devastating impact of the Minnesota court's decision in this case is to allow off-reservation business to be conducted in the State of Minnesota (or anywhere else) with total immunity! The law must be clarified and harmonized to provide for fair and equitable remedies for

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<sup>7</sup> The Minnesota Supreme Court incorrectly held that all Indian gaming is conducted pursuant to the IGRA and that as a matter of federal law, Respondent must be a tribal entity in order to conduct gaming authorized by statute. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 295 (Minn. 1996). (App. 23). However, this analysis is in error. While it may be that only tribes can own tribal casinos, non-tribal corporations may be hired to manage the operations for the tribe, and individual ownership of Class III gaming may be allowed. See 25 U.S.C. § 2711(3) and 25 CFR § 522, § 522.10. Respondent was managing the casino in the instant case and also had other operations beyond managing the casino.

employer and patrons. Tribal members and non-tribal members alike, who are employed by, or knowingly or *unknowingly*<sup>8</sup>, conduct business with Indian owned businesses, particularly off the reservation, should not be denied a remedy at law. The decision below creates an unnecessarily and irresponsibly dangerous business atmosphere for the conduct of Indian owned businesses. Abuses will continue to be perpetrated with impunity, unless laws are applied uniformly to all employers. The court in *Namekagon Development Company, Inc. v. Bois Forte Reservation Housing Authority*, 395 F.Supp. 23, 28 (D. Minn. 1974) addressed the issue in these terms:

To dismiss this suit against the local housing authority on grounds of sovereign immunity would be grossly unfair. . . . It invited outsiders to do business with it . . . 'It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all of the rights and advantages of a trading corporation in the ability to sue and yet itself be immune from suit and be able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right . . . ' [citation omitted].

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<sup>8</sup> Petitioner was a 23 year old college student looking for part time work, while she put herself through college. She went to work as an hourly security guard for Little Six, Inc., which, from all appearances was just another corporate employer. Little Six, Inc. advertised itself in the newspaper as "one of the fastest growing businesses in Minnesota." (App. 74). Mystic Lake Casino was also represented as "a division of Little Six, Inc." No mention was made of sovereign tribal status. It is unreasonable to expect her, as an hourly employee, without union or other support, to understand the nuances of tribal sovereign immunity, realize the extent of her protection under the law (or lack thereof), and negotiate appropriate protection. Generally, the hundreds of thousands of individuals across the country in a position like Petitioner's, do not have the understanding or the bargaining power to protect themselves. Petitioner, did not know she was going to work for an employer who was not bound by any of the laws that we have all fought long and hard to realize.

See also, *Duluth Lumber v. Delta Development, Inc.*, 281 N.W.2d 377, 383 (Minn. 1979).

It is socially, economically and legally repugnant to unnecessarily allow such conditions to continue unabated in the United States, as if they were occurring in some remote part of the world beyond the reach of our long standing notions of democracy.

**C. The Opinion Below Is Inconsistent With This Court's Previous Opinions Interpreting The Requirements Needed To Establish A Waiver Of The Tribal Sovereign Immunity Defense.**

The lower court's decision contradicts controlling precedent regarding the validity of waivers of tribal sovereign immunity. Native American tribes have a common-law immunity from suit similar to that accorded sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). This immunity bars suits against Native American communities absent a clear waiver of immunity by the community or by congressional act. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara*, 436 U.S. at 58, 98 S.Ct. at 1677. *Blacks Law Dictionary*, 1370 (5th ed. 1979), defines "unequivocal" as "clear; plain; capable of being understood in only one way, or as clearly demonstrated. Free from uncertainty, or without doubt. . . ." The Eighth Circuit recently found a waiver in an arbitration clause. The Eighth Circuit reiterated that the:

Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity."(emphasis added).

*Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560 (8th Cir.1995), *reh'g denied* (April 21, 1995) *cert. denied*, 116 S.Ct.78 (1995). Following the teachings of *Santa Clara* some



courts have indicated that an appropriate analysis requires looking for an affirmative textual waiver of immunity. *Pan American Co. v. Sycuan Band*, 884 F.2d 416, 419 (9th Cir. 1989). Other lower courts have followed *Santa Clara*, in finding that there are many ways in which a tribe may waive the sovereign immunity defense. Minnesota Courts have previously recognized that "[o]ne of the ways a tribe can waive its sovereign immunity is by including a 'sue and be sued' clause in a relevant document." (emphasis added). *McCarthy & Assoc. v. Jackpot Junction*, 490 N.W.2d 156, 158 (Minn. App. 1992), citing *Fontanelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970). A "sue and be sued" clause is nothing more than an expression that the entity has consented to be sued. In the instant case, the written consent to be sued is "irrevocable" and is contained on the face of the voluntary application filed with the State of Minnesota by Respondent. (App. 64).

In the instant case, the Minnesota court acknowledged *Santa Clara* and *Rosebud Sioux*, and reiterated the rule that no magic words are required. It then proceeded to comment, "no words exist, magic or otherwise, that articulate the kind of clear abandonment of this powerful affirmative defense mandated by the Supreme Court". *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 297 (Minn. 1996) (App. 28). The Minnesota Supreme Court has impermissibly raised the standard set forth in *Santa Clara*, and made it impossible to find a waiver unless those "magic words", "the tribe hereby waives its sovereign immunity" are actually written. Indeed, the Minnesota Supreme Court said "[w]e have no 'sue and be sued' clause before us. . . ." *Gavle v. Little Six, Inc.*, 555 N.W. at 297. (App. 29).

The instant decision incorrectly limits valid waivers to the exact language contained in the "sue and be sued" clauses discussed in *Duluth Lumber v. Delta Dev., Inc.*, 281 N.W.2d 377 (Minn. 1979) (court held that tribe purposely waived immunity by enacting ordinance that provided for suits by and against business entity); and *McCarthy & Assoc. v. Jackpot Junction*, 490 N.W.2d 156 (Minn. App. 1992) (court held that tribe could be sued and that sovereign immunity was waived



by sue and be sued language in corporate charter). The lower court inexplicably discounts the explicit language found on the face of Respondent's *voluntary application* filed by its Board of Directors under Minn. Stat. § 303 (the "Application") which declares under penalties of perjury that "**The corporation irrevocably consents to service of process on it as provided by Minnesota Statute 303.13 or any amendment or successor thereto**". (App. 64). The applicable statutory definition of "process" includes "the summons in a civil action, and any process which may be issued in any action or proceeding in any court." Minn. Stat. § 303.02, Subd. 6. By obtaining authority to transact business in Minnesota, Respondent received a "Certificate", (App. 65) which became *prima facie* evidence of the matters contained on its face. Minn. Stat. § 303.23, Subd. 1. Respondent also agreed in writing to be bound by the laws of the State of Minnesota. Minn.Stat. § 303.09. This can only be one thing, a consent to be sued in Minnesota courts, particularly, where the lower court had already determined that it had subject matter jurisdiction over the dispute. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 292 (Minn. 1996) (App. 15-16). The clear language on the face of the Application is a consent to be sued, and thus, the requisite textual waiver of sovereign immunity by Respondent corporation. The Application language here is clear; plain; capable of being understood in only one way, and is free from uncertainty or doubt.

The written "*irrevocable consent to service of process*" found in the Application is the type of unequivocal expression required under *Santa Clara Pueblo*. The lower courts departed from *Santa Clara Pueblo* when they found that the Respondent's irrevocable consent to receive the summons in a civil action, and consent to participate in any process which may be issued in any action or proceeding in any court, was not an unequivocal consent to be sued. All the pertinent facts pertaining to the waiver and consent were clearly set forth in writing.

The primary focus and intent of the Minnesota Foreign Corporations Act and other similar state statutes is to make a foreign corporation suable and accountable in local courts for

disputes arising from their business activities in the state. The particular statutory language, form documents and filing requirements are all specifically designed to accomplish this result. Many courts, including this Court, recognized this fact long ago. The decision of the lower court also contradicts the line of cases that have grown out of *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed 167 (1939). "The whole purpose of requiring designation of an agent for service is to make a non-resident *suable in the local courts*." (emphasis added). *Doula v. United Technologies Corporation*, 759 F. Supp. 1377, 1382 (D. Minn. 1991). This matter is so well settled that the Eighth Circuit Court of Appeals stated the following:

Appointment of a registered agent for service of process is not one of the specific types of *consent* listed by the Supreme Court in the cited case<sup>9</sup>, but it is nevertheless a traditionally recognized and well-accepted species of general consent, possibly omitted from the Supreme Court's list *because it is of such long standing as to be taken for granted*. (emphasis added).

*Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1999 (8th Cir. 1990).

Moreover, the designation by a foreign corporation, in conformity with a valid State statute and as a condition of doing business within the state, of an agent upon whom service of process may be made, *is an effective consent to be sued in the courts of that state*. (emphasis added).

*Beales v. L. D. Shreiber & Co.*, 56 F.Supp. 814, 815 (D. Minn. 1944), citing *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed 167 (1939). Furthermore, a designation of an agent for service of process is "a voluntary act." *Neirbo*, 308 U.S. at 174. The cases of *Rykoff-Sexton, Inc. v. American Appraisal Associates, Inc.*, 469

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<sup>9</sup> i.e. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

N.W.2d 88, 90 (Minn. 1991); *Knowlton v. Allied Van Lines*, 900 F.2d 1196, 1200 (8th Cir. 1990); *Ytuarte v. Gruner + Jahr Printing and Publishing Co.*, 935 F.2d 971 (8th Cir. 1991) and *Doula v. United Technologies Corporation*, 759 F. Supp. 1377, 1382 (D. Minn. 1991) establish a well-settled principle that appointing an agent for service of process under Minn. Stat § 303.01 et seq. not only provides for jurisdiction in Minnesota Courts (as the lower courts recognized), but also constitutes a *consent to be sued* in Minnesota courts. The Minnesota Supreme Court stated in 1915 that:

It is reasonable that a foreign corporation, keeping and maintaining agents in the state for procuring business for its benefit and profit, should *answer* in this forum to a citizen of this state for a breach of contract or duty arising out of business so procured. . . . (emphasis added).

*W.J. Armstrong Co. v. New York Cent. & H.R.R. Co.*, 129 Minn. 104, 111, 151 N.W. 917, 919 (1915). This statement is as true today as it was 80 years ago.

The lower court clearly departed from the *Santa Clara Pueblo* and *Neirbo* line of cases, when it refused to recognize a plain and simple consent to be sued, and thus, a waiver of tribal sovereign immunity clearly present in the instant case.

#### **D. The Courts of Appeals and State Courts Are Irreconcilably Split On What Is Required To Establish A Waiver Of The Tribal Sovereign Immunity Defense.**

In the instant case, the lower courts have decided that a waiver of sovereign immunity hinges upon whether or not a standard "sue and be sued" clause exists. The Minnesota Supreme Court's explanation of their decision as follows, is equally erroneous:

Quite simply, consent to service of process, and thus to personal jurisdiction, cannot be construed as an automatic waiver of an otherwise available affirmative defense. Presumably foreign corporations that register to do business in Minnesota do not



understand that they are waiving their right to assert affirmative defenses, based, for example upon a statute of limitations, failure of consideration, accord and satisfaction and the like. Similarly, we conclude that LSI, by agreeing to service of process, cannot be said to have waived the affirmative defense of sovereign immunity.

In the instant case, Little Six, Inc. consented to be sued in Minnesota courts through a written filing that expressly stated that the corporation irrevocably consented to service of process. By operation of law and plain common sense, it waived all *jurisdictional defenses*, including the jurisdictional defense of tribal sovereign immunity.

It is clear that many forms of waivers have been readily recognized by other courts. For example, courts have held that a tribe's agreement to an arbitration clause constitutes a valid waiver of the immunity defense. See *Hydaburg Cooperative Association v. Hydaburg Fisheries*, 826 P.2d 751, 754 (Alaska 1992); and *Nenana Fuel Co., Inc. v. Native Village of Venetie*, 834 P.2d 1229, 1233 (Alaska, 1992). In the *Hydaburg* case the court stated: "[a]n arbitration clause in an agreement executed by an Indian tribe would be meaningless if it did not constitute a waiver of the tribe's immunity from suit to compel arbitration or to enforce an arbitration award." *Hydaburg*, 826 P.2d at 755.

Like the decision in *Hydaburg*, the consent to service process herein, would be a meaningless act if it did not constitute a waiver of the jurisdictional based sovereign immunity defense. A waiver may also be found in any evidence that shows intent that is inconsistent with the notion of tribal sovereign immunity. The court in *Nenana Fuel* stated:

In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983), we held that a tribe waives its sovereign immunity by agreeing to contract terms *inconsistent with sovereign immunity*. Eyak had entered into a contract with GC Contractors under which GC Contractors was to build a community center for Eyak. Pursuant to an arbitration



clause in the contract, the parties submitted to arbitration a dispute concerning Eyak's failure to pay money due under the contract. The arbitrator awarded GC Contractors the full sum sought and rejected Eyak's argument that it would not be bound by any arbitration decision on the grounds of sovereign immunity. Adhering to the general rule that all provisions in a contract should be found meaningful, we affirmed the superior court's confirmation of the arbitration award.

*Nenana Fuel*, 834 P.2d at 1232. Based upon *Santa Clara Pueblo*, *Rosebud Sioux*, *Nenana Fuel*, *Native Village of Eyak*, *Hydaburg*, *Duluth Lumber*, *McCarthy*, *Dacotah Properties* and many other similar cases, Respondent's Application must constitute a waiver of sovereign immunity, as the language is as clear and definite as that found in any "sue and be sued" clause or "arbitration" clause.

In *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985) the Eighth Circuit set out examples of when tribal sovereign immunity has been waived. The *American Indian Agricultural Credit Consortium*, court stated:

Tribes and persons dealing with them long have known how to waive sovereign immunity when they so wish. (See *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980) affirmed on other grounds, 455 U.S. 130, 102 Supreme Court 894, 1982) (Tribal Council Tax Ordinance expressly provides the tribe consents to suit in tribal or federal court); *Mekagon Development Company v. Bois Forte Reservation Housing Authority*, 517 F.2d 509 (Tribal Council Ordinance establishing housing authority provides: "The Council hereby gives its irrevocable consent to allowing authority to sue or be sued in its corporate name upon any contract, claim or obligation arising out of its activities . . . "); *Fontanelle v. Omaha Tribe of Nebraska*, 430 F.2d at 147 (Tribal Corporate Charter authorizes it to "sue or be sued in courts of competent

jurisdiction"); *Maryland Casualty Company v. Citizens National Bank*, 361 F.2d 517 (5th Cir. 1966) (Tribal Constitution authorizes the tribe to "sue or be sued" but bars attachment of tribal property). . . .

*American Indian Agricultural Credit Consortium*, 780 F.2d at 1379.

The unsettling problem created by the lower courts decision herein, is that if, as the lower court claims, that "irrevocably" consenting to service of process does not result in the waiver of the sovereign immunity defense because *affirmative defenses are retained* by the corporation or the tribe, then, virtually all of the other state and federal court of appeals cases cited above would need to be overturned for the same rationale. Under a "sue and be sued" clause waiver like that found in numerous cases like *McCarthy & Assoc. v. Jackpot Junction*, 490 N.W.2d 156 (Minn. App. 1992), and *Fontanelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970), the tribe would still have all of its affirmative defenses, including tribal sovereign immunity. Under an "arbitration clause" waiver like the one found in numerous cases like *Hydaburg Cooperative Association v. Hydaburg Fisheries*, 826 P.2d 751, 754 (Alaska 1992), and *Nenana Fuel Co., Inc. v. Native Village of Venetie*, 834 P.2d 1229, 1233 (Alaska, 1992), the tribe would still retain all of its affirmative defenses and could successfully assert sovereign immunity within the arbitration proceeding. The decision of the Minnesota Supreme Court below cannot be reconciled with scores of long-standing cases recognizing the various forms that a waiver of immunity may take, other than the "magic words", "the tribe hereby waives its sovereign immunity." *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560 (8th Cir.1995), *reh'g denied* (April 21, 1995) *cert. denied*, 116 S.Ct.78 (1995).

The Minnesota Supreme Court's reliance on *Ransom v. St. Regis Mohawk Education and Comm. Fund, Inc*, 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995) is misplaced, confusing and further accentuates the irreconcilable split among the lower courts. The Minnesota Supreme Court first determined that it in fact had personal and subject matter

jurisdiction in the instant case. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 292 (Minn. 1996). (App. 15-16). However, in discussing Respondent's Application and Certificate of Authority to Transact Business in Minnesota (App. 63-65), it cited *Ransom* for the following:

the mere fact that a tribal corporation, by statute, has designated an agent for service of process or is empowered to 'sue and be sued' does not automatically subject that corporate entity to any court's jurisdiction *where jurisdiction is otherwise lacking*. (emphasis added).

See *Gavle v. Little Six, Inc.*, 555 N.W.2d at 297. (App. 29). In *Ransom*, there was no written Application whereby the corporation "irrevocably consented to service of process" in New York courts. For purposes of refusing to find a waiver, the Minnesota Supreme Court went on to say "[w]e agree with this analysis" *Id.* The flawed logic is evident. The *Ransom* case turned upon the fact that the New York Court of Appeals could not find that it had jurisdiction based upon the New York statute. Here, the Minnesota court had already determined that it had jurisdiction over this matter before it even discussed waiver and the *Ransom* case. Once the Minnesota Supreme Court found that it had jurisdiction, *Ransom* became irrelevant to the waiver analysis.

## CONCLUSION

Laws and doctrines are not made and enforced in historical and political vacuums. The protection allowed the Indian tribes under the doctrine of sovereign immunity arose during a very different day and age. This case must be looked at under the light of the modern day. It may be that tribal sovereign immunity has its valid place for the right reasons, including matters which are wholly internal to a tribe. This is not one of those cases. The "anachronistic fiction" of tribal sovereign immunity, with its origins based in racial segregation, should not operate to negate Petitioner's basic constitutional rights. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people



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May 29, 1998

The Hon. Senator Ben Nighthorse Campbell  
United States Senate  
Committee On Indian Affairs  
Washington, D.C. 20510-6450

Re: S. 1691

Dear Senator Campbell:

I am writing in response to your letter dated May 8, 1998. Thank you for taking the time to thoroughly explore these very important issues and for keeping an open mind to positive change.

The following is my response to the two questions you raised in your letter:

## 1. **1993 Bus Tour Case - Clear Waiver of Immunity.**

The Minnesota Court of Appeals opinion in this case is found at Dacotah Properties-Richfield, Inc. v. Prairie Island Indian Community, 520 N.W.2d.167 (Minn. App. 1994). I have enclosed a copy of the opinion for your convenience as Exhibit A hereto. The waiver of immunity in this case was found in a "sue and be sued" clause in the tribe's 1934 Federal Corporate Charter. The tribe claimed that it did not operate under the charter, and that the waiver was null and void. The Dacotah Properties case is a good example of how even with clear waiver language, tribes choose to litigate the immunity issue.

You asked me whether I thought that S. 1691 would eliminate tribal discretion in waiving immunity and whether the same would have a negative impact upon contracts in general. With all due respect, I see no need to preserve sovereign immunity from suits based upon validly executed contracts. When parties enter into voluntary contractual relationships they expect the other side to perform as agreed. This is the essence of contract. Surely, the tribe expects the other party to perform under the contract. If the non-tribal party defaults, the tribe can initiate litigation, in state or federal court, if needed to protect its interests. Why should this be a one way street? If a tribe does not intend to be bound by a contract or perform thereunder, then it should not enter into that contract. The tribes have total discretion on whether or not they want to enter into the contract in the first place. In basic terms, your question appears to be will tribes decide not to enter into contracts if they will be required to follow through on their contractual promises? The answer is

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that tribes may do a better job of analyzing or negotiating contracts, but I don't believe they will shy away from business transactions, just because they are going to be treated like any other contracting party. In turn, if the vague concept of tribal immunity is removed from the business environment, non-tribal parties will have far less apprehension about doing business with tribes and will be more willing to participate with tribes in economic expansion.

Currently, court decisions are based upon a presumption favoring tribal interests. Tribal immunity exists unless the complaining party can establish the existence of a written waiver of immunity by the tribe. Apart from S. 1691 type legislation, there may be other legislative plans worth exploring. At a minimum, I suggest that Congress turn the presumption around. Immunity should exist only if the tribe preserves it in a written contract. Congress should fashion legislation that provides that if a tribe wishes to enter into a contract and still preserve immunity on that contract, then the tribe should have the burden of explicitly spelling out these key legal provisions in a written contract. Standard contract language might read as follows:

**PLEASE BE ADVISED THAT YOU ARE ENTERING INTO THIS CONTRACT WITH A TRIBE OR TRIBAL OWNED ENTITY WHICH CLAIMS SOVEREIGN IMMUNITY FROM LAWSUITS. IF THERE IS A DISPUTE REGARDING THIS CONTRACT, YOU DO NOT HAVE THE RIGHT TO INITIATE LITIGATION TO ENFORCE YOUR RIGHTS AGAINST THE TRIBE OR TRIBAL ENTITY IN FEDERAL, STATE OR TRIBAL COURT.**

Tribes should be required to make a full disclosure of their sovereignty claims, so as not to work an unfair surprise on the other contracting party. Tribes would still have control over the immunity issue, but they won't be able to take unfair advantage of unsuspecting parties.

On related contract issues, the United States Supreme Court ruled this week on Kiowa Tribe of Oklahoma v. Manufacturing Technologies (No. 96-1037). (Copies attached as Exhibit B). Even though the end result in this case is favorable for the tribe, the opinion is not a resounding endorsement of the doctrine of tribal sovereign immunity. The clear message of the opinion is that it is time for a change and that Congress should take the lead in this area. The Court seems to say that in the Kiowa case, the parties had equal bargaining powers and that the Plaintiff suing for collection on a promissory note should have known that it needed to get waiver of immunity language in the contract. This is a prime example of what is wrong with the current state of affairs. This area of law is so confusing and so unsettled that it is not fair to place the legal burden on the non-tribal party which may have little or no understanding of these complex issues. Isn't justice better served by having the tribal party (which should have a much better understanding of tribal immunity issues) fully disclose its intention to rely on sovereign immunity up front. If the non-tribal party enters into the contract after a full tribal immunity disclosure, then there is no unfair surprise and no reason for litigation.

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Providing written waivers in negotiated contracts only address part of the problem. Parties who come in contact with tribal entities do not always have negotiated contracts. Both the majority and dissenting opinions in Kiowa discussed a distinction between negotiated contract cases between parties with equal bargaining power and the problems encountered by "...those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." The Kiowa Court went on to state:

These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to play in this important judgment. (emphasis added).

Congress should consider protecting individual employees and patrons of tribal businesses with S. 1691 type rules which might differ from those which apply to larger businesses that have more bargaining power. If a tribe invites a person to stay at its hotel and gamble at its casino, it ought to have standard business duties and liabilities regarding wrongful injuries which may occur on site. Federally mandated insurance programs may be one answer, but we should not continue to tolerate wrongs without remedies. Furthermore, employees of tribal businesses should not be left without the protection of state and federal employment laws. These protections should automatically apply to all employees.

## **2. Gavle v. Little Six, Inc. (96-1215):**

You have asked me to explain the Minnesota Supreme Court's decision to ignore what appears to be a voluntary waiver by the tribe in that case. We were obviously as befuddled by the decision as you appear to be. The short answer to your question is that we have no logical explanation for what the Minnesota Supreme Court did and that is why we filed our Petition for Certiorari in January, 1997. It should be noted that even after deciding the Kiowa case this week, the United States Supreme Court did not rule on the Gavle petition which has been pending for almost 16 months. Given the fact that the Supreme Court generally rules on Certiorari Petitions in a matter of a few months, our assumption here is that the Court is struggling with the same issue you did. Gavle and its companion case Cohen are different from Kiowa in a number of ways. One clear distinction is that the plaintiffs in Gavle and Cohen fall into the class of individuals discussed in Kiowa who were unaware that they were dealing with a tribe, who did not know of tribal immunity, or who had no choice in the matter. The other clear distinction from Kiowa to Gavle, as you seemingly agree, is that the Shakopee Mdewakanton Sioux Community's corporation, Little Six, Inc. provided a clear waiver of the tribal immunity defense. I have attached as Exhibit C copies of the original documents signed by the tribal corporation and filed with the Minnesota secretary of State for purposes of acquiring authority to transact business in the State of Minnesota. The language in these documents should have been more than sufficient, as the rule of

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application in this area is that no magic words are required to constitute a waiver of immunity. The documents in Gavle together with the clear language of the Minnesota statute undoubtedly create a consent to be sued in Minnesota Courts. The whole intent of the statute in the first place is to make foreign business corporations subject to Minnesota law and the jurisdiction of Minnesota courts when they transact business in the State.

My assumptions as to what lead to the majority decision of the Minnesota Supreme Court in Gavle are only speculation. However, it seems to me that the Minnesota Supreme Court found it easier to "pass the buck" to the United States Supreme Court or to Congress. Many Courts view these issues as more political than judicial. In this regard the Minnesota Supreme Court said

While the time may well come, or even be upon us now, that a tribal owned corporation, operated for profit as is LSI, (i.e., Little Six, Inc.) should as a matter of fairness and equity be subject to the same liabilities as a non-tribally owned corporation, it is not for this court to make that decision in absence of some change in Congressional policy or direction from the U.S. Supreme Court....

Clearly, what is just and fair is taking a back seat to what may be politically palatable. Everyone seems to be in agreement here that changes are required, but no one (except Sen. Gorton) seems to be really willing to implement these changes. While we are still hopeful that the United States Supreme Court will agree to hear the Gavle case, with your unique perspective on these issues, I sincerely hope that you will carry positive change forward.

You have asked me to comment on contract and waiver issues, however, I must take this opportunity to reiterate the need for drastic changes regarding reservation civil rights. It is no wonder that many reservation communities have not flourished, socially or economically, under a governmental system where the constitutional rights of the individual members are not protected. I have continued to receive calls since I testified in April. Many of these calls are from tribal members who are being denied civil rights by their own tribes. As Americans, how can we tolerate and support any form of government which does not guarantee and enforce standard constitutional rights for all people, particularly where tribal members are all United States citizens and the reservations exist within our boundaries. Only those tribal leaders who are abusing their power will fear accountability in tribal government. I hope that you are in agreement.

On a personal note, I was very impressed with the way you handled the April 7, 1998 hearing in Seattle, given the heated factions in attendance. I was also encouraged by your words regarding the need for communities to work together. I am looking forward to positive change. I would be more than happy to respond to any more inquiries that you or the Committee may have

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Thank you once again for giving me this opportunity to comment on these important issues. Respectfully submitted.

Very truly yours,

Huffman, Usem, Saboe, Crawford & Greenberg, P.A.



Craig D. Greenberg

encl

cc: Sen. Slade Gorton



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520 N.W.2d 167, *Dacotah Properties-Richfield, Inc. v. Prairie Island Indian Community*,  
(Minn.App. 1994)

\*167 520 N.W.2d 167

**DACOTAH PROPERTIES--RICHFIELD, INC., Plaintiff,**  
v.  
**PRAIRIE ISLAND INDIAN COMMUNITY d/b/a Treasure Island Casino  
and Bingo, Defendant and Third-Party Plaintiff, Appellant,**  
v.  
**Brent JOHNSON, et al., Third-Party  
Defendants/Counterclaimants, Respondents.**  
**Brent JOHNSON, Third-Party  
Defendant/Counterclaimant/Third-Party Plaintiff,**  
v.  
**PRAIRIE ISLAND INDIAN COMMUNITY d/b/a Treasure Island Casino  
and Bingo, et al., Third-Party Defendants.**

No. C4-94-626.

Court of Appeals of Minnesota.

Aug. 2, 1994.

Review Granted Sept. 28, 1994.

In dispute with commercial property lessor, the Native American community brought third-party claim against former employee alleging that disputed oral lease was employee's responsibility and employee counterclaimed for breach of employment contract and various statutory violations. Community's motion to dismiss based on sovereign immunity was denied by the District Court, Hennepin County, Beryl A. Nord, J. Appeal was taken. The Court of Appeals, Lansing, J., held that: (1) community waived sovereign immunity by including "sue and be sued" clause in corporate charter; (2) limited contractual waiver of sovereign immunity in employment agreement did not restrict general waiver; (3) community did not waive sovereign immunity to suit by bringing third-party claim against former employee; and (4) community was subject to state statutory law by reason of off-reservation employment activities and waiver of sovereign immunity as to economic affairs.

Affirmed as modified.

1. INDIANS k27(1)  
209 ----  
209k27 Actions  
209k27(1) Rights of action.

Minn.App. 1994.

Native American communities have common-law immunity from suits similar to that

accorded sovereign powers, absent clear waiver of immunity by community or by Congressional act.

2. INDIANS k27(1)  
209 ----  
209k27 Actions  
209k27(1) Rights of action.

Minn.App. 1994.

Court lacks power to hear or decide litigation if Native American community's sovereign immunity stays in tact.

3. UNITED STATES k131  
393 ----  
393IX Actions  
393k131 Jurisdiction.

Minn.App. 1994.

Sovereign immunity is jurisdictional in nature, but operates essentially as defense.

4. INDIANS k27(1)  
209 ----  
209k27 Actions  
209k27(1) Rights of action.

Minn.App. 1994.

"Sue and be sued" clause in tribal corporate charter is an express waiver of sovereign immunity. Indian Reorganization Act, Sec. 17, 25 U.S.C.A. Sec. 477.

5. INDIANS k27(1)  
209 ----  
209k27 Actions  
209k27(1) Rights of action.

Minn.App. 1994.

"Sue and be sued" clause in corporate charter does not waive immunity for actions taken by Native American community in governmental capacity. Indian Reorganization Act, Secs. 16, 17, 25 U.S.C.A. Secs. 476, 477.

6. INDIANS k27(1)  
209 ----  
209k27 Actions  
209k27(1) Rights of action.

Minn.App. 1994.

Native American community may be deemed to have waived immunity by virtue of "sue and be sued" clause in its corporate charter if community mixes its use of governmental and corporate powers. Indian Reorganization Act, Secs. 16, 17, 25 U.S.C.A. Secs. 476, 477.

7. INDIANS k27(1)

209 ----

209k27 Actions

209k27(1) Rights of action.

Minn.App. 1994.

Making of employment agreement was economic endeavor of Native American community and, thus, "sue and be sued" clause of community's corporate charter waived sovereign immunity with respect to law suit stemming from making and performance of employment agreement. Indian Reorganization Act, Secs. 16, 17, 25 U.S.C.A. Secs. 476, 477.

8. INDIANS k27(1)

209 ----

209k27 Actions

209k27(1) Rights of action.

Minn.App. 1994.

Pledge or assignment of income or chattel by Native American community was not required as precondition of waiver of sovereign immunity in law suit arising from employment agreement dispute; limitations and power to levy judgment, lien, or attachment affects only enforcement of judgment, not whether there is immunity. Indian Reorganization Act, Secs. 16, 17, 25 U.S.C.A. Secs. 476, 477.

9. STATES k191.7

360 ----

360VI Actions

360k191 Liability and Consent of State to Be Sued in General

360k191.7 Construction of grant of consent.

Minn.App. 1994.

Contractual waivers of sovereign immunity must be strictly construed in favor of sovereign.

10. INDIANS k27(1)

209 ----

209k27 Actions

209k27(1) Rights of action.

Minn.App. 1994.

Native American community can effect limited waiver of immunity.

11. INDIANS k27(1)

209 ----

209k27 Actions

209k27(1) Rights of action.

Minn.App. 1994.

Native American community did not waive immunity as to other claims by agreeing to limited waiver in employment agreement with respect to compensation and severance disputes.

12. INDIANS k27(1)  
 209 ----  
 209k27 Actions  
 209k27(1) Rights of action.

Minn.App. 1994.

Limited contractual waiver of sovereign immunity by Native American community in employment agreement did not negate or constrict general waiver of sovereign immunity from "sue and be sued" clause of community's charter. Indian Reorganization Act, Secs. 16, 17, 25 U.S.C.A. Secs. 476, 477.

13. INDIANS k27(1)  
 209 ----  
 209k27 Actions  
 209k27(1) Rights of action.

Minn.App. 1994.

Native American community did not waive its sovereign immunity by filing third-party complaint against former employee in law suit disputing obligations under employment agreement.

14. INDIANS k27(1)  
 209 ----  
 209k27 Actions  
 209k27(1) Rights of action.

Minn.App. 1994.

Native American community does not waive its immunity to sue by bringing action, even when counterclaims brought against it are compulsory.

15. INDIANS k27(1)  
 209 ----  
 209k27 Actions  
 209k27(1) Rights of action.

Minn.App. 1994.

Native American community was subject to suit by former employee alleging violations of state Human Rights Act, restraint of trade, and deceptive trade practices statutes given that employment duties involved developing and managing tour and travel operations outside reservation lands and community waived sovereign immunity by "sue and be sued" charter provision. Indian Reorganization Act, Secs. 16, 17, 25 U.S.C.A. Secs. 476, 477.

#### \*168 Syllabus by the Court

I. A Native American community waives its sovereign immunity when it takes actions under a corporate charter containing a "sue and be sued" clause.

II. State statutory law can be applied to those activities of a Native American community that extend beyond reservation boundaries and for which the community has waived its



sovereign immunity.

Brian B. O'Neill, Richard A. Duncan, Thomas S. Schroeder, Todd D. Steenson, Faegre & Benson, Minneapolis, and Peter T. Poncelet, Welch, for appellant.

Ronald H. Usem, Craig D. Greenberg, Huffman, Usem, Saboe, Crawford & Greenberg, P.A., Minneapolis, for respondents.

Considered and decided by DAVIES, P.J., and LANSING and FORSBERG, JJ.

### OPINION

LANSING, Judge.

This appeal presents questions of sovereign immunity and subject matter jurisdiction in litigation involving business transactions of a Native American community. The district court converted the community's motion to dismiss to one for summary judgment, identified genuine issues of material fact, and denied the motion. We affirm the denial of the motion but modify the judgment by holding that the disputed issues are resolved by application of law.

### FACTS

The Prairie Island Indian Community (Community) is organized under both a federally recognized constitution and bylaws, and a federally recognized corporate charter. The constitution provides that the community council, the governing body of the Community, has the power "[t]o manage all economic affairs and enterprises of the Community in accordance with the terms of a charter \* \* \*." The charter provides that the Community \*169 has the power "[t]o sue and to be sued in courts of competent jurisdiction within the United States \* \* \*

The Community contracted with Brent Johnson for his employment and for the purchase of assets of Johnson's business, Mainstreet Ventures Holdings, Inc. d/b/a Winning Ways Tours, a company that arranged bus tours to casinos, including Treasure Island Casino & Bingo, which the Community owns. The agreement contained a limited waiver of sovereign immunity "for the enforcement of the compensation and severance provisions" of the agreement. Two months after entering this agreement, the Community discharged Johnson.

After the discharge a commercial property lessor sued the Community for breach of an oral lease for office space. The Community brought a third-party claim against Johnson, alleging that the lease was Johnson's responsibility. Johnson counterclaimed for breach of his employment contract, common law and statutory misrepresentation, unlawful restraint of trade, deceptive trade practices, and violation of the Minnesota Human Rights Act. The Community then filed a motion to dismiss based on sovereign immunity and a lack of subject matter jurisdiction. Except for that part relating to the employment contract claim, the Community appeals the district court's denial of the motion.

## ISSUES

- I. Did the Prairie Island Indian Community waive its sovereign immunity?
- II. Provided the Prairie Island Indian Community waived its sovereign immunity, can Minnesota apply its state statutory law to the Community's activities that extend beyond reservation boundaries?

## ANALYSIS

[1] Native American communities have a common-law immunity from suit similar to that accorded sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). This immunity bars suits against Native American communities absent a clear waiver of immunity by the community or by a congressional act. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara*, 436 U.S. at 58, 98 S.Ct. at 1677. This requirement advances the " 'overriding goal' of encouraging tribal self-sufficiency and economic development." See *Oklahoma*, 498 U.S. at 910, 111 S.Ct. at 910; see also *American Indian Agric. Credit v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir.1985) ("Indian tribes long have structured their many commercial dealings upon the justified expectation that absent an express waiver their sovereign immunity stood fast.").

[2][3] If a Native American community's sovereign immunity stays intact, a court lacks power to hear or decide the litigation. See *Puyallup Tribe, Inc. v. Washington Dep't of Game*, 433 U.S. 165, 172, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."). Although sovereign immunity is jurisdictional in nature, it operates essentially as a defense. *Krieg v. Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir.1994).

In concluding that there were genuine issues of material fact precluding summary judgment, the district court drew a distinction between the Community's governmental and corporate capacities. The Indian Reorganization Act of 1934 allows Native American communities to organize in two different ways: (1) by adopting a tribal constitution under section 16 of the Act, see 25 U.S.C. Sec. 476; and (2) by incorporating pursuant to a corporate charter under section 17 of the Act, see 25 U.S.C. Sec. 477. A section 16 constitutional entity and section 17 corporate entity are generally considered distinct organizations. *Ramey Constr. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir.1982). The Department of the Interior has recognized that a section 16 entity "may have as broad or broader economic powers" than its business counterpart, acting under section 17. See *Timber as a Capital Asset of the Blackfeet Tribe*, Op. No. M-36545 (Dep't Interior Dec. \*170 16, 1958) (emphasis added), quoted in *S. Unique v. Gila River Pima-Maricopa*, 138 Ariz. 378, 674 P.2d 1376, 1382 (App.1983).

[4][5][6] A "sue and be sued" clause in a tribal corporate charter is an express waiver of sovereign immunity. *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir.1989); see also *Duluth Lumber & Plywood v. Delta Dev.*, 281 N.W.2d 377, 384

(Minn.1979) (presence of "sue and be sued" clause in ordinance creating housing authority constituted waiver); *McCarthy & Assoc. v. Jackpot Junction Bingo Hall*, 490 N.W.2d 156, 157-58 (Minn.App.), pet. for rev. denied (Minn. Nov. 17, 1992); *Fontenelle v. Omaha Tribe*, 430 F.2d 143, 147 (8th Cir.1970). But because of the distinction between an entity organized under a corporate charter and one organized under a constitution, a "sue and be sued" clause in a corporate charter does not waive immunity for actions taken by a Native American community in its governmental capacity. *Atkinson v. Haldane*, 569 P.2d 151, 174-75 (Alaska 1977). Nonetheless, if a Native American community mixes its use of governmental and corporate powers, it may be deemed to have waived immunity by virtue of a "sue and be sued" clause in its corporate charter. See *Martinez v. Southern Ute Tribe*, 150 Colo. 504, 374 P.2d 691, 694 (1962) (finding blanket waiver when a Native American community refers to both its governmental and corporate powers in the language introducing the "sue and be sued" clause in the corporate charter).

[7] Although the Prairie Island Community is organized under both a constitution and a charter, the Community's acts at issue here could not reasonably be viewed as governmental acts taken under the constitution alone. The constitution gives the Community council, the governing body of the Community, the power "[t]o manage all economic affairs and enterprises of the Community in accordance with the terms of the charter \* \* \*." (Emphasis added). The corporate charter gives the Community power "[t]o sue and to be sued in courts of competent jurisdiction within the United States \* \* \*." The charter also gives the Community power "to make and perform contracts and agreements of every description \* \* \*." The issues in this lawsuit stem from the making and performance of an employment agreement that is indisputably an economic endeavor of the Community.

The interaction with Johnson is no less an economic endeavor because the Community's resolution authorizing the employment agreement refers to the constitution. This argument by the Community ignores the constitutional provision that specifically states that economic affairs are handled in accordance with the charter.

[8] We also reject the Community's argument that a pledge or assignment of income or chattels must be established as a precondition of a waiver. The "sue and be sued" clause limits the power to levy a judgment, lien, or attachment upon the property of the Community to income or chattels specially pledged or assigned; however, this limitation affects only the enforcement of a judgment, not whether there is immunity in the first instance. See *McCarthy*, 490 N.W.2d at 159.

In concluding that there is no genuine issue of fact on the capacity in which the Community acted, we do not attach much significance to the use of the corporate name rather than the slightly divergent constitutional name in the employment agreement. But there is some probative value in Johnson's argument that the Community distributes corporate dividends under a distribution plan contained in its charter. The Community counters that the Indian Gaming Regulatory Act allows payments to members of a Native American community out of net revenues from the casino. See 25 U.S.C. Sec. 2710(b)(3) (1988). Payments can be made under the Act, however, only if the Native American community has prepared a plan to



allocate revenues to authorized uses. See id. Sec. 2710(b)(3)(A). The plan for the distribution of corporate dividends set forth in the charter appears to satisfy the Act. The Community does not contend a plan exists outside the charter that governs payments, and the payments appear to be evidence of corporate activity.

The second area in which the district court identified a fact issue is whether a separate limited waiver in Johnson's employment \*171 agreement applies to Johnson's claims. The Community argues that the limited waiver in the employment agreement should be construed strictly and does not affect any claim other than Count I, the employment contract claim.

[9][10] Contractual waivers of sovereign immunity must be construed strictly in favor of the sovereign. *United States v. Nordic Village, Inc.*, --- U.S. ---, ---, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992). A Native American community can effect a limited waiver of immunity. See *Tibbetts v. Leech Lake Reserv. Bus.*, 397 N.W.2d 883, 885-86 (Minn.1986).

[11] The employment agreement contained the following waiver:

12. SOVEREIGN IMMUNITY. Nothing in this Agreement shall be construed or interpreted to effect a waiver of sovereign immunity other than a limited waiver of the Employer's sovereign immunity for the enforcement of the compensation and severance provisions of this Agreement. The Employer hereby expressly waives its immunity from suit for this stated purpose.

This waiver unambiguously limits its scope to the compensation and severance portions of the agreement, and we decline to consider extrinsic evidence to broaden the scope of the waiver. See *Metropolitan Sports Facility Comm'n v. General Mills*, 470 N.W.2d 118, 123 (Minn.1991) (when terms of contract are unambiguous, court must look solely to the language of the contract itself). We agree that the Community did not waive its immunity to Counts II through VI of the counterclaim by agreeing to the waiver in the employment agreement.

[12] But we do not accept the Community's argument that the limited contractual waiver in the employment agreement constricts the general waiver found in the "sue and be sued" clause. The adoption of a limited waiver following the adoption of a general waiver does not negate that part of the general waiver that extends beyond the terms of the limited waiver. Both waivers are clearly expressed and both operate. See *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. at 1677 (waiver must be clearly expressed); see also *Rosebud*, 874 F.2d at 552 (recognizing multiple waivers as found in corporate charter and through recoupment doctrine).

[13][14] The last area in which the district court identified a fact issue is whether the Community waived its immunity by filing a third-party complaint against Johnson. The United States Supreme Court has held that a Native American community does not waive its immunity to suit by bringing an action, even when counterclaims brought against it are compulsory. *Oklahoma*, 498 U.S. at 509, 111 S.Ct. at 909; see also *United States v. United States Fidelity & Guar.*, 309 U.S. 506, 513, 60 S.Ct. 653, 656-57, 84 L.Ed. 894 (1940). The limited exception for claims brought under the recoupment doctrine does not apply. See



Rosebud, 874 F.2d at 552 (acknowledging waiver of sovereign immunity to claims that fall within recoupment doctrine). Johnson concedes that the recoupment issue was not argued below. Consequently, that theory cannot be used to show a voluntary waiver of immunity. See Thiele v. Stich, 425 N.W.2d 580, 582 (Minn.1988) (limiting review to issues raised in the district court).

There are no disputed issues of material fact that would affect the determination of whether the Community waived its sovereign immunity. The "sue and be sued" clause in the Community's charter applies to the economic dealings with Johnson, and the district court correctly denied the Community's motion to dismiss based on sovereign immunity and lack of subject matter jurisdiction.

## II

[15] The Community further argues that, as a federally recognized Indian tribe, the Community is not subject to state civil regulatory laws and all counts that rely on statutory regulations should be dismissed.

Native Americans "going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973) (discussing regulation of activities of Native American community); see also \*172 Duluth Lumber, 281 N.W.2d at 382; R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 984-85 (9th Cir.1983), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985); R.C. Hedreen Co. v. Crow Tribal Hous. Auth., 521 F.Supp. 599, 606-07 n. 4 (D.Mont.1981); cf. Padilla v. Pueblo of Acoma, 107 N.M. 174, 179-80, 754 P.2d 845, 850-51 (1988) (analyzing exercise of jurisdiction over a Native American community for off-reservation activities as a matter of comity), cert. denied, 490 U.S. 1029, 109 S.Ct. 1767, 104 L.Ed.2d 202 (1989). See generally Felix S. Cohen, Handbook of Federal Indian Law 348-49 (1982 ed.).

A state has less power to apply its laws to activities within reservation boundaries. See Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959). Yet, even within reservation boundaries, "state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." Mescalero, 411 U.S. at 148, 93 S.Ct. at 1270; see also 18 U.S.C. Sec. 1162 (1988); 28 U.S.C. Sec. 1360 (1988) (current version of Public Law 280, giving some states, including Minnesota, limited criminal and civil jurisdiction over actions arising within the areas of Indian country).

Although a state can regulate the activities of a Native American community that extend beyond reservation boundaries, this application of state law is still dependent on a Native American community's waiver of its immunity or Congressional consent. See Puyallup, 433 U.S. at 171-73, 97 S.Ct. at 2621; see also Santa Clara Pueblo, 436 U.S. at 58-60, 98 S.Ct. at 1677 (absent clear waiver of sovereign immunity, a Native American community is immune

from suit).

Johnson's counterclaim alleges common law and statutory claims that the Community fraudulently misrepresented facts to induce Johnson to sell Winning Ways and enter into the employment agreement. Additional counts allege discrimination under the Minnesota Human Rights Act, restraint of trade, and deceptive trade practices. The discrimination and restraint of trade counts appear to be based on the Community's alleged actions in discouraging Johnson from bringing minority individuals to the casinos. Johnson also claims discrimination based on his own race.

All of the counts in Johnson's counterclaim allege actions that extend beyond reservation boundaries. At least some contract negotiations took place off the reservation, including as far away as Las Vegas, Nevada. The employment agreement itself states that Johnson's "duties shall be rendered at 1401 West 76th Street, Suite 200, Minneapolis, Minnesota 55423 \* \* \*." The Community does not dispute that this location is off the reservation. Johnson's duties involved developing and managing tour and travel operations of the casino, activities that would occur outside reservation lands.

Because the Community's activities at issue here extend beyond the reservation and because the Community waived its sovereign immunity, state laws apply. The Community's reliance on *Bryan v. Itasca County, Minn.* 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) and *Tibbetts v. Leech Lake Reserv. Bus.*, 397 N.W.2d 883 (Minn.1986) is misplaced. *Bryan* deals with the application of state law under Public Law 280, which is a special grant of jurisdiction to state courts. Public Law 280 applies, however, only to activities within Indian country and does not apply to Native American communities themselves. See 18 U.S.C. Sec. 1162; 28 U.S.C. Sec. 1360; *Bryan*, 426 U.S. at 388, 96 S.Ct. at 2111. *Tibbetts* is also inapposite because in *Tibbetts* the community had not waived its sovereign immunity to the workers' compensation claim at issue. *Tibbetts*, 397 N.W.2d at 886-89. The facts of this case are distinguishable because there was a valid waiver.

#### DECISION

We affirm the district court's denial of summary judgment as modified. We hold that the Community waived its sovereign immunity through the "sue and be sued" clause in its corporate charter, that as a matter of law the contractual waiver does not restrict the general waiver, and that the Community did not waive its immunity to suit by bringing a third party claim against Johnson. We also hold that, by reason of the \*173. Community's off-reservation activities and its waiver of sovereign immunity as to economic affairs, the Community is subject to state statutory laws.

Affirmed as modified.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KIOWA TRIBE OF OKLAHOMA v. MANUFACTURING TECHNOLOGIES, INC.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF OKLAHOMA, FIRST DIVISION  
No. 96-1037. Argued January 12, 1998 - Decided May 26, 1998

Petitioner, a federally recognized Indian Tribe, owns land in Oklahoma, and the United States holds land in trust for it there. After the Tribe's industrial development commission agreed to buy

from respondent certain stock issued by a third party, the then-chairman of its business committee signed a promissory note, in the Tribe's name, agreeing to pay respondent \$285,000 plus interest. The note recites it was signed at Carnegie, Oklahoma, where the Tribe has a complex on trust land. According to respondent, however, the note was executed and delivered in Oklahoma City, beyond tribal lands, and obligated the Tribe to make its payments in that city. The note does not specify a governing law, but provides that nothing in it subjects or limits the Tribe's sovereign rights. The Tribe defaulted on the note; respondent sued in state court; and the Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit. The trial court denied the motion and entered judgment for respondent. The Oklahoma Court of Civil Appeals affirmed, holding that Indian tribes are subject to suit in state court for breaches of contract involving off-reservation commercial conduct.

**Held.** Indian tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. See, e.g., *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 476 U.S. 877, 890. Respondent's request to confine such immunity to transactions on reservations and to tribal governmental activities is rejected. This Court's precedents have not drawn those distinctions, see, e.g., *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 168, 172, and its cases allowing States to apply their substantive laws to tribal activities occurring outside Indian country or involving nonmembers have recognized that tribes continue to enjoy immunity from suit, see, e.g., *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 510. The Oklahoma Court of Appeals' belief that federal law does not mandate such immunity is mistaken. It is a matter of federal law and is not subject to diminution by the States. E.g., *Three Affiliated Tribes*, *supra*, at 891. Nevertheless, the tribal immunity doctrine developed almost by accident: The Court's precedents reciting it, see, e.g., *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, rest on early cases that assumed immunity without extensive reasoning, see, e.g., *Turner v. United States*, 248 U.S. 354, 358. The wisdom of perpetuating the doctrine may be doubted, but the Court chooses to adhere to its earlier decisions in deference to Congress, see *Potawatomi*, *supra*, at 510, which may wish to exercise its authority to limit tribal immunity through explicit legislation, see, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58. Congress has not done so thus far, nor has petitioner waived immunity, so it governs here. Pp. 2-8.

**Reversed.** KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST,

C. J., and O'CONNOR, SCALIA, SOUTER, and BREYER, JJ., joined.



S TEVENS , J., filed a dissenting opinion, in which T HOMAS and G INSBURG ,

JJ., joined.

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~~Opinion of the Court~~

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

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No. 96-1037

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KIOWA TRIBE OF OKLAHOMA, PETITIONER v. MANUFACTURING TECHNOLOGIES, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF OKLAHOMA,  
FIRST DIVISION

[May 26, 1998]

JUSTICE KENNEDY delivered the opinion of the Court.

In this commercial suit against an Indian tribe, the Oklahoma Court of Appeals rejected the tribe's claim of sovereign immunity. Our case law to date often recites the rule of tribal immunity from suit. While these precedents rest on early cases that assumed immunity without extensive reasoning, we adhere to these decisions and reverse the judgment.

I

Petitioner Kiowa Tribe is an Indian tribe recognized by the Federal Government. The Tribe owns land in Oklahoma, and, in addition, the United States holds land in that State in trust for the Tribe. Though the record is vague about some key details, the facts appear to be as follows: In 1990, a tribal entity called the Kiowa Industrial Development Commission agreed to buy from respondent Manufacturing Technologies certain stock issued by Clinton-Sherman Aviation, Inc. On April 3, 1990, the then-Chairman of the Tribe's Business Committee signed a promissory note in the name of the Tribe. By its note, the Tribe agreed to pay Manufacturing Technologies \$285,000 plus interest. The face of the note recites it was signed at Carnegie, Oklahoma, where the Tribe has a complex on land held in trust for the Tribe. According to respondent, however, the Tribe executed and delivered the note to Manufacturing Technologies in Oklahoma City, beyond the Tribe's lands, and the note obligated the Tribe to make its payments in Oklahoma City. The note does not specify a governing law. In a paragraph entitled "Waivers and Governing Law," it does provide: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." App. 14.

The Tribe defaulted; respondent sued on the note in state court; and the Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit. The trial court denied the motion and entered judgment for respondent. The Oklahoma Court of Appeals affirmed, holding Indian tribes are subject to suit in state court for breaches of contract involving off-reservation commercial conduct. The Oklahoma Supreme Court declined to review the

judgment, and we granted certiorari. 521 U. S. \_\_\_\_ (1997).

## II

As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. See *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (USF&G). To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. In one case, a state court had asserted jurisdiction over tribal fishing "both on and off its reservation." *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 167 (1977). We held the Tribe's claim of immunity was "well founded," though we did not discuss the relevance of where the fishing had taken place. *Id.*, at 168, 172. Nor have we yet drawn a distinction between governmental and commercial activities of a tribe. See, e.g., *ibid.* (recognizing tribal immunity for fishing, which may well be a commercial activity); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991) (recognizing tribal immunity from suit over taxation of cigarette sales); *USF&G, supra*, (recognizing tribal immunity for coal-mining lease). Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.

Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U. S., at 510. There is a difference between the right to demand compliance with state laws and the means available to enforce them. See *id.*, at 514.

The Oklahoma Court of Appeals nonetheless believed federal law did not mandate tribal



immunity, resting its holding on the decision in *Hoover v. Oklahoma*, 909 P. 2d 59 (Okla. 1995), cert. denied, 517 U.S. 1188 (1996). In *Hoover*, the Oklahoma Supreme Court held that tribal immunity for off-reservation commercial activity, like the decision not to exercise jurisdiction over a sister State, is solely a matter of comity. 909 P. 2d, at 62 (citing *Nevada v. Hall*, 440 U.S. 410, 426 (1979)). According to *Hoover*, because the State holds itself open to breach of contract suits, it may allow its citizens to sue other sovereigns acting within the State. We have often noted, however, that the immunity possessed by Indian tribes is not coextensive with that of the States. See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). In *Blatchford*, we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the "mutuality of . . . concession" that "makes the States' surrender of immunity from suit by sister States plausible." *Id.*, at 782; accord *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. \_\_\_, \_\_\_ (1997) (slip op., at 5-6). So tribal immunity is a matter of federal law and is not subject to diminution by the States. *Three Affiliated Tribes*, *supra*, at 891; *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154 (1980).

Though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident. The doctrine is said by some of our own opinions to rest on the Court's opinion in *Turner v. United States*, 248 U.S. 354 (1919). See, e.g., *Potawatomi*, *supra*, at 510. Though *Turner* is indeed cited as authority for the immunity, examination shows it simply does not stand for that proposition. The case arose on lands within the Creek Nation's "public domain" and subject to "the powers of [the] sovereign people." *Turner*, *supra*, at 355. The Creek Nation gave each individual Creek grazing rights to a portion of the Creek Nation's public lands, and 100 Creeks in turn leased their grazing rights to *Turner*, a non-Indian. He built a long fence around the land, but a mob of Creek Indians tore the fence down. Congress then passed a law allowing *Turner* to sue the Creek Nation in the Court of Claims. The Court of Claims dismissed *Turner's* suit, and the Court, in an opinion by Justice Brandeis, affirmed. The Court stated: "The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Turner*, 248 U.S., at 358. "No such liability existed by the general law." *Id.*, at 357.

The quoted language is the heart of *Turner*. It is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine. One cannot even say the Court or Congress assumed the congressional enactment was needed to overcome tribal immunity. There was a very different reason why Congress had to pass the Act: "The tribal government had been dissolved. Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent." *Id.*, at 358. The fact of tribal dissolution, not its sovereign status, was the predicate for the legislation authorizing suit. *Turner*, then, is but a slender reed for supporting the principle of tribal sovereign immunity. *Turner's* passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit. We so held in *USF&G*, saying:

"These Indian Nations are exempt from suit without Congressional authorization." 309 U. S., at 512 (citing *Turner*, supra, at 358). As sovereigns or quasi-sovereigns, the Indian Nations enjoyed immunity "from judicial attack" absent consent to be sued. 309 U. S., at 513-514. Later cases, albeit with little analysis, reiterated the doctrine. E.g., *Puyallup*, 433 U. S., at 167, 172-173; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), *Three Affiliated Tribes*, 476 U. S., at 890-891, *Blatchford*, supra, at 782, *Coeur d'Alene*, supra, at \_\_\_\_ (slip op., at 6).

The doctrine of tribal immunity came under attack a few years ago in *Potawatomi*, supra. The petitioner there asked us to abandon or at least narrow the doctrine because tribal businesses had become far removed from tribal self-governance and internal affairs. We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency. *Potawatomi*, 498 U. S., at 510. The rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities. JUSTICE STEVENS, in a separate opinion, criticized tribal immunity as "founded upon an anachronistic fiction" and suggested it might not extend to offreservation commercial activity. *Id.*, at 514-515 (concurring opinion).

There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. See *Mescalero v. Jones*, 411 U.S. 145 (1973); *Potawatomi*, supra; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.

Congress has acted against the background of our decisions. It has restricted tribal immunity from suit in limited circumstances. See, e.g., 25 U.S.C. § 450f(c)(3) (mandatory liability insurance); § 2710(d)(7)(A)(ii) (gaming activities). And in other statutes it has declared an intention not to alter it. See, e.g., § 450n (nothing in financial-assistance program is to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity

from suit enjoyed by an Indian tribe"); see also *Potawatomi*, 498 U. S., at 510 (discussing Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 et seq. ).

In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries. As with tribal immunity, foreign sovereign immunity began as a judicial doctrine. Chief Justice Marshall held that United States courts had no jurisdiction over an armed ship of a foreign state, even while in an American port. *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812). While the holding was narrow, "that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, the State Department issued what came to be known as the Tate Letter, announcing the policy of denying immunity for the commercial acts of a foreign nation. See *id.*, at 486-487. Difficulties in implementing the principle led Congress in 1976 to enact the Foreign Sovereign Immunities Act, resulting in more predictable and precise rules. See *id.*, at 488-489 (discussing the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §§ 1604, 1605, 1607).

Like foreign sovereign immunity, tribal immunity is a matter of federal law. *Verlinden*, *supra*, at 486. Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation. See, e.g., *Santa Clara Pueblo*, 436 U. S., at 58.

In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. Congress "has occasionally authorized limited classes of suits against Indian tribes" and "has always been at liberty to dispense with such tribal immunity or to limit it." *Potawatomi*, *supra*, at 510. It has not yet done so.

In light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case. The contrary decision of the Oklahoma Court of Appeals is Reversed.

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[Other parts of the opinion, PDF versions, and related documents]

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(Bench Copy)

STEVENS , dissenting

SUPREME COURT OF THE UNITED STATES

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No. 96-1037

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KIOWA TRIBE OF OKLAHOMA, PETITIONER v. MANUFACTURING TECHNOLOGIES,  
INC.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF OKLAHOMA ,  
FIRST DIVISION  
[May 26, 1998]  
JUSTICE STEVENS , with whom JUSTICE THOMAS and JUSTICE GINSBURG join,



dissenting.

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973). There is no federal statute or treaty that provides petitioner, the Kiowa Tribe of Oklahoma, any immunity from the application of Oklahoma law to its off-reservation commercial activities. Nor, in my opinion, should this Court extend the judgemade doctrine of sovereign immunity to pre-empt the authority of the state courts to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity.

I

"The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Nevada v. Hall*, 440 U.S. 410, 414 (1979). In the former category, the sovereign's power to determine the jurisdiction of its own courts and to define the substantive legal rights of its citizens adequately explains the lesser authority to define its own immunity. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). The sovereign's claim to immunity in the courts of a second sovereign, however, normally depends on the second sovereign's law. *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136 (1812). An Indian tribe's assertion of immunity in a state judicial proceeding is unique because it implicates the law of three different sovereigns: the tribe itself, the State, and the Federal Government.

As the Court correctly observes, the doctrine of tribal immunity from judicial jurisdiction "developed almost by accident." *Ante*, at 4. Its origin is attributed to two federal cases involving three of the Five Civilized Tribes. The former case, *Turner v. United States*, 248 U.S. 354 (1919), rejected a claim against the Creek Nation, whose tribal government had been dissolved. The Court explains why that case provides no more than "a slender reed" of support for the doctrine even in federal court. *Ante*, at 4-5. In the latter case, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) (USF&G), the Federal Government sought to recover royalties due under coal leases that the United States had executed on behalf of the Choctaw and Chickasaw Nations. The Court held that the Government's action was not barred by a prior judgment against it entered by a different federal court. The holding that the prior judgment was

"void in so far as it undertakes to fix a credit against the Indian Nations," *id.* , at 512, rested on two grounds. First, in a companion case decided that day, 1

the Court ruled that "cross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration," *ibid.* ; but no statute had authorized the prior adjudication of the cross-claim against the Federal Government. The second ground was the statement, supported by a citation of *Turner* and two Eighth Circuit decisions addressing the immunity of two of the Five Civilized Tribes, that: " These Indian Nations are exempt from suit without Congressional authorization." *Ibid.* (emphasis added). At most, the holding extends only to federal cases in which the United States is litigating on behalf of a tribe. Moreover, both *Turner* and *USF&G* arose out of conduct that occurred on Indian reservations.

In subsequent cases, we have made it clear that the States have legislative jurisdiction over the off-reservation conduct of Indian tribes, and even over some onreservation activities. 2

Thus, in litigation that consumed more than a decade and included three decisions by this Court, we rejected a tribe's claim that the doctrine of sovereign immunity precluded the State of Washington from regulating fishing activities on the Puyallup Reservation. *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 175-176 (1977). It is true that as an incident to that important holding, we vacated the portions of the state-court decree that were directed against the Tribe itself. *Id.* , at 172-173. That action, however, had little practical effect because we upheld the portions of the decree granting relief against the entire class of Indians that was represented by the Tribe. Although Justice Blackmun, one of the "strongest supporters of Indian rights on the Court," 3

wrote separately to express his "doubts . . . about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*," *id.* , at 178, our opinion did not purport to extend or to explain the doctrine. Moreover, as the Tribe's predominant argument was that "the state courts of Washington are without jurisdiction to regulate fishing activities on its reservation," *id.* , at 167, we had no occasion to consider the validity of an injunction relating solely to off-reservation fishing.

In several cases since *Puyallup* , we have broadly referred to the tribes' immunity from suit, but "with little analysis," *ante* , at 5, and only considering controversies arising on reservation territory. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), a Tribe member and her

daughter who both lived on the Santa Clara Pueblo reservation sued in federal court to challenge the validity of a tribal membership law. We agreed with the Tribe that the court lacked jurisdiction to decide this "intratribal controvers[y] affecting matters of tribal self-government and sovereignty." *Id.*, at 53. Our decision in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 476 U.S. 877 (1986), held that North Dakota could not require a Tribe's blanket waiver of sovereign immunity as a condition for permitting the tribe to sue private parties in state court. That condition was "unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws," because it required "that the Tribe open itself up to the coercive jurisdiction of state courts for all matters occurring on the reservation." *Id.*, at 891. 4

Most recently, we held that a federal court lacked authority to entertain Oklahoma's claims for unpaid taxes on cigarette sales made on tribal trust land, which is treated the same as reservation territory. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509511 (1991). 5

In sum, we have treated the doctrine of sovereign immunity from judicial jurisdiction as settled law, but in none of our cases have we applied the doctrine to purely off-reservation conduct. Despite the broad language used in prior cases, it is quite wrong for the Court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the Tribe's land or its sovereign functions. Moreover, none of our opinions has attempted to set forth any reasoned explanation for a distinction between the States' power to regulate the offreservation conduct of Indian tribes and the States' power to adjudicate disputes arising out of such off-reservation conduct. Accordingly, while I agree with the Court that it is now too late to repudiate the doctrine entirely, for the following reasons I would not extend the doctrine beyond its present contours.

## II

Three compelling reasons favor the exercise of judicial restraint.

First, the law-making power that the Court has assumed belongs in the first instance to Congress. The fact that Congress may nullify or modify the Court's grant of virtually unlimited tribal immunity does not justify the Court's performance of a legislative function. The Court is not merely announcing a rule of comity for federal judges to observe; it is announcing a rule that pre-empts state power. The reasons that undergird our strong presumption against construing federal statutes to pre-empt state law, see, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 518 (1992), apply with added force to judge-made rules.

In the absence of any congressional statute or treaty defining the Indian tribes' sovereign immunity, the creation of a federal common-law "default" rule of immunity might in theory be justified by federal interests. By setting such a rule, however, the Court is not deferring to Congress or exercising "caution," ante, at 8—rather, it is creating law. The Court fails to identify federal interests supporting its extension of sovereign immunity—indeed, it all but concedes that the present doctrine lacks such justification, ante, at 6—and completely ignores the State's interests. Its opinion is thus a far cry from the "comprehensive pre-emption inquiry in the Indian law context" described in *Three Affiliated Tribes* that calls for the examination of "not only the congressional plan, but also 'the nature of the state, federal, and tribal interests at stake . . .'" 476 U.S., at 884 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)). Stronger reasons are needed to fill the gap left by Congress.

Second, the rule is strikingly anomalous. Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? As a matter of national policy, the United States has waived its immunity from tort liability and from liability arising out of its commercial activities. See 28 U.S.C. §1346(b), 2674 (Federal Tort Claims Act); §1346(a)(2), 1491 (Tucker Act). Congress has also decided in the Foreign Sovereign Immunities Act of 1976 that foreign states may be sued in the federal and state courts for claims based upon commercial activities carried on in the United States, or such activities elsewhere that have a "direct effect in the United States." 28 U.S.C. § 1605(a)(2). And a State may be sued in the courts of another State. *Nevada v. Hall*, 440 U.S. 410 (1979). The fact that the States surrendered aspects of their sovereignty when they joined the Union does not even arguably present a legitimate basis for concluding that the Indian tribes retained, indeed, ever had—any sovereign immunity for offreservation commercial conduct.

Third, the rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.



I respectfully dissent.

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## Notes

1 *United States v. Shaw*, S. 495 (1940).

2 "The general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia*, 6 Pet. 515, 561; *The Kansas Indians*, 5 Wall. 737, 755-757; and *The New York Indians*, 5 Wall. 761, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations." *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962).

3 Dussias, *Heeding the Demands of Justice: Justice Blackmun's Indian Law Opinions*, 71 N. D. L. Rev. 41, 43 (1995).

4 The particular counter-claims asserted by the private party, which we assumed would be barred by sovereign immunity, concerned the construction of a water-supply system on the Tribe's reservation. *Three Affiliated Tribes S.*, at 881.

5 The Court cites *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U. S. \_\_\_\_ (1997), as having "reiterated the doctrine" of tribal

sovereign immunity. Ante, at 5. Each of those cases upheld a State's sovereign immunity under the Eleventh Amendment from being sued in federal court by an Indian tribe. The passing references to tribes' immunity from suit did not discuss the scope of that immunity and were, of course, dicta.

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State of Minnesota  
Office of the Secretary of State

APPLICATION OF FOREIGN CORPORATION  
FOR A CERTIFICATE OF AUTHORITY TO  
TRANSACTION BUSINESS IN MINNESOTA  
180 State Office Building, St. Paul, MN 55155

0056218

Please send a certificate of good standing (sometimes called a certificate of status) for this corporation signed by the filing officer of the state under the laws of which the corporation is organized.

1. The name of this corporation, which is registering in compliance with Section 303.06 of the Minnesota Foreign Corporation Act, is:

Legal Name of Corporation

Little Six, Inc.

Note: To determine whether this name is available, call (612) 296-2803.

2. The alternate name in Minnesota (if applicable) from item 5 is:

Name Used in Minnesota (if Different)

3. The state or country under the laws of which the corporation is incorporated is:

Governed Under the Laws of the State of ☒ Community of  
Shakopee Mdewakanton Sioux

4. The address of its proposed registered office in the State of Minnesota is: (see note below)\*

Address of the Corporate Registered Agent in Minnesota (Number, Street, City, State, Zip Code)  
2330 Sioux Trail N.W., Prior Lake, Minnesota 55372

and the name of its registered agent (who must be located at that address) is:

Name of the Corporate Registered Agent in Minnesota

Leonard Prescott

\* Note: If the address listed for item 4 is not the location where the registered agent can be found, change it to such a location. This is vitally important.

~~Notwithstanding to service of process on it as provided by Minnesota Statutes 303.13 or any amendment~~

I certify that I am ~~authorized to execute this application~~ and I further certify that I understand that by signing this application, I am subject to the penalties of perjury as set forth in section 609.48 as if I had signed this application under oath.

*Allen K. Row*  
(President, Vice-President, Secretary or Assistant Secretary)

SC-00191-02

Filing Number:

Filing Stamp:

0056218

STATE OF MINNESOTA  
DEPARTMENT OF STATE  
FILED

APR 23 1991

*Paul Andrew Mauer*  
Secretary of State M

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State of Minnesota

56218

**SECRETARY OF STATE**

## Certificate of Authority to Transact Business

I, Joan Anderson Grove, Secretary of State of Minnesota, do certify that: The following corporation has duly complied with the relevant provisions of Minnesota Statutes, Chapter 303, and is authorized to do business in Minnesota on and after this date with all the powers, rights and privileges, and subject to the regulations, duties and restrictions, set forth in that chapter.

Name of Corporation in Minnesota:

Little Six, Inc.

Name of Corporation in State of Incorporation:

Little Six, Inc.

Corporate Charter Number: 56218

State of Incorporation: XX

Registered Office in Minnesota:

2330 Sioux Trl NW

Prior Lake

MN 55372

Name of Registered Agent: Leonard Prescott

This certificate has been issued on 04/23/1991.



*Joan Anderson Grove*  
Secretary of State.



**TESTIMONY OF THE TOWN OF IGNACIO, COLORADO**  
**BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS**  
**ON**  
**TRIBAL SOVEREIGN IMMUNITY**  
**AND RELATED ISSUES**

**April 7, 1998**

The Board of Trustees of the Town of Ignacio, Colorado very much appreciates this opportunity to present testimony to this honorable committee. We want to thank you for holding this series of public hearings. We are grateful for the opportunity to voice concerns which face our community.

Our town is a small, tri-ethnic community located in Southwestern Colorado. We have approximately 800 residents, many of whom are third and fourth generation residents of the Town. The Town was established in 1906, and is the only municipality within the boundaries of the Southern Ute Indian Reservation.

The Town occupies approximately 110 acres and for all practical purposes, is completely surrounded by Tribal property. A major state highway runs through the Town, and the commercial portion of the Town along that highway is limited in size and is bounded by the Reservation. Other than the conversion of existing residential properties, there is no opportunity for commercial expansion within the Town. Therefore, there is a very limited opportunity for the Town to expand its tax base and it is very dependent on maintaining its limited tax base.

The Southern Ute Tribe and the Town have historically cooperated with each other in many areas to strengthen our community. Our Southern Ute neighbors are a very important part of our community and we value their friendship and involvement in community activities, and we want to do nothing to erode that cooperative spirit.

However, we are facing some issues involving Tribal sovereignty which negatively impacts our community. We believe that these issues cause concerns to both the Town and the Southern Ute Tribe and both entities can benefit from a clear policy and an understanding of where the boundaries lie regarding these sovereignty issues.

We want to make it clear that we do not want to interfere with the operations of the Southern Ute Tribe and we support the concept of sovereignty, and support their efforts in self governance and economic independence. However, on the same hand, we desire to protect our ability to effectively govern within the boundaries of the Town and we wish to assure our ability to sustain an economic

base within the Town. In effect, we desire clear lines that will assure reciprocal sovereignty; the Southern Ute Tribe on the Reservation, and the elected Board of Trustees and the State of Colorado within the Town.

Existing laws and policies of the Federal government make this a difficult proposition, and we are asking you to consider policy changes to assure the continued viability of the Town.

The Town's concerns center on criminal/civil jurisdictional issues, the acquisition and creation of new Trust lands, and Tribal sovereign immunity which limit the Town's ability to deal with taxation issues, land use issues and land acquisition issues to assure the survival of the Town.

#### **ACQUISITION OF NEW TRUST LANDS:**

Over a number of years, the Tribe acquired ownership of various parcels of property within the Town from private owners. Some of the properties had been used for private commercial purposes in the past. All had been subject to property tax prior to their acquisition by the Tribe.

The properties are scattered throughout Town, and none are contiguous with any other Tribal lands.

The Tribe recently requested that five parcels of property which were acquired from non-Indian owners be transferred into Trust and the Bureau of Indian Affairs has made a preliminary determination that the lands should be taken into Trust. The Town objected to the request to the BIA and is currently appealing the preliminary BIA determination. The Town's objections center on the following concerns.

- ▶ Taxation Issues
- ▶ Jurisdictional Issues
- ▶ Impact of Trend of Acquisitions
- ▶ Land Use Issues

#### **TAXATION ISSUES:**

The Town has concerns about both sales tax and property tax impacts of the acquisition of property in Town and the transfer of that property into Trust.

While the Town does impose a property tax, the primary source of revenue for the Town is sales tax. A handful of commercial enterprises pay the sales tax which is required to continue the operation of the Town, and the loss of any one of those to Tribal ownership could be devastating to the Town.

We know that the Federal law allows states to collect sales taxes for sales to non-Native Americans, but the testimony presented at this hearing and at the hearings conducted on March 11, 1998 on this subject make it clear how much difficulty states and local governments are having in collecting these taxes.

The economic base of the Town is such that the Town could all but disappear during the time it would take for the Town, the State and the Tribes to battle over tax collections. We simply could not survive a multi-year dispute over taxes.

The Town will also be severely impacted by the loss of property tax revenues. Even though the Town cannot collect property taxes on property which is placed in Trust, it still is required to provide municipal services to those properties located in Town. The Tribe will have the benefit of the use of streets, water utilities, snow plowing and police services even though they are not paying the taxes which support those services.

The impact of the loss of property tax revenues could be even more devastating to other local governments which provide services to these properties. Local government entities such as schools, fire districts, sanitation districts and library districts are dependent on the property tax as their sole source of revenue.

The Tribe and the State of Colorado have entered a Compact regarding taxation of properties which are acquired by the Tribe when those properties were previously subject to taxation. However, the Compact is terminable by any party, and the Compact specifically does not apply to any property which has been taken into Trust status. The Compact does not alleviate the Town's concerns over the loss of revenues from either sales tax or property tax.

We are not stating that the Tribe is engaging in any attempts to purposefully cause damage to the Town and its residents. However, because of the size of the Town, even the acquisition of a few properties per year will constitute a very real threat should the Tribe decide to undertake that sort of activity. We trust that the current administration of the Tribe will act fairly, but because there are no restrictions on this type of activity, the Town is without protection against the erosion of its already small tax base.

#### JURISDICTIONAL ISSUES:

The Town of Ignacio was granted the authority to exercise criminal and limited civil jurisdiction over Native Americans in the Town of Ignacio by the Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat. 201 (Public Law 290).

While the Town may exercise criminal jurisdiction over Native Americans in Town, there is case law that limits the Town's police department ability to pursue a Native American suspect from the Town onto the Reservation. The acquisition of enclaves of Trust property in Town creates issues as to how the Town may exercise the criminal jurisdiction which was granted by Public Law 290 when an Native American suspect steps onto small parcel of Trust property within the Town.

The Town's ability to effectively police will be distorted if pursuit is available only in certain parts of Town, or if issues of jurisdiction arise, depending on where an offense occurred or where a suspect is located at the time of apprehension.

Issues regarding the application of state civil law on these Trust enclaves also arise. It is not at all clear whether these lands should be treated on the same basis as other reservation lands for taxation and jurisdictional issues.

#### LAND USE ISSUES:

The Town has adopted Land Use Regulations which apply to all privately owned lands within the Town. When those lands are acquired by the Tribe, then the Town's ability to enforce any type of regulations are severely impeded. It appears that the transfer of those properties into Trust will forever remove the property from any type of regulation by the Town.

To date, the Tribe has not made a use of the property which is intrusive to surrounding properties. However, that possibility exists, and if a use is not compatible or if it interferes with the use of a neighboring property, the Town will have no ability to rectify that situation.

A purchaser of property in Town may assess whether they wish to acquire a property adjacent to the Reservation knowing that no state or county regulations will control the use of adjacent property. However, if Tribes are allowed to acquire any property and remove it from state and local jurisdiction, then land use decisions and property values will be severely impacted by the uncertainties created by the possibility that any type of use could be made on that property. Some predictability of regulation is necessary to sustain compatible land uses and assure future land values.

#### TREND OF ACQUISITIONS:

The Town of Ignacio is very small, and its tax base is very limited and fragile. Any trend toward the acquisition of private lands in Town and the resultant loss of revenue and loss of regulation on those lands could very well threaten the existence of the Town. Even the gradual acquisition of a few key properties per year could be devastating.

The current law provides for very few limits on the abilities of Tribes to acquire lands which are currently held in private ownership and then to place those properties in Trust. The Town believes that safeguards and limitations on the transfer of lands into Trust status, particularly within the confines of an existing municipality must be imposed.

#### **JURISDICTIONAL ISSUES:**

Because the Town is surrounded by Tribal lands and because there is a checkerboard of private lands and Tribal Trust lands and Tribal allotments, the boundaries for law enforcement and civil jurisdiction in and around the Town can be a nightmare for law enforcement officials.

As indicated above, the State of Colorado and the Town were granted criminal and civil jurisdiction within the Town as if the State had assumed jurisdiction under what is commonly known as Public



Law 280. The Town's ability to equitably police in the Town is impacted by the interplay between the cases interpreting Public Law 280, the existence of Trust lands in Town and the fact that the Town is surrounded by Tribal property.

The Town and the Tribe are attempting to resolve some of these difficult law enforcement issues by agreement, and no specific Federal action in this area is requested at this point. However, the Town desires to point out that its inability to apply even treatment to all defendants who violate laws within the Town leads to unequal treatment. Adding to this inequity is the fact that the Tribal code differs from the Town's criminal code and the State statutes in many respects leading to the perceived inequity in treatment of defendants depending on the exact location of the incident. The inequities arise in the area of DUI enforcement, insurance and restitution issues when traffic accidents occur and in fines and penalties in traffic cases.

Ignacio is a closely knit community and the perception of unequal treatment leads to hard feelings between groups of people. Again, the Town does not wish to interfere with the Tribe's attempts to control their own police force, their courts and their systems of punishment. The Town only desires the same respect when attempting to do the same thing in Town.

#### **TRIBAL SOVEREIGN IMMUNITY ISSUES:**

Because the Town is surrounded by Tribal property, it has no ability to expand its boundaries or to condemn surrounding property to assure its continued existence. For instance, the Pine River runs through the Reservation adjacent to the Town. Unfortunately for the Town, the Town boundaries are not contiguous with the River.

The Town has historically purchased treated water from the Tribe and the Tribe owns and operates its own water treatment facility. The Town has considered at various times the construction of a separate water treatment facility. To do that, the Town would need to draw water which is available for appropriation from the River, to supply a treatment plant.

Any other Town could access the River through condemnation of property if it could not negotiate for access. However, in this case, that remedy is not available to the Town, and the consequence is that the Town cannot provide for its own utility needs. To date, the Tribe has refused to grant easements or other access to the River for treated water purposes.

Again, the Town recognizes the need for the sovereignty doctrine, and is not seeking the right to condemn Tribal property on a widespread or unlimited basis. However, the Town is in a unique position and is boxed in with no way to access land or resources which it may need for its citizens. The current law allows the Tribe to acquire lands in Town in Trust status to effectively expand the Reservation boundaries, but the Town is not allowed any sort of reciprocal authority.

**CONCLUSION:**

While some of the problems faced by the Town may be unique to us, many are not and a careful examination of current Federal policy in this area could mutually benefit both the Tribes and their non-Native neighbors.

The Town strongly supports limits on the creation of new Trust lands within the Town and encourages a review of sovereign immunity law and jurisdictional law to assure reasonable and equitable treatment of the Tribe and the Town.

Thank you for this opportunity to present this testimony. We will be happy to provide any further information which you would find helpful.



## TOWN OF IGNACIO

P. O. Box 459 • IGNACIO, COLORADO 81137

Phone: 563-9494

May 28, 1998

The Honorable Ben Nighthorse Campbell  
Chairman, Indian Affairs Committee  
United States Senate  
Committee on Indian Affairs  
Washington, DC 20510-6450

Dear Senator Campbell:

Thank you for your letter requesting additional information from the Town as a follow up to the testimony presented at the April 7, 1998 hearing in Washington State.

Your first question was whether the Town would support legislation to encourage agreements between the Town and the Tribe regarding jurisdiction, law enforcement, hot pursuit and other similar issues.

The major issues which exist between the Town and the Tribe include the following: (1) Conversion of land within Town to trust status, (2) Land use issues, (3) Taxation issues, (4) Jurisdiction/Police issues, (5) Sovereign immunity issues and (6) Gaming issues.

The Town believes that it is possible for the entities to contract on these issues under existing law. While the parties may be able to contract, we have not yet been able to reach agreement on many of these issues, and many will probably prove to be contentious.

For example, it is likely that the parties could agree on police issues. However, it is not likely that the parties would enter an agreement which would limit the acquisition of lands in trust status in Town.

The Town would support legislation which would assist the Town in assuring its continued existence. The acquisition of trust lands in Town is considered to be a very significant issue by the Town Board and the Board would strongly support legislation which places limits on the Tribe's ability to acquire and convert lands in Town to trust status.

Likewise, the Town is concerned about its inability to secure lands or easements around its boundaries for public use like any other town could. The Town in many ways finds itself landlocked by the Reservation, with no way to gain access to roads, utilities or the river without Tribal consent. The Town recognizes that the Tribe must maintain sovereignty, but the Town would support some limited waiver of that doctrine to allow the provision of basic services to our citizens.

The Honorable Ben Nighthorse Campbell  
May 28, 1998  
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Your second question was whether there are existing agreements between the Town and the Tribe regarding cooperative efforts involving economic development, jurisdiction and other similar issues.

The Town and the Tribe have historically cooperated extensively on a wide variety of issues which are important to the community. However, there have never been any formal agreements between the entities over these issues. Until recently, there has not been a perceived need to formalize those arrangements.

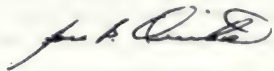
The parties have discussed the negotiation of agreements for jurisdictional issues and police issues. The police departments are operating under a protocol now which incorporates most of the provisions which were involved in the negotiation, but there is no formal agreement between the parties over jurisdiction or police issues at this time.

The parties informally discuss economic development issues, but there are no agreements which would require either party to consult with the other over any economic development issues.

The Town and the Tribe are currently negotiating a water supply contract which would continue the historic arrangement where the Town purchases treated water from the Tribe.

I hope this answers your questions. If I can provide any further information, please let me know, and I will be happy to do what I can to get it to you.

Sincerely,



Jose B. (Balty) Quintana  
Town Manager

cc: Town Board of Ignacio  
Southern Ute Tribal Council



April 2, 1998

Senate Committee of Indian Affairs  
Hart Building  
Washington, D.C. 98202

**"Treat all men alike, give them all the same laws"**

Chief Joseph, Nez Perz Tribe  
1879

**Re: "Senate Bill 1691- Testimony of Ms. Victoria J. Julius"**

As an American citizen and a member of the Lummi Indian Tribe, I urge you to "pass" the Senate Bill 1691, but to exclude the sections on Taxation, Tort Claims and the granting of State Courts jurisdictions of Indian Tribes. These sections would be injurious and infringe on the Treaty Rights of Indian Tribes. It would be more beneficial for the writer of this bill to conduct more extensive research on these sections to justify changes.

Conversely, I fully support providing legal protection and remedies to "all citizens" residing on Indian Tribes. It is true that citizens do not have the legal protection and remedies available to them. Because citizens have no rights Tribal leaders blatantly violate the rights of others. This is a common occurrence on most Indian Tribes. Tribal leaders lie to your face and claim that they live by the laws? That statement alone is a "travesty of justice and to the rights of the majority of Indian people! The fact is, Indian people do not have any legal protection and legal remedies. This statement is supported by the 1000's of lower court cases claiming violations of basic rights brought before the Federal court systems. For years, these problems have been brought to the attention of Congress, but it was ignored.

It is true, Indian Tribes and their leaders must be held accountable and currently they are accountable to no one. This bill is greatly needed and must be passed to establish, enforce and protect the fundamental basic rights of the Indian people as all other Americans enjoy under the United States Constitution of America.

Martin King Jr. led the movement for civil rights for all Americans, except the Indian people and the fact that these rights exist today for other Americans are credited to him under the U.S. Constitution. Today, Native American Indians and citizens have no one to represent them and to secure them the legal protection and remedies. Clearly, the bill is focused to represent "citizens" (non-Indians) who reside on the Reservations and the good part is, if passed, the bill actually will secure Indians their rights to protection and legal remedies where "none existed before."

### "Tribal Leaders Abusive Attacks"

I was a leader in the community to reform the Tribe's court and law enforcement systems, my involvement led to my being elected onto the Tribal Council, I was assigned to investigate fiscal improprieties by the Budget Committee and as a result, the Tribal Council conspired to take the following actions against me:

#### FACTS:

- I was stripped of my Tribal Council position and illegally removed.
- The Tribal Council, in a session I was told would be a mere "discussion," "usurped" the criminal justice system and acted as prosecutor, judge, and jury in a secret kangaroo court action held in a Tribal Council closed session. (1) There was no secretary taking minutes, no tape recording, and no court reporter; (2) I had no opportunity to obtain counsel, to call witnesses, or to prepare a defense; (3) The Tribal Council published a Notice on May 25, 1994 to detail their "disciplinary action" against me, which was distributed to all reservation residents, thus, to assure utter humiliation and disgrace to me, both politically and personally; (4) This made my chances to a "fair trial absolutely impossible."
- I was stripped of my job and without any prior notice!
- I was stripped of any other job prospects, permanently because a Tribal leader stated that I was being punished.
- I was stripped of my status within the Tribal community.
- I was stripped of my "human rights" by (10) male Tribal leaders designed to punish, exact retribution against me.

I ask you, are these the kind of actions that a responsible government would take against (1) individual?

This all happened because I investigated possible fiscal improprieties. Before I started this investigation, my accounting background, and Master's Degree, I was an asset to the Tribe. I was a leader in the grassroots movement to reform the Lummi Tribe's Court system and abuse of citizens by the police. I was active in the recall elections of council members which stemmed from that movement, elected to the Tribal Council by the supporters of the reform movement and the recall campaign and became the "sole" female member of the Council. I was an outspoken advocate for change and my work on the budget committee, investigated possible fiscal improprieties. I stood up for my rights and fought the Tribal leaders through the Tribal Court system into Federal Court, but had to drop the lawsuit due to the growing finances it placed on me, and the Tribe's sovereign immunity!

### "The Governing Body has Absolute Power & Authority"

The Tribal Council (governing body) was given "absolute power and authority" over its Tribal membership by the Tribe's Constitution and Bylaws. In the 1970's the Constitution and Bylaws was constructed by a few unknowing Council members with the assistance of the Bureau of Indian Affairs. Tragically, the Constitution and Bylaws excluded a "separation of powers" to separate the Tribal Council powers from the Tribal Court, the Law Enforcement and the Administrative branches

of the Tribe. As a result, corruption, collusion and criminal activities implemented by Tribal leaders at every level of operations, functions and activities of the Tribal Government. Also, Tribal leaders plot to take arbitrary actions against Tribal members and citizens stripping them of any human rights, civil rights, due process of law and equal protection. "Without any rights," what hope does anyone have for the future?

No responsible government should have this type of insurmountable powers and should be repugnant to other responsible courts and governments. The outcome of the lack of rights and law enforcement occurs in the following areas of the Tribe:

**FACTS:**

- Unfair Housing practices are implemented by the influence of Tribal leaders to ensure that their families get housing first! Or their relatives, or a select few who belong to their "click."
- Unfair Employment practices are implemented by Tribal leaders to secure jobs for their spouses, or family members first. They're hired whether or not they are qualified to fill a certain position.
- Unfair Employment practices in the hiring and firing of positions. Tribal leaders at their whim have terminated numerous Tribal employees to accommodate their political plans. Hiring practices are implemented in the same manner as firing practices. For example, a former group of Tribal leaders wrote out a "hit list" on a chalk board of tribal employees who were going to be fired once the new leaders became seated in their positions on the Council.
- Unfair "contract awards" practices. Contracts are commonly given to preferences spouses, or family members or a select few friends of the Tribal leaders.
- Unfair Law Enforcement practices. Tribal leaders have been known to "coerce" police officers into dropping charges against their family members, or else face loss of their jobs.
- Unfair Tribal Court practices. Its not unusual for Court decisions that made in favor of Tribal leaders and their immediate family members, or a select few.
- Unfair Law Enforcement practices. A former Tribal leader used his political influence to coerce a Police officer of the Tribe to drop a "Driving Under the Influence" of alcohol citation written to his spouse.
- Unfair administrative practices. A "gag order" was placed on the Tribe's newsletter staff to selectively print only what they authorize by Tribal leaders!
- No Freedom of Speech. Tribal leaders passed a "Policy" to stop the freedom of speech to those only authorized by the Tribal Chairman.
- No freedom of Press. Any attempts made by Tribal members to publish newsletters, or fliers were immediately stopped by Tribal leaders with them making contacts with the Post master, the mail delivery persons, etc.
- Unfair "debt practices." Special privileges are granted to certain Tribal members. For example, a Tribal member who is 1<sup>st</sup> cousin to a former Council member was forgiven for a \$10,000.00 education loan while other Tribal members who seek & obtain education loans are required to "repay" their loans.
- Unfair Employment Policies & Procedures practices. The current Human Resource Director had requested to be paid "her regular pay while attending classes during work hours!" Other employees are required to take time off "without pay" or use their accrued vacation leave to attend school! The GM granted her request.



- Unfair employment practices. A Tribal Judge was suddenly "terminated" after he had handed down his ruling on my case at the Tribal Court level. The Tribal leaders and their attorneys claim this as "unsubstantiated" proof, but how much proof must one have?
- My former husband was openly threatened of his job by a Tribal leader if he continued to support me on my case. ( See attached document)
- The Tribal laws were written then "repealed" which excludes "slander and libel" laws. Tribal leaders claim that their way of securing their seats on the Council by abusing others rights... that is, they are free slander others candidates names and seek to destroy them as they see fit.

**"FBI does not investigate deaths on the Reservation"**

Shortly following the Tribal leaders attack against me, my brother was found "drowned" on the far side of Portage Island, a Tribal forest reserve. He had been directed to the Island to locate some "eagle feathers" for his step-daughter's initiation process into an Indian religious group. Its not the first death has come to family members of those demanding accountability. Death also come directly to those seeking it! A fellow Tribal member had approached some of our family members and bragged of how he had killed a Tribal member and beaten him to death. He had implicated Tribal Council leaders involvement. The individuals who spoke of their involvement indicated that my brother was beaten to death. Unusual body markings on my brother indicated foul play. There have been no charges in my brother's death and his file is labeled "suspicious." A friend of mine inquired about his case file a few months ago and the Court replied that for some reason they could not find his file?

The Civil Rights Commission report of the FBI refusing to investigate murders on Indian Reservations is consistent with the F.B.I. lack motivation or inept at bringing closure to most murder cases on Indian reservations. The Lummi Law and Order was even more inept during this time, but then their immediate supervisor and direction comes from certain Tribal leaders. The cover up of murder cases and other oppressive antics on the Reservation can only be compared to that of Mafia thug-like criminal activities and behaviors.

Also, my telephone was "bugged" at home and I had received an indirect death threat to get off the Council or I'd end up like my brother. They pressured my court advocate to move off the Reservation. She had feared for her life because the police officers followed her comings and goings on the Reservation. She has since passed away. Tribal leaders made my life unbearable until I finally moved off-the-Reservation with my children causing me unsurmountable personal injury and financial astronomical burdens.

Tribal leaders latest efforts to get me "fired" from my previous job failed, but is another routine example of what lengths Tribal leaders will go to exact retribution against citizens. Their vendetta tactics never end!

Citizens across the United States have complained to Congress about these types of basic rights violations to no avail. Congress instead has only granted Indian tribes more power and more sovereignty! (See President Clinton's and Vice-President Al Gore's policy statements to uphold Tribes sovereignty)



Other Red Flag Indicators Attributed to Tribal Leaders abuses of power:

1. Congress through policy decisions does not require Indian Tribes to enforce the Freedom of Information Act and the Privacy Act. In turn, Tribal members abuse this and have disclosed confidential medical information to the general public of citizens medical illnesses!
2. The "Civil Rights Commission" in Washington, D.C. sent a report to Congress which stated that the FBI refuses to investigate murders committed on Indian Reservation. The FBI stated that individuals credibility of witnesses are the reason. Congress did not respond to this report and it still is on file.
3. Nearly (10) years ago, Congress failed to respond to the Honorable Senator Orrin Hatch when he introduced mere proposed amendments to the Indian Civil Rights Act of 1968 on August 15, 1988. This bill would have given citizens "access to Federal District Courts if they had violations of civil rights, due process of law and equal protection of laws. Senator Hatch's report cited numerous citizens legal complaints of cruelty and abuses taken by Tribal leaders.

Tribal leaders claim that they live by the law, is simply NOT TRUE! This is a fact and is evidenced by their use of federal grant dollars to "abuse the rights of others through the Tribal Court and Law Enforcement systems. (See attached Bellingham Herald article)

1. Tribal leaders use federal dollars to pay Tribal attorneys to write their Tribal laws, only to ignore them and to destroy others! Tribal leaders won't stop their ways. They'll continue their abuse of powers and continue to violate the basic rights and basic human rights of others.
2. Then Tribal leaders abuse of federal dollars to protest the basic fundamental rights of the American Indian people and citizens of those same individuals rights they have sought to abuse and to destroy?" These leaders do not speak for me. Do they speak for the "grassroots" people? Why are they not heard?

That is a "travesty of justice" and to the rights of the American Indian people! Tribal leaders abuse and violations of the rights of others should be repugnant to Congress and to other responsible governments!

I encourage you to contact Indian Tribes and ask them for copies of the "list of housing" recipients, a list of employment, and a list of education monies, and the list is endless! Ask an expert on "kinship" ties and they'll show you with a report and prove who on those lists are related to who! You'll see that the main ones who benefit are those of Tribal leaders, their families and relatives, the Tribal attorneys and a "select few" who are friends who belong to "a click" of individuals who support Tribal leaders.

In closing, I urge you to pass Senate Bill 1691, with the goal of saving my children and grandchildren from an oppressive condition found on the Reservations in America. Tribal members have suffered long enough without any rights! Stop Tribal leaders from using federal

dollars to abuse citizens and deny them of their basic fundamental rights! Stop Tribal leaders from using federal dollars to pay Tribal attorneys to write "form letters" to other Tribes to further their abuses against Tribal members and citizens. Stop the oppression of citizens of their basic rights. Grant citizens their basic rights to "freedom of speech, freedom of press, and other basic rights all other Americans enjoy under the United States Constitution of America.

Senator Gorton is taking the right direction by taking "the time to at least submit his proposal to actually secure basic fundamental rights of all citizens and Indians across the United States. I do not believe that his bill is anti-Indian. Even though it seems the bill is directed at property owners rights, at least it includes incorporation of securing legal protection and remedies for Indians. Who else will listen to the pleas of the Indian people to secure them the basic rights other Americans enjoy under the U.S. Constitution of America?

Congress has the authority to define, limit and waive laws for Indian Tribes. Yesterday, it was Indian Tribes fighting with the Federal government for their treaty rights, Today its Tribal members and citizens fighting with Tribal leaders for their rights!

"Treat all men alike, give them the same laws"

Chief Joseph, Nez Perz Tribe  
1879

Respectfully submitted,



Victoria Julius  
2100 Alabama St., Apt. T-3  
Bellingham, WA 98226

cc: Senate Judiciary Committee Members  
Honorable Senator John McCain  
Honorable Senator Domenici  
Honorable Senator Slade Gorton

Treat all men alike. Give them all the same law.

Give them all an even chance to live and grow.

All men were made by the same Great Spirit Chief. They  
are all Brothers.

The Mother Earth is the Mother of all people, and people  
should have equal rights upon it.

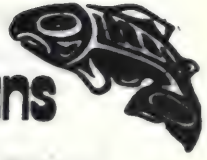
We only ask an even chance to live as other men live. We  
ask to be recognized as men.

Let me be a free man. . . Free to work, free to trade, free to  
choose my teachers, free to follow the religion of my fathers,  
free to think and talk and act for myself -- and I will obey  
every law or submit to the penalty.

.....*Chief Joseph of the Nez Perce Indians*



# Puyallup Tribe of Indians



## WRITTEN STATEMENT

of

JOHN HOWARD BELL

on behalf of the

PUYALLUP INDIAN TRIBE

for the

SENATE COMMITTEE ON INDIAN AFFAIRS

Oversight Hearing on

TRIBAL SOVEREIGN IMMUNITY

April 7, 1998

My name is John Bell. I am the Director of the Legal Department of the Puyallup Indian Tribe, which is the in-house legal department for the Tribal government. The Puyallup Tribe requests that this Statement be included in the record of the Committee's Oversight Hearings on the subject of tribal sovereign immunity.

The information I would like to present to the Committee is drawn from my first-hand experience during almost 25 years as an attorney for the Tribe. During that time, I have litigated a wide variety of cases dealing with sovereign immunity in federal courts, tribal courts, and state courts. I have been on both sides of the issue, and I have dealt regularly with the issue in settings outside the courtroom. I have advised the Tribe and drafted the documents concerning waivers of the Tribe's sovereign immunity in a wide variety of circumstances.

I respectfully suggest that the most important thing the Committee can do is to gather and base its decisions on accurate information about tribal sovereign immunity and how it is used. Senate Bill 1691 is based on two premises, neither of which is accurate. Critics of Indian tribes have suggested to you that Indian tribes hide behind sovereign immunity to evade responsibility for their actions, and that state and federal governments have waived their sovereign immunity.

Both of those premises are false. Many Indian tribes -



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including the Puyallup Tribe, whose experience I will describe for you - do not routinely use their immunity to prevent claims against them. State and federal governments, by contrast, use their immunity in ways that prevent many legitimate claims against state and federal agencies from being heard.

I would like to describe how the Puyallup Indian Tribe handles the doctrine of sovereign immunity day in and day out. I believe this information will be of particular use to the Committee because the Puyallup Tribe is located in a major metropolitan area, deals daily with thousands of people - Indian and non-Indian - in a wide variety of contexts, deals with other governments and with businesses large and small; and in a variety of these situations deals with the issue of sovereign immunity, both the Tribe's and that of the federal and state government.

Sovereign immunity is vitally important to the Tribe, just as it is to state and federal governments. It must be used to ensure the viability of tribal governmental systems, just as state and federal governments use it for that purpose.

But the Puyallup Tribe also focuses very intently on the importance of using the doctrine in a fair and responsible manner. The Tribe knows that it must also be willing to have legitimate claims and disputes considered and decided. For that reason, the Tribe regularly waives its immunity in a variety of ways, just as state and federal governments - to some extent - do. As a result, the Tribe provides a variety of remedies for wrongs and perceived wrongs, including judicial and administrative remedies. The Tribe does NOT simply raise the shield of sovereign immunity and refuse to deal with claims.

In all my years at the Tribe, there have been only a handful of cases dismissed and claims rejected because of sovereign immunity. By contrast, in the vast majority of claims and cases, the Tribe provides a remedy and a forum (and in many cases, more than one of each) for all manner of claims, including tort, contract, debt collection, property, and civil rights claims.

The telling contrast is that in my experience, it has been much more difficult for a wronged party to obtain both a forum and a remedy from state government and from the federal government than it has been from tribal government. If anyone's sovereign immunity needs fixing, it is state and federal sovereign immunity, not tribal sovereign immunity.

The Puyallup Tribe regularly waives its immunity in a

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variety of ways.

#### Tort claims

One of the most common is in the Tribe's handling of tort claims. Individuals who have been injured as a result of a tribal business or activity are not required to litigate the issue of sovereign immunity in order to be compensated for their injury. (State and federal governments frequently do require individuals to litigate and overcome sovereign immunity in order to recover from those governments. I will give examples below.)

Individuals who have personal injury claims against the Tribe are not required to go to court, though they may do so if they wish. The Tribe carries liability insurance for the wide range of its functions, both governmental and business, including liability for premises in which tribal businesses are conducted; insurance for tribal vehicles; liability insurance for law enforcement, medical treatment, and other activities.

Claims against the Tribe are not rejected based on the Tribe's sovereign immunity. They are dealt with under the Tribe's insurance policies as any other employer, business, or private party would do. The Tribe requires that its insurance carriers agree not to assert the Tribe's sovereign immunity.

In the last five years, there have been about 75 injury claims filed against the Tribe and its various programs. In 65 of those cases, the Tribe has paid and will pay out close to half a million dollars to the claimants. Fewer than a dozen cases have been rejected. The Tribe did not assert its sovereign immunity in any of those cases; the claims rejected were typically because of the claimants' failure to provide information or follow through with the claims.

When litigation of a tort claim does arise, the Puyallup Tribe typically waives its immunity in order to allow the claim to be litigated. The circumstances in which the Tribe waives its immunity, both for litigation and for settlement of claims from insurance proceeds, are as broad as or broader than the waivers adopted by state and federal governments.

I know that this happens because I represent the Tribe on these issues; I advise the Tribal Council and I draft the documents incorporating the waivers. I have also litigated cases against the federal and state governments in which we were faced

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with sovereign immunity defenses. In my experience, the Puyallup Tribe waives its immunity in tort cases at least as liberally as the state and federal governments and is an easier jurisdiction to deal with than either the state or federal governments.

After participating in the state workers compensation program for many years, the Tribe recently enacted its own ordinance governing the subject and provides coverage for workers through a private insurance carrier. One of the main reasons for the change was the inefficiency of the state program, and consequent unfairness to employees (who of course include Indians and non-Indians). The program, which covers the same injuries and pays the same benefits as the state program, includes a waiver of the Tribe's sovereign immunity (for both administrative and judicial remedies) to allow an injured worker to pursue his/her claim should s/he be dissatisfied with the payment proposed by the insurance company.

#### Civil rights & property claims

Civil rights and property issues often overlap in the same claim or case, so I will discuss both under this heading.

The Tribe regularly waives its sovereign immunity to allow determination of all manner of claims involving property rights, including real and personal property, and civil rights. Some of those waivers are spelled out in tribal ordinances that establish procedures, both administrative and judicial, for pursuing claims. Other waivers are handled on a case-by-case basis, where a decision to assert or forego sovereign immunity is made by the Tribal Council or other relevant governing body depending on the nature of the case. Both approaches - statutory and case-by-case waivers - are an established part of by state and federal governments procedures and laws as well.

The Tribe has adopted a number of ordinances that waive the Tribe's immunity for the determination of many kinds of claims against the Tribe, including:

Denial and revocation of permits and licenses for a variety of activities under several ordinances

Employment rights claims under the Tribe's Personnel Policies

Workers compensation claims

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Enrollment (tribal membership) issues

Land use and zoning determinations

Administrative procedure claims

Complaints against government officials involving ethics issues

Business license and tax issues

Small Business Fund grants

Hiring and employment rulings and orders

Election and voting issues

In each of these areas the Tribe has created either an administrative or a judicial process, or both, for the determination of claims against the Tribe and appeals by individuals of adverse decisions made by the Tribe. Those processes are regularly used by employees and members of the community, Indian and non-Indian.

A sampling of pending and recently concluded lawsuits in which the Tribe has waived its immunity, either by ordinance or for an individual case, gives an indication of the scope and range of those waivers. Cases include claims of:

Police misconduct

Wrongful termination

Violation of due process or property rights in the denial or revocation of a license or permit

Wrongful denial of membership in the Tribe

A right to payment of benefits from the Tribe

In some of these cases, the Tribal Court or an administrative body of the Tribe ruled against the Tribe and in favor of the individual - including both Indians and non-Indians. That demonstrates that the Tribe has not limited waivers of its sovereign immunity to cases in which the Tribe has a slam dunk. The Tribe has also not discontinued waivers of its immunity simply because some rulings go against the Tribe.



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### Contract disputes

Another context in which the Tribe regularly waives its immunity is in contracts with other parties.

The myths that have been circulated by critics of Indian tribes have unfortunately created, in the wider community, great uncertainty and hesitation about dealing with tribes and participating in tribal processes. That reluctance is almost uniformly based on inaccurate information and characterizations, and not on any direct experience dealing with tribes.

As a result, tribes have to be very creative in negotiating contract terms dealing with dispute resolution. Despite that roadblock, the Puyallup Tribe regularly negotiates contracts with non-Indian parties that include waivers of the Tribe's immunity to allow for determination of disputes that arise under the contracts. As I will discuss later in my comments, parties and attorneys that have dealt with the Tribe, including the Puyallup Tribal Court, have come away realizing that there is no basis in fact for their reluctance to deal with the Tribe.

Another setting in which the Tribe waives its immunity is to allow collection of debts in garnishment actions. Although state courts have no jurisdiction over Indian tribes (under rulings by the federal courts and by the Washington Supreme Court), the Tribe responds to state court writs of garnishment that are sent to the Tribe by notifying creditors' attorneys of the procedure available in Tribal Court for enforcement of foreign judgments. We make them aware of the existence and availability of the Tribal Court, including a copy of the tribal ordinance dealing with that subject. Once again, that is a far more cooperative and informative approach than a party receives from the state or federal government when either of those governments asserts its sovereign immunity.

Collection of child support obligations is a subject that the Tribe has devoted particular attention to. The Tribe has an informal working arrangement with the State of Washington for dealing with the issue. The relevant state agency has come into Tribal Court to enforce support obligations. The Tribe and that State agency are working on a formal written agreement to pin down the process.

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#### Governmental authority/jurisdiction disputes

Sovereign immunity - federal, state, and tribal - sometimes gets in the way of determining competing jurisdictional claims. The Puyallup Tribe and the State of Washington have solved that problem by entering mutual waivers of their immunity in the agreement that has become known as the Puyallup Land Claims Settlement Agreement, 25 U.S.C. 1773 et seq.

Those waivers allowed, for example, a lawsuit which the Tribe and the City of Pife resolved by negotiating a stipulation regarding the issuance of permits on fee lands within the Reservation. The stipulation included agreement to continue discussions, apart from the lawsuit, on a related jurisdiction issue that was not involved in the suit.

Another example is an agreement being negotiated by the Tribe, the Washington Department of Ecology, and the federal Environmental Protection Agency concerning regulation of contaminated properties that are subject to RCRA (Resource Conservation and Recovery Act) permits. The mutual waivers, as well as substantive provisions dealing with jurisdiction, in the Land Claims Settlement Agreement have helped facilitate the negotiations.

#### Puyallup Tribal Court

Hesitations about sending non-Indian litigants to Tribal Court are not justified. Limiting waivers of tribal immunity to tribal courts - in the same way that states generally limit their waivers to actions in state courts and the federal government to federal courts - is completely reasonable.

Those attorneys who have represented non-Indian parties in Puyallup Tribal Court would be a very useful source of information on this topic. They would tell you, by and large, that the Court gives much more careful consideration to each case than do Washington state courts, for example.

State courts are burdened by a tremendous overload and backlog which prevents them from giving cases the attention and consideration they need and deserve. Attorneys of every size, shape and description will tell you of their frustration trying to get adequate consideration of a case in state court, especially in a timely manner.

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In Puyallup Tribal Court, by contrast, which does not have that kind of overload, the judges have - and devote - the time to give careful consideration to each case.

Another prevailing myth is that tribal courts are unfair to non-Indians and always rule in favor of the tribe. That statement is not even remotely close to being true. If anyone is telling you that, they are not telling you the truth. Our office litigates regularly in tribal, federal, and state courts. It is an ironic testimony to the fairness of tribal courts that our winning percentage in Puyallup Tribal Court is considerably lower than our winning percentage in federal and state courts. The Tribal Court frequently rules against the tribe, in favor of individuals both Indian and non-Indian.

In short, Indian tribes are not the outlaws and renegades that opponents of tribal sovereignty would have you believe. The Puyallup Tribe uses the doctrine of sovereign immunity in a responsible way, provides access to compensation for those who have been wronged, and does so in a manner far more accessible and far less resistant than do state and federal governments.

#### The other side of the coin: federal & state immunity

The other side of the coin - the second of SB 1691's premises - is also inaccurate. State and federal governments maintain their sovereign immunity for many kinds of claims. As the Committee knows, from the testimony of other witnesses, waivers given by those governments have severe limits.

The information that I would like to provide on this part of the subject demonstrates that state and federal governments retain and assert their immunity in many areas, including situations where they have, by their own admission or by their courts' determination, violated the rights of individuals. Even in those cases, the wronged parties are often forced to litigate the issue of sovereign immunity, and are not always successful in having their claims addressed.

In other words, the State of Washington and the federal government use sovereign immunity to prevent claims and compensation in many of the same kinds of situations for which critics are seeking a waiver of tribes' immunity.

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### Federal government

In order to recover from the United States, a party - even one who has admittedly been wronged - must overcome a double hurdle. According to the federal courts, that party must demonstrate both an explicit waiver of the federal government's sovereign immunity and Congress' intention to create a substantive legal right.

What that means for a party seeking recompense is that in addition to establishing that a federal agency violated her/his rights, s/he may have to convince a federal court that Congress intended both a waiver of sovereign immunity, to allow the lawsuit, and the creation of a substantive right, to allow recovery for violation of the right.

As a result, a party may be prevented from recovering simply because s/he cannot afford to pursue lengthy litigation to overcome those hurdles. The key point for the Committee's consideration is that the federal government maintains these obstacles in the same kinds of situations that SB 1691 seeks to prevent tribes from maintaining their immunity in foreign courts.

A good example is a class action lawsuit in which co-counsel and I represented a number of Indian people in federal court against the Indian Health Service. In the first part of the case, the court ruled that the plaintiffs had been wronged, that IHS had improperly denied their claims.

The case went on for several more years, however, before we knew whether IHS would be required to pay the plaintiffs' claims. Federal law required that we overcome the two hurdles: a waiver of sovereign immunity and a substantive right to recover.

Although the court eventually ruled in our favor on both issues, the judge described it as a close call. The court came close to ruling that the claimants would receive no recompense even though the same court had ruled that their rights were violated. People will obviously be successful in those situations, if at all, only when they have the resources and the endurance to pursue that kind of case to a conclusion.

### State government

State governments also use sovereign immunity to avoid answering for wrongs they have committed. For example, I repre-



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mented a tribal member who had been given a citation by a Washington Department of Fisheries enforcement officer. The State quickly agreed that the citation had been improper, that it should not have been issued. The State dismissed the citation.

The tribal member asked to be compensated for the fishing time that she lost as a result of the improper citation. That was a full night of fishing, which would have brought in several thousand dollars. That compensation was very important because the fishing season is so short in South Puget Sound waters, and one lost night plays havoc with the struggle of tribal fishers to make ends meet.

The State refused to pay compensation. I therefore filed suit in federal court on behalf of the tribal member. The State's response? It filed, and the court granted, a motion to dismiss based on the State's sovereign immunity.

The assistant attorney general who handled the case nevertheless agreed, informally, that justice had not been done. He agreed to a settlement, and the State paid part of the money that the tribal member had lost.

In short, the State does not routinely waive its immunity for claims, even when its employees violated someone's rights. This kind of case has particular relevance to the discussion of S. 1691 for a couple of reasons.

You might observe that the State does waive its immunity for some claims as long as you take them to state court. But the Puyallup Tribe does the same. As I mentioned, the Tribe regularly waives its immunity to allow settlement or litigation of claims through insurance coverage and in tribal administrative and judicial forums.

Another observation that might be made about the case is that the State faced up to its responsibility, by voluntarily paying some compensation, notwithstanding its sovereign immunity. Again, the Puyallup Tribe does the same. The difference is that the Tribe does not require people to go through the trouble and expense of litigating the issue of sovereign immunity before it will respond to their claim. This is my own speculation, but it seems clear to me that the State followed the strategy it did so that if the tribal member did not persevere through the litigation, the claim would go away. How many similarly meritorious claims never see the light of day because people don't have the resources or the patience to litigate the issue of sovereign

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immunity against the State?

One of the most notorious examples of the State hiding behind sovereign immunity is one that is on the grandest scale. In the Indian Gaming Regulatory Act, Congress gave the states a voice in the conduct of gaming by Indian tribes. The word "gave" is literally accurate, because the United States Supreme Court had ruled that the states have no such right.

To balance this gift and concession that Congress was giving the states, the Act required the states to negotiate in good faith with tribes, and provided that if a state failed to do so, a tribe could sue the state in federal court to enforce that obligation. That compromise approach was crafted by Congress itself.

The states' response to that arrangement, after they had been allowed to sit at the table despite the adjudicated absence of state jurisdiction, was to hoist up the defense of sovereign immunity and argue - successfully - that neither Congress nor the tribes could touch them. If an Indian tribe were to behave in that fashion, critics of tribal sovereign immunity would give us no peace.

I should add that, to its credit, the State of Washington has, after several years of hiding behind that defense, agreed to a consensual lawsuit in federal court addressing one of the major gaming issues that divides tribes and the state. But the response of states across the country to IGRA demonstrates in graphic terms that if sovereign immunity is being abused, it is state governments that are abusing it, not Indian tribes.

#### Conclusion

The most important thing that needs to result from the Committee's inquiry is to correct the untruths that are being circulated concerning tribal sovereign immunity. It is unfortunate that a common, stereotypical perception of tribal sovereign immunity that flourishes in the non-Indian community is based on such inaccurate information. It graphically demonstrates the unfortunate reality that a lie repeated enough times is eventually perceived to be the truth.

Indian tribes in fact use sovereign immunity in a measured, responsible manner. If Congress is to consider modification of the doctrine, it needs to examine its use by state and federal

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governments, not simply tribal.

We thank the Committee for its consideration of this information.



LAW OFFICE  
of the  
PUYALLUP INDIAN TRIBE



April 27, 1998

Sen. Ben Nighthorse Campbell  
United States Senate  
Committee on Indian Affairs  
Washington, D.C. 20510-6450

Re: S. 1691, Tribal Sovereign Immunity  
Use of Sovereign Immunity by the Federal Government

Dear Senator Campbell and Members of the Committee:

During the discussions of S. 1691, Senator Gorton's proposal to do away with the sovereign immunity of Indian tribes, Senator Gorton has argued that other governments have abandoned the defense of sovereign immunity.

That statement is not accurate, as a simple bit of legal research demonstrates. The United States government, as well as state and local governments, regularly and routinely use their sovereign immunity to avoid claims that are filed against them.

List #1 in Appendix A to this letter shows the reported cases in the federal district courts during the first ten months of 1997 in which the United States successfully asserted its sovereign immunity and obtained dismissal of either the entire case or one or more claims in the case.

These cases are almost exclusively cases filed by everyday individuals - either private citizens or government employees seeking recompense for injuries, for contract claims, for employment grievances, and the like.

This list is only the tip of the much larger iceberg of cases in which the federal government asserts sovereign immunity. The list does not include:

Unreported cases from the federal district courts, which are the majority of cases heard by the courts;

Claims that were not filed because claimants were advised by their attorneys that they could not overcome sovereign immunity, or because claimants could not afford the attorney fees and other costs that would be required to pursue that issue;

Cases in which the United States' defense of sovereign



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immunity was unsuccessful, but was nevertheless asserted, forcing the claimant to pay his/her/its attorney fees to litigate that issue.

Even with those limitations, the list is substantial and eye-opening. In the ten month period that it covers, there were at least 45 reported cases in which a federal district court dismissed all or part of a case based on the United States' sovereign immunity. That doctrine is obviously a major weapon that the federal government uses to prevent the courts from hearing many claims.

State and local governments and agencies also regularly and successfully assert their sovereign immunity to obtain dismissal of cases in federal court. List #2 in Appendix A is a small sampling of those cases. It is not an attempt to list all such cases. It is simply a list of examples showing that state and local governments regularly use their immunity as a defense to claims filed against them.

The Puyallup Tribe earlier submitted, for the Committee's record on this bill, my statement demonstrating that the Puyallup Indian Tribe does not use sovereign immunity to avoid responsibility for claims that are made against it. The contrast between the extensive use of sovereign immunity by federal, state, and local governments, on the one hand, compared to the restraint shown by the Puyallup Tribe in its use demonstrates that Senator Gorton's characterization of the situation is wholly inaccurate. I would be glad to send a copy of that statement to you if that would be helpful.

I would be happy to provide any additional information on this issue that the Committee would find useful.

Sincerely,



John Howard Bell  
Tribal Attorney

cc: Members of the Committee

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## APPENDIX A

List #1 - Cases or claims dismissed because of the federal government's sovereign immunity

*Becker v. Department of the Army*, 981 F.Supp. 905 (D.Md. 1997)

*International Islamic Community of Masjid Baytulkhaliq, Inc. v. United States*, 981 F.Supp. 352 (D.Virgin Islands 1997)

*Fletcher v. Runyon*, 980 F.Supp. 720 (S.D.N.Y. 1997)

*United States v. Kaufman*, 980 F.Supp. 1247 (S.D.Fla. 1997)

*Taylor v. Gearan*, 979 F.Supp. 1 (D.D.C. 1997)

*Sanner v. United States Government*, 979 F.Supp. 1327 (D.Kan. 1997)

*Chem-Nuclear Systems, Inc. v. Arivec Chemicals, Inc.*, 978 F.Supp. 1105, (N.D.Ga. 1997)

*First Nat. Ins. Co. of America v. F.D.I.C.*, 977 F.Supp. 1060 (S.D.Cal. 1997)

*Baez v. United States*, 976 F.Supp. 102 (D.Puerto Rico 1997)

*Hagy v. United States*, 976 F.Supp. 1373 (W.D.Wash. 1997)

*Operation Rescue Nat. v. United States*, 975 F.Supp. 92 (D.Mass. 1997)

*Fanoele v. United States*, 975 F.Supp. 1394 (D.Kan. 1997)

*Ochran v. United States*, 975 F.Supp. 1464 (M.D.Fla. 1996)

*Minns v. United States*, 974 F.Supp. 500 (D.Md. 1997)

*Clark v. United States*, 974 F.Supp. 895 (E.D.Tex. 1996)

*Gadd By and Through Gadd v. United States*, 971 F.Supp. 502 (D.Utah 1997)

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*Dazzle Mfg., Ltd. v. United States*, 971 F.Supp. 594 (CIT 1997)

*Franklin Sav. Corp. v. United States*, 970 F.Supp. 855 (D.Kan. 1997)

*Militello v. Bardell*, 970 F.Supp. 1022 (M.D.Fla. 1997)

*O'Ferrell v. United States*, 968 F.Supp. 1519 (M.D.Ala. 1997)

*Escobar v. Commissioner of Internal Revenue*, 967 F.Supp. 214 (W.D.Tex. 1997)

*Conner on Behalf of Conner v. United States*, 967 F.Supp. 894 (M.D.La. 1997)

*County of St. Louis v. Thomas*, 967 F.Supp. 370 (D.Minn. 1997)

*Hosey v. Jacobik*, 966 F.Supp. 12 (D.D.C. 1997)

*Dzuira v. United States*, 966 F.Supp. 126 (D.Mass. 1997)

*Crisp v. United States*, 966 F.Supp. 973 (E.D.Cal. 1997)

*Columbia Gulf Transmission Co. v. United States*, 966 F.Supp. 1453 (S.D.Miss. 1997)

*Moreno v. United States*, 965 F.Supp. 521 (S.D.N.Y. 1997)

*Barry v. Stevenson*, 965 F.Supp. 1220 (E.D.Wis. 1997)

*Duval Ranching Co. v. Glickman*, 965 F.Supp. 1427 (D.Nev. 1997)

*Western Nat. Mut. Ins. Co. v. United States*, 964 F.Supp. 295 (D.Minn. 1997)

*Quraishi v. Shalala*, 962 F.Supp. 55 (D.Md. 1997)

*Research Triangle Institute v. Board of Governors of the Federal Reserve System*, 962 F.Supp. 61 (M.D.N.C. 1997)

*Shuster v. Oppelman*, 962 F.Supp. 394 (S.D.N.Y. 1997)

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*Moschetto v. United States*, 961 F.Supp. 92 (S.D.N.Y. 1997)  
*Graves v. United States*, 961 F.Supp. 314 (D.D.C. 1997)  
*Crenshaw v. United States*, 959 F.Supp. 399 (S.D.Tex. 1997)  
*LeCrone v. United States Navy*, 958 F.Supp. 469 (S.D.Cal. 1997)  
*Djordjevic v. Postmaster General, United States Postal Service*, 957 F.Supp. 31 (E.D.N.Y. 1997)  
*Petition of Harley & Browne*, 957 F.Supp. 44 (S.D.N.Y. 1997)  
*Advanced Materials, Inc. v. United States*, 955 F.Supp. 58 (E.D.La. 1997)  
*Fleischer v. United States Dept. of Veterans Affairs*, 955 F.Supp. 731 (S.D.Tex. 1997)  
*Pflum v. United States*, 953 F.Supp. 339 (D.Kan. 1997)  
*Gilbert v. F.D.I.C.*, 950 F.Supp. 1194 (D.D.C. 1997)

List #2 - Cases or claims dismissed because of the immunity of state and local governments in federal court

*Correa v. City of Bay City*, 981 F.Supp. 477 (S.D.Tex. 1997)  
*Nihiser v. Ohio E.P.A.*, 979 F.Supp. 1168 (S.D.Ohio 1997)  
*Macklin v. Huffman*, 976 F.Supp. 1090 (W.D.Mich. 1997)  
*Lebron v. Ashford Presbyterian Community Hosp.*, 975 F.Supp. 407 (D.Puerto Rico 1997)  
*Rogers v. Morales*, 975 F.Supp. 856 (N.D.Tex. 1997)  
*Ware v. Wyoming Bd. of Law Examiners*, 973 F.Supp. 1339 (D.Wyo. 1997)  
*Arndt v. Wisconsin Dept. of Corrections*, 972 F.Supp. 475 (W.D.Wis. 1996)



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*Jemzura v. Public Service Com'n*, 971 F.Supp. 702 (N.D.N.Y. 1997)

*Harris v. Hayter*, 970 F.Supp. 500 (W.D.Va. 1997)

*Does v. Covington County School Bd.*, 969 F.Supp. 1264 (M.D.Ala. 1997)

*Command Force Sec., Inc. v. City of Portsmouth*, 968 F.Supp. 1069 (E.D.Va. 1997)

*Gaines v. Texas Tech University*, 965 F.Supp. 886 (N.D.Tex. 1997)

*Duval Ranching Co. v. Glickman*, 965 F.Supp. 1427 (D.Nev. 1997)

*Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 962 F.Supp. 131 (N.D.Ind. 1997)

*Alley v. Angelone*, 962 F.Supp. 827 (E.D.Va. 1997)

*Digiore v. Illinois*, 962 F.Supp. 1064 (N.D.Ill. 1997)

*Morongo Band of Mission Indians v. Stach*, 951 F.Supp. 1455 (C.D.Cal. 1997)

\*

# *Stockbridge-Munsee Community*

BAND OF THE MOHICAN INDIANS

TRIBAL COUNCIL OFFICES

Testimony of Robert Chicks, President  
Stockbridge-Munsee Band of Mohican Indians  
P.O. Box 70, Bowler, Wisconsin 54416  
April 18, 1998

It is an honor to be able to provide testimony to the United States Senate Committee on Indian Affairs on such an important issue as **Tribal Government Sovereign Immunity**. Tribal Nations as sovereign entities are under attack throughout the United States. Because some Tribes are experiencing unprecedented economic growth and development and have stronger voices in the political realm, all Tribes are experiencing a backlash. Tribal sovereignty is being challenged on every level by individuals, local and state governments, the courts up to the highest court of this land and now the federal government.

Many representatives of the federal government seem to have forgotten this government's longstanding moral and legal obligations to Tribes. Last year, Senator Slade Gorton included a budget rider, Section 120, in the 1998 Interior appropriations bill (H.R. 2107) which would have (1) required Indian tribal governments to waive all sovereign immunity against suit as a condition of receiving federal funds and (2) authorized actions against tribal governments to be heard in federal and state courts rather than tribal courts. This proposal to force Tribes into what appeared to be an unlimited waiver of their sovereign immunity and remove tribal court jurisdiction would have put self-governance, the progressive center piece of U.S. American Indian

Policy, at extreme risk. Tribal leaders would have been subject to potentially countless lawsuits, tribal assets would have been depleted. With the tribal courts undermined and tribal leaders unable to perform their jobs without the threat of suit, self-governance would have been destroyed.

When the harsh realities of Mr. Gorton's rider were made known, the majority of the Senate voted against it, voting for Tribal Sovereignty and Tribal Self-governance. Now, Senator Gorton has introduced a bill, S. 1691, the "**American Indian Equal Justice Act**" which, though more detailed, is similar in scope to Section 120.

S. 1691 contains extremely broad waivers of tribal sovereign immunity and would subject tribal governments to virtually any type of law suit in both federal and state courts. Ironically, Senator Gorton, an advocate to capping damages claims, proposes with S. 1691, to expose Tribal Governments to unlimited damages claims. Like section 120, S. 1691 would make it nearly impossible for Tribal Governments to carry out basic governmental functions and would jeopardize the resources and future of Tribal Governments. Some, well versed in federal Indian policy, might believe that it is Senator Gorton's intent to destroy Indian Governments by picking up where policies of Termination and Assimilation failed.

Gorton and those supporting S. 1691 have engaged in a campaign of misinformation against tribal self-determination. The sponsors have played upon common misunderstandings about Tribal Government, relying on slanted anecdotes and broad unsupported generalizations about the "unfairness" of tribal sovereign immunity and tribal courts. One case frequently cited in making their point regarding the need to waive sovereign immunity is an incident where a tribal police car collided with a non-tribal member vehicle on the reservation during a highspeed chase.

According to the story, the victims had no recourse since the Tribe claimed sovereign immunity. One issue the proponents do not mention when using this incident is that federal law provides coverage under the Federal Tort Claims Act for third party damages or injuries caused by a tribal employee carrying out his or her duties under any of the federally contracted programs operated by Tribes, and tribal law enforcement is almost always at least partially funded through a federal "self-determination" contract.

Even if Senator Gorton could justify a need for a waiver of Tribal Government sovereign immunity, he cannot justify an unlimited waiver of immunity that exposes Tribes to unlimited damages. Federal and State waivers of immunity have many limitations, in some cases, remedies are confined to injunctive relief only, with no money damages. When money damages are available, they are limited in order to protect the public treasury.

Sovereigns are accountable to their people and failure to exercise sovereignty in a responsible manner will result in the removal of leaders from office through elections or extraordinary measures. The Stockbridge-Munsee Tribe has ordinances protecting the rights of its members and also the rights of non-members who work for the Tribe or who have a relationship with the Tribe. One good example of our Tribe's responsible exercise of its sovereignty is its **Employee Rights Ordinance**. The Tribe has waived its sovereign immunity for enforcement of this Ordinance. The waiver is limited in scope to protect the Tribe's assets; however, it does provide for up to one year of back pay and other appropriate remedies.

Whenever the Stockbridge-Munsee Tribe enters into business agreements, remedies for default are provided. Waiving sovereign immunity is not the only way to provide protection for vendors and Indian and non-Indian business people. The Tribe uses a variety of alternatives to



waivers of immunity. In contracts, escrow accounts, up-front payment or first performance are some of the options. Additionally, the Tribe has liability insurance for all of its property, vehicles and businesses and does not invoke sovereign immunity in any tort case up to the limit of the insurance coverage.

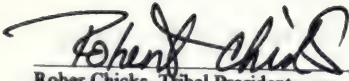
Sovereign immunity is essential to self-governance because it protects the public treasury, ensures that the public servants carry out their jobs without the threat of suit and shields the governments from being sued into extinction. Without immunity, law suits could potentially cripple the Stockbridge-Munsee Tribe. We are a small Tribe with less than two thousand members. We have a modest casino operation that helps to fund most of the Tribal Programs. While we believe in the responsible exercise of sovereignty and in fairness, we cannot support and we urge you not to support legislation that leaves Tribal Nations defenseless and vulnerable to countless lawsuits. Indian Nations are governments, not individuals or corporations, and as any other government, should be able to protect the assets of their people and to go about the business of governing without the constant threat of suit.

S. 1691 seeks not only to waive tribal governmental immunity, it also seeks to undermine the Tribal Justice System (which the federal government has helped to create) by eliminating the longstanding doctrine of exhaustion, recognized as the law of the land by the United States Supreme Court, and permitting cases to be taken directly to federal and state courts. This bill would end the tradition of tribal control over tribal matters. It is an assault on the administration of justice by Tribal Governments and again, cuts at the heart of tribal self-governance.

S. 1691 is designed to render Indian Tribes unable to protect their lands, resources, cultures and future generations. I urge you to read this bill with awareness to the disastrous

impact it would have on Indian Nations and to vote NO to its thinly disguised policy of termination. Vote NO to the injustice this bill would have on Indian Nations. Vote NO to more broken promises and let your vote be one that recognizes and upholds the legal and moral obligations of this United States of America to all the Indian Nations within.

Thank you.



Robert Chicks, Tribal President  
Stockbridge-Munsee Band of Mohican Indians



Phone (206) 466-1111  
Fax (206) 466-1111

## **Swinomish Tribal Community**

P.O. Box 817 • 950 Moorage Way  
LaCrosse, Washington 98251

**Statement of**  
**BRIAN CLADOOSBY, CHAIRMAN**  
**SWINOMISH INDIAN SENATE**  
**on behalf of the**  
**SWINOMISH INDIAN TRIBAL COMMUNITY**  
**IN OPPOSITION TO S. 1691**

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**SENATE COMMITTEE ON INDIAN AFFAIRS**  
**April 7, 1998, Field Hearing**

\*\*\*

This statement in opposition to S. 1691 is submitted on behalf of the Swinomish Indian Tribal Community for inclusion in the record of the April 7, 1998, field hearing held in Seattle, Washington.

We believe that S. 1691 misrepresents both (1) the extent to which the United States and the states have retained and continue to assert sovereign immunity, and (2) the extent to which Indian tribes routinely waive their immunity. Premised on this misrepresentation, S. 1691 would alter sovereign immunity in a manner, and to an extent, that is unprecedented.

We believe that the bill's sponsor, in the April 7 field hearing, misrepresented S. 1691 as making no change in substantive law. In fact, the bill apparently would allow state law to apply in circumstances where tribal law now controls, and would create new substantive federal law.

We believe that the bill would deny Indian tribes the right to have cases involving federal law issues heard in federal court, even under circumstances where any other defendant would have that right.

And finally, we are concerned that anecdotal testimony about isolated disputes may overshadow the fact that most tribes have well developed judicial systems, and the fact that many tribes, like Swinomish, have entered into cooperative relationships with neighboring governments. Both these developments protect the property rights and civil rights of Indians and non-Indians alike.

**I. S. 1691 Would Alter Sovereign Immunity in a Manner, and to an Extent, that is Unprecedented.**

Both the "findings" in S. 1691 and the testimony of bill supporters might lead an uninformed observer to believe that the federal government and all state governments have fully waived their sovereign immunity, but that Indian tribes never grant such waivers. Both of those beliefs would be wrong.

As numerous witnesses testified, both the United States and individual states retain their sovereign immunity in many circumstances, and waive their immunity in other circumstances, but only if strict conditions are met. Indeed, on March 3, 1998, the Supreme Court, in a case upholding the absolute immunity of local legislators from civil liability, noted that states and the federal government are "often protected by sovereign immunity" even for constitutional violations. *Bogan v. Scott-Harris*, \_\_\_ U.S. \_\_\_ (March 3, 1998).

Although Congress has granted limited waivers of the federal government's sovereign immunity for certain types of claims, the United States has retained its immunity in broad areas, including functions that are inherently governmental or are deemed discretionary. To the extent that waivers have been granted, they are almost always limited to the United States' own court system.

Similarly, to the extent that individual states have granted waivers of immunity, the waivers typically have strict limitations and are effective only within that state's own court system. For instance, most states that permit tort claims have adopted intricate claims procedures that must be strictly complied with prior to any judicial relief being available. Furthermore, many states have recently begun aggressively asserting their Eleventh Amendment immunity from suit in neutral federal courts. Most notably, states such as Washington have successfully asserted this immunity in lawsuits brought by tribes to enforce the federal Indian



Gaming Regulatory Act, thereby barring any judicial review even when the state has violated IGRA, and even though Congress clearly intended that a federal court remedy be available to tribes.

In contrast, tribal sovereign immunity is not absolute, and is often voluntarily waived. Tribes, of course, are not immune from lawsuits brought by the United States. And a number of cases have held that individual tribal officials can be sued for prospective injunctive and declaratory relief when it is shown that they have acted illegally.

Waivers of sovereign immunity are routinely granted by tribes in contracts, allowing enforcement of the contract terms. In contrast to the federal and state governments, which require that contract claims be pursued in their own court systems, Swinomish and other tribes have negotiated contractual waivers covering binding arbitration or authorizing enforcement in the federal courts or even in state courts. And it should be remembered that contracts are, by definition, consensual. No party is forced to enter into a contract with a tribe if the party is dissatisfied with the scope of the tribe's waiver of its immunity.

With respect to tort claims, Swinomish--like many tribes--maintains substantial liability insurance coverage, and routinely waives its sovereign immunity up to the limits of that coverage. To our knowledge, no tort claim has ever exceeded the limits of the Tribe's liability insurance.

Moreover, the procedures for pursuing a tort claim against the Tribe are substantially less onerous than those mandated by most states. As mentioned above, most states have intricate tort claims procedures; if those procedures are not strictly followed, the claimant is barred from seeking judicial relief. In contrast, the Tribe routinely refers a claimant directly to the Tribe's liability insurer. If the matter is not resolved, no further steps need be taken by the claimant before he brings an action in Tribal Court.

Finally, in order to accord due process to both Indians and non-Indians alike, the Tribe's ordinances provide for judicial review by the Tribal Court. The Tribe's court system, and an example of the extensive due process protections provided under tribal law, are discussed in more detail in the final section of this statement.

Based on the false premise that federal and state sovereign immunity has been completely waived, but tribal sovereign immunity is never waived, S. 1691 would alter tribal sovereign

immunity in a manner, and to an extent, that is unprecedented. Congressional waivers of federal sovereign immunity have always been voluntary, and are almost always limited to actions brought in the federal government's own court system. Similarly, state waivers of sovereign immunity have been voluntary and are limited to the state's own court system. Although Congress occasionally uses its power under the Commerce Clause to waive state Eleventh Amendment immunity, such action has always been for the limited purpose of allowing enforcement of specific federal statutes in federal court.

In contrast, S. 1691 provides for a very broad waiver of tribal sovereign immunity, imposes the waiver involuntarily, and subjects tribes to lawsuits not in their own court systems, but in state court systems that typically have had a long histories of hostility to tribes.

## **II. Contrary to the Sponsor's Claims, S. 1691 Would Change Substantive Law.**

During the April 7 field hearing, the sponsor of S. 1691 claimed that the bill "does not change the law" and that no rights "under substantive law" are changed. Those statements are simply not correct.

S. 1691 apparently would change substantive tort law in many circumstances, by allowing state law to control in lieu of tribal law. S. 1691 also adopts new substantive federal law regarding the payment of taxes claimed by a state. And even more broadly, S. 1691 allows states to unilaterally apply all of their tort and contract laws to on-reservation tribal actions, thereby superseding tribal law.

There are substantial differences between states in the law governing liability for torts--differences based on legitimate public policy. Similarly, there may be substantial differences, also based on legitimate public policy, between the tort law of an Indian tribe and the tort law of the state in which the tribe's reservation is located. Under sections 4, 5, and 6 of S. 1691, tribes would be liable for torts to the same extent that a "private individual or corporation" would be liable under state law. These provisions would allow state law to control, even when that state law differs from tribal law.

In addition, S. 1691 removes any requirement of tribal consent prior to a state, under Public Law 280, making both its tort law and its contract law applicable to Indians on a reservation, and applicable to tribes themselves.

Finally, S. 1691 adopts substantive federal law, where none now exists, requiring that tribes and individual tribal members collect and remit taxes imposed by a state on non-members of the tribe.

Contrary to the sponsor's assertions, these provisions do change "substantive" law. And by imposing state law on tribes in situations where tribal law now controls, S. 1691 strikes at the core of tribal governmental authority: "the right of reservation Indians to make their own laws and be governed by them." *Williams v. Lee*, 358 U.S. 217 (1959).

### **III. S. 1691 Would Deny Tribes the Access to Federal Courts that Every Other State Court Defendant Has.**

Under 28 U.S.C. § 1441, any defendant in a state court lawsuit can "remove" the lawsuit to federal court if the suit includes federal law claims, unless an act of Congress expressly provides otherwise. Section 6(d) of S. 1691 would deny to Indian tribes this right of removal to federal court in any case that included a tort or contract claim against the tribe. Thus, by inserting a tort or contract claim against a tribe in a suit that also involves issues of federal law, a plaintiff could bar the federal law issues from being decided by a federal court. This would leave tribes as the only state court defendants who could not assert the right to have federal law claims decided by a federal court. S. 1691 is certainly not an "equal justice act" when it strips tribes of a right held by every other state court defendant.

S. 1691 has been touted as providing "neutral" forums for suits against tribes. That claim is particularly ironic when S. 1691 would deny tribes the right to have issues of federal law decided by a neutral federal court, rather than by state courts that have, at times, been hostile to both Indian tribes and to defendants seeking to protect their rights under federal law.

### **IV. Tribal Judicial Systems and Cooperative Intergovernmental Relationships Already Protect Civil Rights and Property Rights.**

The Committee has heard anecdotal testimony of isolated disputes between tribes and individuals and between tribes and other governments. But such testimony, and S. 1691 itself, ignore the fact that tribes such as Swinomish already provide effective judicial remedies and act as responsible governments in cooperation with other governments and governmental agencies.

### A. The Swinomish Tribal Court.

The Swinomish Tribal Community provides a court system that consists of both a trial court and an appeals court. The Tribe was a founding member of the Northwest Intertribal Court System (NICS), which was established in 1979. NICS is a non-profit corporation governed by representatives of its member tribes. NICS provides impartial judges for its member tribes' court systems. The judges may be Indian or non-Indian. Although the judges may be either attorneys or non-attorneys, all have received substantial judicial training.

One clear indication of the extent to which tribal judicial systems in Washington have developed and become accepted by the non-Indian community is Civil Rule 82.5, adopted by the Supreme Court of Washington in 1995. That rule recognizes that, under federal law, tribal courts may have exclusive or concurrent jurisdiction over certain matters. The rule mandates dismissal of state court lawsuits that are within the exclusive jurisdiction of a tribal court, allows transfer of state court lawsuits to tribal courts when there is concurrent jurisdiction, and provides a mechanism for state court recognition and enforcement of tribal court judgments. The adoption of Civil Rule 82.5 by the Washington Supreme Court is particularly significant: during the 1970's that same Court, at the behest of then-Attorney General Slade Gorton, assisted the State in openly flouting federal court orders in its efforts to deny the fishing rights guaranteed to tribes by federal treaties. *See Puget Sound Gillnetters Ass'n v. U.S. District Court*, 573 F.2d 1123 (9th Cir. 1978) ("The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . . the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." *Id.* at 1126 (citations omitted). "[T]he Washington Supreme Court in a recent series of decisions attempted to strip the state agencies of their power to comply with the district court's orders." *Id.* at 1128.)

### B. An Example: Reservation Utility Improvements.

The process followed by the Tribe in providing sewer and water utilities and road improvements on the Swinomish Reservation, and the legal protections provided to individuals wishing to challenge that process, illustrate the responsible governmental action typical of tribes today.



Beginning in the mid-1980's, the need for utility improvements in the southwestern portion of the Reservation, known as Westshore or the Pull-and-be-Damned Road area, became evident. The area, which borders on Skagit Bay in Puget Sound, consists primarily of allotted trust land that has been divided into residential lots. Approximately half of the lots are currently leased to non-Indians under BIA approved leases. The area also includes some fee parcels.

It had been determined that elevated levels of fecal coliform contamination had polluted the Westshore tidelands, threatening public health and forcing the Tribe to close the beaches and ban shellfish harvesting. The lack of a public water system threatened not only public health, but also public safety due to the absence of fire hydrants. Unpaved roads hampered emergency vehicle access and also posed a threat to public safety.

In 1989 the Tribe adopted a utility ordinance. The ordinance created a utility authority to operate public utilities on the Reservation and established a utility commission to serve as the policy setting board of directors for the utility authority. The utility commission is made up of five members, at least three of whom must be users of the Tribe's public utilities. Although not required by the ordinance, at least one utility commission member since 1989 has been a non-Indian Westshore lessee of allotted trust land. Currently two non-Indians serve on the commission.

The Tribe also formed reservation utility improvement districts (RUIDs) covering the Westshore area for water improvements and for sanitary sewer improvements. Provisions governing the RUIDs in the Tribe's utility ordinance are very similar to Washington state statutes governing off-reservation utility improvement districts (UIDs). Like UIDs under state law, the RUIDs provide a mechanism for assessing lands within their boundaries to pay the local share (non-grant funded) costs of utility improvements, with each land parcel being assessed a share of the local costs in proportion to the benefit that the parcel derives from the funded utility improvements.

In 1990, the Tribe began construction of paved roads in the Westshore area. The \$2 million road project was funded by the BIA, with no local share cost assessed to the benefitted properties. The road project also cleared utility corridors, thereby reducing the cost of the ensuing sewer and water projects and the local share assessments for those projects. The sewer and water systems became operational in 1993.

Public meetings and hearings were held by the Tribe during the utility planning process and during the preparation of the assessment rolls. During 1988 and 1989, public information meetings on the proposed utility improvements were held. A public hearing was then held prior to the formation of the two RUIDs. In 1994, after publication of preliminary assessment rolls, another public hearing was held. As a result of testimony during that hearing, the assessment rolls were substantially modified, resulting in a reduction of proposed assessments. Later in 1994, after publication of the proposed final assessment rolls, all interested parties were notified of the opportunity to file written protests on the proposed assessments. A hearing on the protests was subsequently held.

Under the utility ordinance, parties responsible for payment of the assessments are authorized to bring actions in the Swinomish Tribal Court for review of the assessment upon exhaustion of their administrative remedies through the protest and hearing procedure. Eighty-five such actions were filed by non-Indian lessees of Westshore trust land. None of the non-Indian owners of the 45 assessed fee parcels appealed.

Because of the size and complexity of the 85 actions filed challenging the Swinomish assessments, the Northwest Intertribal Court System assigned Thomas E. Sheldon to hear the cases. All of the 85 utility assessment petitioners were represented by legal counsel. None raised any question as to the competence or impartiality of Judge Sheldon. Judge Sheldon received his undergraduate degree from the University of Pennsylvania Wharton School of Finance and Commerce and his law degree from the University of Washington School of Law, and studied in the Common Market Business Law Program at the City of London College. During his 25 years of legal experience, Judge Sheldon served as a Senior Trial Attorney in the U.S. Department of Justice, as a visiting assistant professor of law at the University of Oregon, as Senior Assistant Attorney General for the Commonwealth of the Northern Mariana Islands (CNMI), and as a CNMI administrative law judge.

After answering each of the 85 petitions challenging the utility assessments, the Tribe filed with the Court a 1,894 page administrative record. The Court consolidated the cases, received briefing and held a hearing on cross-motions addressing preliminary matters. After a decision on the preliminary motions, the Court established a schedule for cross-motions for summary judgment.

Following extensive briefing on the summary judgment motions, the Court held a day-long hearing. On November 3, 1995, the Court issued an opinion granting the Tribe's motion for summary judgment, denying the petitioners' motion, and affirming the assessments. The opinion discussed in detail, and rejected, each of the petitioners' grounds for challenging the assessments.

Petitioners then moved for reconsideration by the Tribal Court. After full briefing and a second hearing, the Court, on February 16, 1996, denied petitioners' motion for reconsideration. Although the Tribe has an established Court of Appeals which, like the Tribe's trial court, is staffed by impartial outside judges provided by the Northwest Intertribal Court System, no appeals were filed by the petitioners.

On March 8, 1995, while their petitions challenging the utility assessments were being actively litigated in Swinomish Tribal Court, non-Indian Westshore tenants filed a complaint with the U.S. Environmental Protection Agency, which had provided grant funding for the sanitary sewer portion of the utility project. The complaint claimed that the Tribe had discriminated against the non-Indian tenants in violation of Title VI of the Civil Rights Act of 1964, and included many of the same claims already being litigated in Tribal Court.

The EPA Office of Civil Rights, with the full cooperation of the Tribe, conducted a two-year investigation of the complaint. EPA officials met with the Westshore tenants, conducted a number of meetings and interviews with officials and staff of the Tribe, and submitted numerous written questions and document requests to which the Tribe responded.

On January 15, 1998, EPA issued a final decision which found no violation of Title VI, fully agreeing with the Tribal Court that the assessments were non-discriminatory.

### **C. Intergovernmental Cooperation**

In order to meet long standing public health and safety needs of the Swinomish Reservation, and to avoid jurisdictional confrontation and litigation, the Swinomish Tribal Community has generally favored a strategy of cooperation with those state and local governments and agencies expressing an interest in reservation affairs. Several historic interlocal agreements have been signed that successfully incorporate non-tribal interests in the administration of tribal land use and regulatory policy. The following chart summarizes those agreements:

**INTERGOVERNMENTAL COOPERATIVE AGREEMENTS  
THE SWINOMISH INDIAN TRIBAL COMMUNITY**

NATURE OF AGREEMENT	DATE	AFFECTED PARTIES AND PURPOSE OF AGREEMENT
<b>LAND USE</b>		
County Government	1987	Memorandum of Understanding for Cooperative Land Use Planning and Implementation. Skagit County Commissioners.
County Government	1998	MOU for Joint Administration of Land Use Policy. Skagit County.
<b>PUBLIC SAFETY</b>		
County Government	1994	Cross-Deputization Agreement. Skagit County Sheriffs Department.
Municipalities	1990-Present	Mutual Aid Agreements with the Skagit County municipalities of Burlington, LaConner, Anacortes, Sedro Woolley, Concrete, and Couplerville (Island County).
<b>UTILITIES AND PUBLIC HEALTH</b>		
Municipalities	1984, 1993, 1997	Regional Wastewater Facility Sharing and Plant Expansion Agreement. Town of LaConner.
County, Regional Utility Districts, State Agency	1984	Skagit County Coordinated Water Supply Systems Planning. City of Anacortes, Skagit Public Utility District, Washington Department of Health, and local water associations.
Water Association established under State law	1987	Petition to become part of Tribal Water Utility System. Shorewood Water Association.
Private Sewer District	1993	Petition to incorporate and operate under Tribal Utility Laws. Shelter Bay Community, Inc.
<b>UTILITIES AND ENVIRONMENTAL PROTECTION</b>		
State, Regional and County Jurisdictions	1996	Skagit River Water Rights Agreement: Reserved Supply, In stream Fisheries. City of Anacortes, Skagit Public Utility District, Skagit River Tribes, Skagit County, Washington Department of Ecology.
<b>ENVIRONMENTAL PROTECTION</b>		
Federal Agency	1989	Approval of Tribal Application for "Treatment as a State" under EPA regulations. U.S. Environmental Protection Agency.
Federal, State Agencies	1996	Tri-Party Agreement for CWA NPDES Permit Administration. U.S. EPA, Washington Department of Ecology.
Federal Agency	1996	Tribal Environmental Agreement: EPA. U.S. Environmental Protection Agency.
State Agency	1996	MOU for air quality technical assistance. Northwest Air Pollution Authority.
State Agency	1997; Pending	Protocols for Coordinated Forest Practices Regulation. Draft MOU for institutionalizing joint administration. Washington State Department of Natural Resources.



The intergovernmental cooperative initiatives listed above have been widely recognized as a promising approach to meeting the complex needs of the broader reservation community while concurrently advancing the principles of tribal self-determination. In 1989, Washington Governor Booth Gardner applauded the efforts of the Swinomish Tribe and Skagit County to resolve their land use conflicts through collaboration. That effort also received formal recognition from the Washington Chapter of the American Planners Association, the Planning Association of Washington, and the Washington State Office of Historic Preservation. In 1996, Governor Lowry issued a statement of support and pledged the state's commitment to cooperate with the Swinomish Tribe in administering a comprehensive water resources management program.

The Swinomish Tribal Community firmly believes that such intergovernmental cooperation--not the litigation that would be encouraged by S. 1691--offers the greatest protection to the rights of Indians and non-Indians alike.

**D. An Example: Swinomish Police Cross-Deputization and Mutual Aid Agreements.**

The Swinomish Tribal Community maintains a police department currently consisting of five full-time and one part-time officers. All have met the same training requirements met by law enforcement officers throughout Washington. Indeed, between 1990 and 1994 the Tribe operated five state-approved training academies for reserve officers from both tribal and non-tribal departments. Two of the graduating classes achieved the highest average scores in State history on the state-administered certification exam.

Based on the success of the reserve academies, the Tribe was approved by the State to offer a satellite academy for full-time officers in 1995. As a result, law enforcement officers from throughout western Washington, employed by the State and by local non-Indian jurisdictions, have received training from the Swinomish Police.

The Tribe has entered into law enforcement mutual aid agreements with numerous municipalities near the Swinomish Reservation. In addition, in 1994 the Tribe entered into an agreement with Skagit County providing for the cross-deputization of Swinomish Police officers by the County Sheriff. The cross-deputization allows tribal officers, under limited circumstances, to exercise law enforcement authority on behalf of the Sheriff, thereby avoiding

many of the jurisdictional issues that have plagued law enforcement in Indian country.

We believe that this cooperation enhances the protection of property rights and civil rights of both Indians and non-Indians, on and off the Reservation. For example, in 1996 an armed bank robbery occurred in LaConner, a nearby off-reservation community. Swinomish Police officers were responsible for identifying and apprehending the non-Indian perpetrator, even though the robbery and arrest occurred outside the Reservation.

### CONCLUSION

For the foregoing reasons, we urge the committee to reject S. 1691. Attention should focus on fostering--not thwarting--functioning tribal judicial systems and responsible tribal governments operating under tribal law.



# **Confederated Tribes of Siletz Indians**

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## **Statement of the Confederated Tribes of Siletz Indians of Oregon Pat Duncan, Chairwoman**

### **Prepared for the Hearing on S. 1691 Tribal Sovereign Immunity**

**submitted to the  
Senate Committee on Indian Affairs  
April 21, 1998**

The Confederated Tribes of Siletz Indians submits this testimony in strong objection to S. 1691, a bill to remove the sovereign immunity of Indian tribes. The Siletz Tribe believes this bill represents a great leap backward in tribal-federal relations and one which threatens the viability and very existence of American Indian tribes.

The Siletz people view S. 1691 with a particular suspicion owing to our own experience. We are a tribe that survived Congressional termination of our sovereignty from 1954 until our restoration in 1977. The Termination Era was perhaps the darkest chapter in our history, but through the perseverance of our people, we have managed not only to survive, but to thrive as a community. We now face a renewed threat to our sovereignty in the guise of S. 1691, offered by Senator Slade Gorton. Sadly, for us, it is a familiar threat and one we must fight.

During the field hearing on this bill in Tukwila, Washington on April 7, 1998, Senator Gorton stated:

"The question raised by this bill is whether or not, on the eve of the 21st century, there shall remain governments under the American flag that will remain entirely irresponsible for their actions."

Although insulting and misguided, Senator Gorton's remark is useful to demonstrate the misconceptions which underlie this bill – that Indian governments are rogue institutions, accountable to neither their own people nor their neighbors. Our testimony will address these misconceptions.

First of all, the government of the Siletz people, from time immemorial, has been responsible and accountable. If it had not been so, we would not be here today. We have also developed excellent government-to-government working relationships with local and state governments to the benefit of all the citizens of the State of Oregon. Second, tribal courts like ours are competent, fair, and well suited to handling the business of tribes and their neighbors. Finally, the termination of tribal sovereign immunity would be a grave detriment to tribes and a breach of trust by the federal government. It would almost certainly eliminate the positive relationships we have established and the tribal institutions we have built.

To more fully appreciate our position, we must review a part of our history because it bears so directly on the current debate. In 1953, Congress adopted House Concurrent Resolution 108 making it the policy of Congress to terminate the responsibility of the United States government to protect the rights and property of American Indian people and tribes. The devastating consequences of the Termination Era are well known to this Committee and still fresh in all our memories. We must draw the attention of this Committee to the fact that this bill, S. 1691, is founded on the same disastrous policy as termination: to subject Indian tribes to the full scope of state laws through the elimination of their tribal sovereign status. Once this is accomplished, there is nothing to stop the destruction of other tribal governmental rights, including civil jurisdiction and tax status, among others. Termination by any other name is still termination, and this bill and this concept should be repudiated.

#### The Siletz Tribal Government is Accountable to its People and its Neighbors

Coming out of the Termination Era, we began with little more than 3,600 acres of our previous 1.1 million-acre reservation and a belief in our destiny as a people. Today, we provide a wide array of governmental services to our own people and are the largest employer in Lincoln County. Our employees, both Indian and non-Indian, include more than 600 people employed by Chinook Winds, 18 by our lumber mill operation, and 179 people working directly for the Tribe. The total annual payroll for Chinook Winds alone exceed \$10 million in 1995 and 1996, resulting in over \$470,000 in State taxes withheld from payroll checks and over \$900,000 in Federal taxes withheld. We are proud of our accomplishments and proud to be good neighbors.

Since President Carter signed the Siletz Restoration Act in 1977, our tribal government has developed working relationships and signed numerous agreements with the state and local governments in Oregon. In Lincoln City, we established the Chinook Winds Gaming & Convention Center. The success of this venture, of course, would not have been possible without the cooperative working relationship we have forged with the State of Oregon and the City of Siletz. This enterprise has greatly benefited our Tribe, the local community and all the people of Oregon.

Owing largely to the success of our gaming operation, the Tribe has been able to contribute toward the general welfare of the local community and the state in a



number of ways. The Tribe and Chinook Winds have developed cooperative sponsorships and provided financial support and/or loaned space for almost 200 activities and events over the past year. For the betterment of our community at large, we worked with community organizations and/or special events such as the American Red Cross, Coastal AIDS Network, Cascade Head Music Festival, Special Olympics and the Women's Wellness Conference -- activities which have primarily benefited the non-tribal community. In addition to the Tribe's purchase and donation of property to the Lincoln County School District for a much needed public high school, we have provided scholarships, assistance to schools located in every area of Lincoln County as well as universities and schools throughout western Oregon.

We have also successfully worked with Lincoln County and the City of Siletz on several projects. A recent example is the development of the City's water treatment facility to benefit tribal members and non-Indians alike. The City had been unable to approve any new housing because of inadequate water facilities. The Tribe was able to access half a million dollars to upgrade the City's water treatment facility so that it could accommodate not only our housing project, but housing development for other citizens and invigorate the City's tax base.

#### The Siletz Tribal Court Safeguards Civil and Property Rights

Senate Bill 1691 is based on the false assumption that there is nothing resembling fairness and competence in our tribal courts. We are frankly puzzled by these claims that tribal courts are somehow inadequate to adjudicate the matters we regularly handle. Tribal members and non-members often use our court system, which has developed a reputation for integrity. Our court dockets are busy but cases are handled fairly and expeditiously. With one Chief Judge, one Associate Judge and two Judges Pro Tempore, one full-time Administrator and one half-time clerk, the Siletz Tribal Court resolved 115 cases of 161 pending in 1997. The Siletz Tribal Court enjoys a well-deserved reputation for fairness and efficiency in matters such as housing disputes, employment grievances and child support enforcement.

As Chief Judge Mary Wynne, of the Colville Tribal Court pointed out to this Committee at the Tukwila hearing,

"Whenever tribal courts have been the subject of close scrutiny, they have not only survived the test of their detractors, but have been applauded for the level of justice administered on reservations. Even investigations which began with apparent hostile intent have ended by stressing the strengths of tribal courts." (Citing the *American Indian Law Review*, vol. 22, p. 288.)

Conspicuous by their absence are credible investigations or reports which would conflict with Judge Wynne's testimony. Throughout the debate of this bill, we have heard anecdotal allegations implying there is no justice in tribal court. But, when these stories are challenged, we often find that tribal court has never even been utilized by detractors. Furthermore, you may recall that during the 1996 Senate

hearings on waiver of tribal immunity in state and federal courts, Robert T. Anderson, Solicitor, Department of the Interior, in responding to a question by Senator Simon on whether the anecdotal evidence of injustices by tribal courts revealed a widespread problem requiring Congressional action, stated:

"I don't believe that the problems with tribal courts in Indian country are so widespread that congress needs to act. And I would point out that the extensive hearings held by the Civil Rights Commission late 1980's and early 1990's to investigate problems or alleged problems with the administration of justice within Indian country came to that precise conclusion. There were extensive hearings in Indian country. And frankly, out of all the mail that we receive at the Interior Department, to the Secretary and to the Solicitor, problems associated with the administration of justice within Indian country are an extremely low and very insignificant portion of the matters that are brought to the attention of the Interior Department." (Emphasis added. Hearing before the Senate Committee on Indian Affairs, No. 104-964 (1996), p. 13)

Such drastic legislation as S. 1691 must be founded on evidence, not hollow anecdotes.

#### Sovereign Immunity is Essential to the Development of Good Government

In the course of debate over S. 1691 and prior attempts to abrogate tribal sovereign immunity, we have repeatedly heard the claim that sovereign immunity is an anachronism unique to Indian tribes and which has been abandoned by the federal and state governments. These statements are plainly untrue.

Sovereign immunity is a doctrine which federal, state, local, and tribal governments all continue to use. Without it, they would be deluged with lawsuits that would paralyze their ability to operate and would drain public resources. Instead, the federal government has limited its waiver of sovereign immunity. 28 U.S.C. § 2680. And those few states which have chosen to waive their immunity have generally done so only in their own courts and subject to strict limitations on the amount of recovery.

The goals of preserving sovereign immunity are no different for the tribal governments than they are for the federal or states governments. The U.S. Congress has consistently endorsed, and the U.S. Supreme Court has affirmed, the principle that sovereign immunity serves the "goal of Indian self-government, including [the] overriding goal of encouraging tribal self-sufficiency and economic development." Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 510. (1991) (internal quotations omitted). There is ample evidence that tribes have waived, and continue to waive, their immunity in a number of instances and through a variety of mechanisms best suited to the particular purpose, including enactment of tribal codes and statutes, and insurance riders. Most importantly, however, is the point that the decision of when and to what extent tribal sovereign immunity would be waived was determined by the tribal government.

Where the federal and state governments preserve the right to deliberately craft limited waivers of their own immunity, S. 1691 would gut tribal sovereign immunity entirely.

### Conclusion

We are pleased with this Committee's commitment to hear from all parties interested in S. 1691 as demonstrated through this series of hearings. We are confident that the Committee will pay heed to the facts presented, not the largely manufactured hysteria surrounding this very serious issue. Clearly there is a need for a better understanding of the place of Indian tribes in the family of governments within the borders of the United States -- that the Siletz Tribe and all other Indian tribes are sovereign entities. We do not govern by the grace of the federal government, rather, our right to govern is based on our ancient existence in this country and by the consent of our people.

As succeeding United States Presidents have confirmed, we have a government-to-government relationship with the United States. We alone should be allowed to determine whether we will waive our sovereign immunity, just as that decision is left with the federal government and the several states. If there are problems to be resolved, the solutions should be carefully tailored to meet them. The sweeping nature of S. 1691 would certainly create more problems than it would resolve. We therefore ask this Committee to repudiate S. 1691.

**TESTIMONY OF ROBERT CONGDON,  
WESLEY JOHNSON AND NICHOLAS MULLANE**  
on behalf of the  
**Towns of Ledyard, North Stonington, and Preston, Connecticut**  
before the  
**Senate Committee on Indian Affairs**

**Introduction**

Mr. Chairman, Mr. Vice Chairman, and members of the Committee, thank you for the opportunity to submit this written testimony on the need for legislative action to address problems associated with tribal sovereign immunity. We serve as the top elected officials of three small towns in southeastern Connecticut -- Ledyard, North Stonington, and Preston - that have witnessed the astonishing growth and success of the Mashantucket Pequot Tribe over this last decade as a result of gaming activities conducted on its lands. With the growth and expansion of the Tribe, problems are now arising as a result of sovereign immunity. The purpose of this testimony is to bring these problems to your attention and request further consideration of this important issue.

Fifteen years ago the Mashantucket Pequot Tribe was not even recognized under federal law. Today, as a result of its hugely successful casino resort, it is the dominant economic force and landowner in the region. For the Towns, standing witness to this growth and success has been both exciting and troubling. We admire the great success of our Indian neighbors, and we are grateful for the economic vitality



their casino has brought to the region. We are greatly concerned, however, over the many problems that are now arising incidental to the Tribe's success and unique status under federal law. These concerns include: 1) the lack of comprehensive environmental review of the Tribe's development activities as required by NEPA and other laws; 2) the Tribe's intention to take extensive landholdings outside of its reservation into trust in violation of federal law and with accompanying damage to the local tax base; 3) the lack of compensation to the Towns for the serious impacts on our communities that result from the Tribe's activities; 4) and the absence of any meaningful mechanism for the Towns to interact with the Tribe to address issues of mutual concern. Another major area of concern is the subject of this hearing, that is the sovereign immunity of the Tribe which insulates it from most forms of legal challenge to its actions. This latter issue is the focus of this testimony.

#### **Background on the Towns and the Tribe**

At the outset, we want to provide some background on the Towns and the Tribe. This information is necessary to obtain a perspective on why the sovereign immunity issue is of such concern to us and our constituents.

Ledyard, North Stonington, and Preston are small communities with a combined population of about 25,000. The Towns' combined annual tax revenue is about \$25 million. Our Towns are located in what has been, until recently, a predominantly rural, residential setting.

In recent years, the social, economic, and environmental character of our communities has experienced rapid transformation as a result of the opening of the Foxwoods Casino and Resort on the reservation lands of the Mashantucket Pequot Tribe. This facility is claimed by many to be the largest, most successful casino in the world. It operates round the clock, 365 days a year, and on a typical summer weekend day the number of visitors to the Casino (about 65,000) is more than twice the total population of all three towns. In the month of March, 1998, the revenues from the Tribe's slot machines alone totaled \$58 million, approximately four times the annual tax revenue of Ledyard, the town in which Foxwoods is located. The Tribe's own officials claim that nowhere in the gambling industry has this level of revenue ever been approached. Annual revenue for the Tribe is estimated to be over \$1.3 billion, with profits well in excess of \$300 million. The Tribe currently consists of 502 members.

The Tribe is by far the largest landowner in the region. It owns over 4,500 acres of fee land outside of the boundaries of its 2,210 acre reservation. This property is scattered throughout southeastern Connecticut, and the Tribe has indicated it intends to purchase much more land. The Tribe also is engaged in numerous economic ventures beyond gaming, including resort facilities, a pharmaceutical network, a shipbuilding business, and other ventures.

As the Committee may know, the Towns have been deeply concerned about the conversion of this fee land to trust status, thus diminishing our already small tax base, and the loss of community planning, zoning and environmental controls. This dispute is the subject of litigation now in progress. Our focus today, however, is on sovereign immunity.

### **Sovereign Immunity Problems**

Increasingly, the sovereign immunity of the Tribe is becoming a very real problem not only for the Towns, but also for parties engaged in business transactions with the Tribe, individuals who enter upon Tribal lands, and other parties who have engaged in some form of contact with the Tribe that may require legal recourse. These problems are sure to proliferate.

From the Towns' perspective, we are frequently disadvantaged in negotiations with the Tribe because of the Mashantucket Pequot's refusal to waive voluntarily its immunity from legal challenge. In our ongoing dispute over trust land expansion, for example (which the Towns were forced to obtain a court order to stop), the Tribe adamantly refused to accept any consensus-based agreement that would be fully enforceable by the Towns.<sup>1</sup> Of course, there is little reason for the Towns or any

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<sup>1</sup> Only after the Department of the Interior unilaterally negotiated a trust lands agreement, without consulting with the Towns and over our objection, was a partial sovereign immunity waiver agreed to. This waiver is virtually meaningless, however, because of its very limited scope and the fact that the agreement developed by the Department failed to address the Towns' concerns.

other party to enter into agreements with the Tribe if they will not be fully enforceable.

In other areas of land use planning, the Tribe has not been willing to agree to be sued if it does not comply with applicable standards. Thus, we have been reluctant to make exceptions to our zoning requirements to accommodate Mashantucket Pequot development plans because we cannot be sure that the Tribe will not claim that the resulting terms and conditions are unenforceable as a result of sovereign immunity. Indeed, in the past the Tribe has claimed that, as a matter of law, certain Ledyard zoning restrictions cannot be enforced. In short, we simply lack the certainty that over time the Tribe will not assert sovereign immunity in an effort to escape the rules and regulations that apply to other landowners.

An area of general concern relates to public safety and emergency medical services. To one extent or another, each Town has a relationship with the Tribe regarding mutual assistance for fire protection, ambulance and, to a lesser extent, police services. Some of these relationships are formalized in mutual assistance agreements; others are informal and cooperative. While these agreements can, and should, be the best examples of cooperation between neighbors, there is an underlying concern about the Tribe's potential reliance on sovereign immunity to shield not only tribal members and the Tribe from liability, but also those who work for or contract with the Tribe to provide such services. To whom do the Towns turn to gain redress



in the event of tribal negligence or contractual breach with respect to these services?  
 To whom does a fireman turn if injured while providing assistance on tribal lands?  
 Sovereign immunity could be asserted in an effort to preclude such claims.

These are not abstract concerns. In a recent personal injury case, for example, the Tribe stated that it would assert sovereign immunity in a claim for damages arising out of a Casino commuter bus accident. This defense would have been raised by the Tribe's insurance company. What good is such insurance to injured parties if the Tribe's sovereign immunity will be used, even by third parties, to bar such claims?

Visitors to the Tribal lands are now also experiencing sovereign immunity defenses. In 1994, an employee of Foxwoods was injured in a fall on ice in the Casino parking lot. She brought a lawsuit against the Tribe to recover damages. The Tribe successfully asserted sovereign immunity to defeat the claims. In dismissing the case, the court ruled that "the Tribe's immunity from suit extends to commercial activities occurring off the reservation." Romanella v. Hayward, No. 3:95CV726 (Aff'd) (D.Conn 1996). Thus, as the Tribe expands its economic base and undertakes business activities throughout the region it will carry the ability to escape legal challenges arising from its conduct. Clearly, this is an advantage no other business enjoys.

The few instances the Towns are aware of in which the Tribe has agreed to waive its immunity offer little reassurance. The Tribe waived its immunity to secure

financing for its Casino from investors. And, as noted above, the Tribe agreed to a limited waiver to obtain from the Department of the Interior the now enjoined approval of the transfer of land into trust outside of its reservation. When the Tribe's self-interest is strong enough, it has agreed to such waivers, but in all other circumstances of which we have knowledge there has been no compromise. No waivers are made. The Tribe's dominant political and economic position give it very little motivation to compromise on such issues, and as a result non-Indian entities negotiating with the Tribe are frequently presented with a take it or leave it position on the sovereign immunity issue.

These instances in which sovereign immunity has already been asserted are, we fear, only a portent of more problems to come. Needless to say, there is no practical basis upon which an economic force as powerful and pervasive as the Tribe should be allowed to conduct all of its affairs under the shield of complete immunity from suit. As the Tribe continues to purchase more and more land and expand its business activities, the unfairness inherent in this doctrine will become increasingly apparent and unjust. Our system of laws cannot tolerate a result in which any party is above the law and outside the system of judicial oversight intended to protect the rights of all citizens and insure a just outcome to legal disputes. Unfortunately, unbridled tribal sovereign immunity gives rise to just such a result.

### The Need For Legislation

We are aware that our problems in dealing with tribal sovereign immunity are not unique. Testimony offered at previous hearings on this subject confirm the widespread and growing nature of the controversy surrounding unlimited tribal sovereign immunity. It is clear that Congress must thoroughly study this problem and develop legislation that, while deferential to sound principles of tribal sovereignty, establishes a balanced and equitable immunity waiver doctrine.

Contrary to the assertions advanced by the proponents of tribal sovereign in past hearings, such a result can be achieved without undermining the independent, sovereign status of Indian tribes. Standards can, and should, be found to address those instances in business, local and state government, and personal transactions, in which a tribe is required to waive appropriate aspects of its total wall of protection from suit.

Of all the sovereign governmental entities, Indian tribes are alone in claiming far-reaching, if not total, immunity from suit. In most respects, the United States has waived its immunity. The majority of the States have done so, as have most local governments. The principle embodied in all of these sovereign immunity waivers is simple — aggrieved parties should have judicial recourse to seek redress for alleged harms they have suffered or to seek to enjoin illegal actions. In the 1990's, the concept of unadulterated immunity of any sovereign is an anachronism.

It has been argued in past hearings that there are special reasons Tribes should be treated differently. These arguments cannot be sustained.

It has been argued, for example, that an immunity waiver would undermine the goals of Indian self-government and self-sufficiency and economic development. A "blanket waiver," it has been claimed, would allow any party who believes a proposed tribal action would affect a property interest to file suit to halt this action and recover damages.

We fail to see how stopping a Tribe from conducting a legal wrong or compensating an injured party "undermines Indian self-government and self-sufficiency." To the contrary, we believe a fundamental attribute of sovereignty is for the government entity involved to live up to its obligations and defend its actions on the merits, not to hide from them. In any event, it should be possible to construct an immunity waiver that does not go so far as to expose a tribe to unfair, frivolous lawsuits. It does not follow that a "blanket waiver" is necessary, but neither can the sweeping immunity currently conferred upon tribes be tolerated.

It also is claimed that any such waiver would "flood state and federal courts with litigation over matters that historically have been reserved for tribal courts." It also is argued that non-Indians who choose to live in Indian country could scorn tribal government and seek to have the courts of the historically hostile non-Indian neighbors of the Tribes empowered to take control of the affairs of the tribe.



This overbroad statement has no support. The number of cases likely to arise as a result of an appropriately crafted immunity waiver can hardly be expected to swamp the judicial system. Moreover, there is no evidence that federal and state courts today are "hostile" to Indians. To the contrary, case law demonstrates that Tribes are treated fairly and often receive the benefit of the doubt from the courts. Taking cases away from tribal courts is not even the issue, as tribal sovereign immunity frequently prevents cases from being adjudicated even in those forums. Finally, many non-Indians "do not choose to live in Indian country." In Ledyard, for example, many residents have suddenly found themselves surrounded by Tribal lands as a result of the Mashantucket Pequot's aggressive land acquisition practices.

It also has been argued that such lawsuits would place a tremendous financial burden on tribes due simply to the costs of defending litigation in non-tribal forums. Id. The mere threat of such suits, it is argued, could paralyze economic development for tribes.

We regard this argument not only to be an overstatement of the consequences of a waiver of sovereign immunity but also to beg the question. Private parties, as well as virtually all government entities, are not excused from the need to defend unlawful conduct because of litigation expenses. Certainly the Mashantucket Pequot Tribe, perhaps the wealthiest in the nation, does not lack the ability to defend its actions in court. Relative to small towns like ours, many Indian tribes are in a far

better position to support a legal defense of its actions than are we. The Mashantucket Pequot Tribe employs a host of attorneys on staff and as outside counsel. It makes extensive political contributions, and has the ability to retain the most sophisticated professional assistance available. In one month, its slot machine revenues alone are quadruple the size of Ledyard's annual tax revenues. Certainly, with respect to this Tribe and many others engaged in gaming, the "financial burden" argument does not hold water. Overall, however, it is not the "financial ability to defend" which is so important. What is crucial is that simple exposure of tribal interests to the common system of justice will in and of itself lead to more reasonable results, results which are unlikely now in a situation where the tribes are immune from the legal process.

Subjecting government entities, whether they be federal, state, local, or Indian, to judicial review of their actions is an important element of our system of government. Clearly, it encourages better and more responsible decisionmaking, and there is no valid reason to excuse the Tribes from such accountability.

### Conclusion

As stated by an Indian tribal court itself: "many sovereigns have waived sovereign immunity in a variety of contexts like the present one without in any way diminishing their sovereignty." Clement v. LeCompte, 22 ILR 6111, 6117 (Cheyenne River Ct. App. Jan. 12, 1994). This is the key principle which should guide future consideration of the tribal sovereign immunity issue. We are certain that appropriate

sovereign immunity waiver legislation can be crafted which protects legitimate tribal self-government and self-sufficiency interests. The problems raised by tribal sovereign immunity proponents can be adequately addressed if a full and objective investigation of the concerns on both sides of the issue is undertaken. On behalf of our Towns, we fervently request that your Committee, and other appropriate Committees, continue to review this issue and, based upon that investigation, draft appropriate tribal sovereign immunity waiver legislation. Thank you.

**WRITTEN TESTIMONY OF****JUSTICE ELBRIDGE COOCHISE (retired)****BEFORE THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS****SENATE BILL 1691 - SOVEREIGN IMMUNITY**

My name is Elbridge Coochise, I am a member of the Hopi Tribe from the Village of Sichomovi of the First Mesa Villages. I served as Associate Judge for my Tribe for 5 years prior to moving to the Northwest to serve 16 years in the Northwest Intertribal Court System as the Administrator and Chief Justice. I retired from the bench in July 1997 after 21 years full time on the bench of tribal courts. I served as President of the National American Indian Court Judges Association for 8 years (1988-1996). I hereby submit this written statement to address the subject of Senate Bill 1691, which is mockingly entitled, "the American Indian Equal Justice Act".

This proposed legislation would strip Indian tribes of their sovereign immunity so they could be sued without their consent, like any non-governmental entity. This legislation would also extend state court jurisdiction over tribes without tribal consent. If enacted, this legislation will undermine and potentially destroy tribes' abilities to function as tribal governments, financially and politically.

This is a direct attack on our people, the Treaties and Executive Orders entered into by the United States and tribes. The treaties were based upon the mutual consent and respect between the American Indian Tribes and the United States government.

Our reservation was set aside for our tribal use, and should be left under our control, jurisdiction and administration.

Indian Nations are well aware of the issues cited in S. 1691 and have been addressing them in numerous constructive ways. We must seek the cooperation of federal and state officials to help us to continue solving these problems through constructive measures. These new mechanisms will rely on the principles of dignity, authority and respect of each of the sovereign governments. The present legislation is both carelessly drawn in the heat of political passions and narrowly designed to serve the interests of just a few individuals while adversely affecting the lives and property of thousands of Indian people.

The most important thing to know about American Indian tribes is that they serve as the governments on Indian lands. Tribal self-government is recognized in the United States Constitution and hundreds of treaties, federal statutes, and Supreme Court cases. Self-government on Indian lands is the fundamental bargain that Indian nations struck with the federal government. As such, it is deserving of serious consideration by the Congress.



My Tribe of 10,000+ members will not benefit with any loss of sovereign immunity protections without our consent. This would mean our financial assets and resources could be devastated in any suit from unwarranted and frivolous suits against the Tribe.

Immunity from suit for governments is acknowledged as a time-honored and proper method for protecting the interests of a political community from narrow and sometimes dishonorable attempts by individuals to take for themselves at the expense of the many. This is an attack on the poorest of the poor of the United States. Indian governments have the same responsibility as the United States of America and each of its fifty states, to protect the public interest. We need to develop alternative solutions to address these issues based upon mutual consent and mutual respect.

Sovereign immunity - an integral aspect of tribal sovereignty is the ability of a tribe to determine when and under what circumstances it will be subject to court suit. This sovereign immunity holds that a tribe can not be sued unless it has agreed unequivocally to be sued. This waiver must be clear and unambiguous. Congress may also waive a tribe's immunity, but it too must act with clarity. Sovereign immunity possessed by tribes is the same immunity that is possessed by all governments, states and the United States.

- Sovereign immunity is essential for all governments to protect the public assets and scarce financial resources of tribes
- Sovereign immunity is essential to promote Tribal self-determination and self-sufficiency goals through economic development.
- Legally, lawsuits against Indian Tribes are barred by sovereign immunity absent a clear waiver by the Tribe or Congressional abrogation.
- Neither the federal government nor state governments have totally waived sovereign immunity.
- Any waiver should only be given by the tribes. This would be based on their needs and concerns as a government.
- Many Tribes have given limited waivers of immunity in certain cases, such as establishing loans; Indian housing; and for actions of their tribal officers, tribal councils and law enforcement personnel.
- A total waiver of immunity would impose upon the Federal Courts an abundant number of new causes of actions, when the Federal Courts are already overburdened.
- Tribal Courts do handle cases on issues of sovereign immunity, both at the trial level and appeals level, with both law trained and lay judges on the bench.

Sovereignty is the power of American Indian tribes to make their own laws and be governed by those laws. It is the right of tribes to have control over their lands, resources and the people who come onto those reservations. It is the right to enforce and have protected those promises made to Indian tribes by the United States in treaties and executive orders when the United States was appropriating Indian lands. It is the right of tribes to protect their members and all people and the lands and resources that were reserved by tribes. It is the right of tribes to control their own resources and destiny as a separate people and sovereigns.

- Indian Nations are governments with the right to make their own laws and be governed by them.
- Indian Nations function as governments - just as the United States deals with states and foreign nations as governments, so it deals with Indian Nations as governments.
- Indian Nations provide basic governmental services to their communities such as judicial systems, education, health care and law enforcement.
- Tribal governments have existed before the formation of the United States and have been confirmed and re-stated by every President since Richard Nixon.
- Tribes have historic and legal status as governments.
- Tribal governance is relevant in today's world and is modern, democratic, fair and deserving of respect as part of the American political system.
- American Indians are not considered a racial or ethnic minority. Because of their unique political status, American Indians are citizens of three sovereign governments: their Tribe/Nation, the United States and the state in which they reside.
- There are 558 federally-recognized Indian Tribes (approx. 2.0 million American Indians and Alaska Native Tribal members).

### JUDICIAL STRUCTURE AND DUE PROCESS

There are 254 court systems in Indian country, many of these tribal courts have been in existence since 1934 or thereafter providing judicial services to their tribes. The Northwest Intertribal Court System (NICS), a circuit court, in the state of Washington where I served as the Chief Justice and Administrator for the past 16 years, served 14 tribes, provided fair and equitable judicial services (both trial and appeals) to our members and people who reside within the borders of our reservations, under each Tribe's Constitution and Laws that are enacted by the Tribe's legislative body, the Tribal Council. The Hopi court also operates under the Constitution and ordinances of the Tribe.

In almost each tribe that I have served as a judge of the trial court and as justice of the appeals court, the tribe(s) under their Constitution have incorporated the Indian Civil Rights Act and the Bill of Rights of the U.S. Constitution by such language as "and any rights guaranteed to any citizen of the United States". In serving as a jurist, we have reviewed cases under the laws of the tribe including the bill of rights as adopted by the tribe's constitutions.

In deciding cases before the tribal courts, we have considered the rights of individuals and in many cases have ruled in favor of individuals in actions against tribes. (See attachments: summary of appeals cases from the Northwest Regional Tribal Supreme Court, 21 cases. Non-Indian won in 2 of 4, 50% of cases against tribes, Indians won 11 of 12, 92% of cases against tribes)

The Tribal Courts can best be compared to a court of general jurisdiction. The courts have jurisdiction over criminal cases involving Indians. It has jurisdiction in civil cases, civil infractions over all people. In the NICS court system the judge and prosecutor handle court on the reservation and are not members of the Tribe. The Tribal Courts encourage attorneys and qualified spokespersons to practice before the court.

The Constitution and Tribal Code provide for basic protections and ensure due process. Judges are appointed for certain terms and can only be removed for cause. In my 21 years, I have ruled many times in favor of individuals in actions against a tribe and have never been fired or replaced for my judgments. Judges can be disqualified from a case, by a party submitting an affidavit of prejudice.

There is an appeal process, where parties may appeal a decision of the tribal trial court to a panel of three judges. Those appellate judges are composed of attorneys in private practice, judges from other tribal courts, judges from the state court or retired state judges. All appeals heard require written opinions which explain the reasons and analysis of their decision and are available to the public. In the Northwest there are currently four volumes of appellate opinions available from the Northwest Regional Tribal Supreme Court, operated by the Northwest Intertribal Court System, under which many tribes' appeals are handled.

Jury trials, which is part of the Tribal Court are allowed for any person at their request. Jury trials are utilized even if not used extensively at all tribes, it is a process that is available.

The NICS Tribes and the Hopi Tribe are not insensitive to, nor unaware of, the needs of non-tribal members or non-Indians on the reservation. The tribes have put in place mechanisms which ensure due process in tribal forums for tribal and non-tribal members on the reservations for their personal safety, protection of the resources and private personal properties.

Tribal sovereign immunity does not put anyone at risk who live within the reservation boundaries. At tribes, many non-Indians may use the tribal court to resolve their disputes. The non-Indians on the reservation would most likely obtain access to justice for less money and in less time than is available in nearby state courts. Even if a tribal government is immune from unconsented suit in federal court, tribal government officials are not and may be sued to restrain unconstitutional action under the Indian Civil Rights Act of 1968.

#### **TORT CLAIMS**

Sections 4 and 5 of S. 1691 create a special Tort Claims Procedure for Indian tribes, allowing tribes to be sued in federal court for money damages for loss of property, personal injury, or death caused by the negligent or wrongful act or omission of an Indian tribe, to the same extent that a private individual or corporation is liable in the state where the act or omission occurred.

The newly proposed Tort Claims Procedure ignores the fact that Congress has already effectively dealt with the problem of tribal government liability for tort damages. In the Indian Self-Determination and Education Assistance Act, Congress requires the Secretaries of Interior and Health & Human Services to obtain liability insurance or equivalent coverage of Indian tribes carrying out self determination contracts (638 contracts); and any policy of insurance so obtained must contain a provision that the insurance carrier will not "raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims . . . within the coverage and policy limits."



In some instances Congress has provided that the Federal Tort Claims Act applies to programs and services that Indian tribes now carry out instead of the federal government. The Indian Self-Determination Act statutory insurance requirement described above, is incorporated in the tribe's PL-638 Contracts with the federal government. Virtually all services and programs at tribes are delivered pursuant to these '638 contracts, hence, there is insurance coverage or Federal Tort Claims Act coverage for whatever claims might arise. In addition, the tribes purchase general liability insurance and waives its immunity to the extent of such coverage and policy limits.

S. 1691 proports an across-the-board waiver that could weaken and destroy tribal governments, totally ignoring the fact that Congress has already provided a careful scheme to provide redress to deserving claimants while protecting the limited resources of tribes.

#### **RESPONSE TO CALEB H. JOHNSON'S TESTIMONY**

I am well aware of the Hopi Tribal Court process in civil matters, of the nature that Hopi Tribal Councilman Caleb Johnson complains of in his testimony on April 8, 1998 in Seattle, WA before this Committee. The civil action wherein Councilman Johnson alleges his due process rights were violated by the Hopi Tribal Court are unfounded.

In the Hopi Tribal Court, a civil action is started by filing a complaint, then service has to be made on the other party by the Complainant (plaintiff), then a affidavit of service has to be filed with the tribal court, the Respondent has 20 days to respond to the complaint after the date of service upon him. The tribal court at that point will set a date for a hearing after the expiration of the 20 days. The Hopi Tribal Court cannot take action on any civil action of this nature until the Plaintiff serves the complaint on the Respondent, plus files with the court a proof of service, normally an Affidavit of Service.

**FACTS:** Mr. Johnson filed his complaint in December 1997. Mr. Johnson did not serve the other party, the Hopi Election Board. That was the extent of his action on his complaint.

Mr. Johnson's due process were not violated by the Hopi Tribal Court. Since he only filed the complaint, did not serve the Election Board, thus not filing a proof of service with the court. The court could not act on his complaint. He has not followed the necessary procedures. One cannot complain of due process violations without following the normal process. If he knows the Hopi Tribal Court, as he alleges, he would have followed the required procedures as legislated for the court by the Tribal Council.

Mere speculation by Mr. Johnson on what may happen does not necessarily constitute denial of due process. The complaint has not been acted upon by the court because it has not been served on the respondent Hopi Election Board by Mr. Johnson. Nor is speculation on what the Election Board's attorney may argue before the Federal District Court, probably on the grounds of sovereign immunity, a denial of due process. The Hopi Court may very well agree with Mr. Johnson on allegations in his complaint after a hearing, but the court has not had the opportunity to act yet.



Mr. Johnson, as a Hopi Councilman, as part of the Tribe's Legislative Body is in a position to assist in the development and improvement of the Tribe's judicial process. The Tribal Council has the responsibility to enhance our court system by seeking and providing the needed resources, legislating the necessary ordinances and rules to operate a viable court system for our people.

#### **RECOMMENDATION**

S. 1691 is clearly inappropriate, and the methods proposed for solving a long standing problem are potentially destructive of Indian rights and the rights of non-Indian citizens, the Bill does demonstrate the need for a diligent and accelerated cooperative effort between Indian and non-Indian governments to solve the problems of jurisdictional confusion and the imbalance between Indian peoples' fights and the rights of non-Indians on and near Indian reservations. Indian leaders in Indian Country, and I as a tribal member, believe there is a workable solution that will preserve the dignity and integrity of Indian, state and federal governments while providing an expeditious method of addressing intergovernmental disputes and problems of citizen rights.

Senator Gorton's efforts to reduce the sovereignty of Indian Tribes by the enactment of a Act by Congress to waive the sovereign immunity of tribes against law suits threatens the future of Indian tribes. Unilateral U.S. Government legislation pending before the U.S. Congress threatens to overturn more than two centuries of developing government-to-government relations between the United States and Indian nations.

The Tribal government structure was determined by the members of the Tribe. The actions by that government are determined by the voting members. We choose to live under the traditional values and cultural norms of the our Tribe, plus have a constitutional form of government. My grandfather was the Secretary in the formation and passage of the Hopi Tribe's Constitution. The strength of our Tribe lies in the people, who want our Tribe to operate in the fashion it now exists.

**I strongly oppose the enactment of S. 1691 and any legislation to waive our Tribe's sovereign immunity** as this would mean financial devastation and the end of tribal governments. Any waiver must be left to the Tribe to determine.

Thank you for the opportunity to submit written comments on S. 1691 and Tribal sovereign immunity legislation.

Attachments:

Case summaries of NICS appeals (7 pages)

## NW INTERTRIBAL COURT APPELLATE CASES

## DUE PROCESS CASES 1993 -1997

<b>Type of Case:</b> Council	Housing	Guardianship	Exclusion	Due Process
<b>Appellant:</b> Officers-I	Gerstner-I	Grandma-NI	Dick, Tom-I	Baldy-I
<b>Respondent:</b> LowElwha	Hoopa	father	Burns-Paiute	Hoopa
<b>Ruling For:</b> Officers	Gerstner	Grandma	Dick	Hoopa

<b>Type of Case:</b> Exclusion	Housing	Gaming	Contract	Exclusion
<b>Appellant:</b> Charles-NI	Alcombrack-I	Parks-NI	Hatch-I	Lopez-NI
<b>Respondent:</b> Chehalis	Tulalip	Tulalip	Cultee-I	Chehalis
<b>Ruling For:</b> Charles	Alcombrack	Parks	no subj juris	Chehalis

<b>Type of Case:</b> DWI	Fishing	Housing	Employment	Tort
<b>Appellant:</b> LaClair-I	Lummi	Johnny-I	Hoopa	Paul-I
<b>Respondent:</b> Quileute	Kinley-I	Tulalip	Risling-I	Taylor-I
<b>Ruling For:</b> LaClair	Kinley	Johnny	Risling	Remand

<b>Type of Case:</b> Contempt	Due Process	Gaming	Writ	Writ
<b>Appellant:</b> Lang-I	Roberson-NI	Revay-I	Hoopa	Hoopa Health
<b>Respondent:</b> Metlakatla	Hoopa	Chehalis	Trial Ct.	Trial Ct
<b>Ruling For:</b> Lang	Hoopa	Revay	Denied	Denied

**Type of Case:** Due Process  
**Appellant:** Teeman-I  
**Respondent:** Burns-Paiute  
**Ruling For:** Teeman

NOTE: I= Indian NI= Non-Indian

Non-Ind. v. Tribe	(4)	Won 2	Lose 2
Non-Ind. v. Tr. Member	(1)	Won 1	Lose 0
Indian v. Tribe	(12)	Won 11	Lose 1
Ind. v. Ind.	(2)	1 no subj. Juris.	1 remanded
Writs	(2)	2 denied	

Number of cases 21

*Kowalski v. Lower Elwha Tribal Council*, 3 NICS App. 242 (Lower Elwha, 1993)

Appellant: Officers of Tribe's Business Committee

Respondent: Lower Elwha Tribal Council

Summary: Plaintiffs claimed they were removed from Business Committee following an alleged "Community Council" meeting. Without allowing oral argument on jurisdiction, trial court dismissed the action on the ground that it lacked jurisdiction over decisions of the Tribal Community Council, pursuant to the Tribe's Court Procedures Ordinance.

App. Ct.: Reversed and remanded for a hearing to determine whether there was, in fact, "community council action" and whether trial court had jurisdiction.

*Hoopa Valley Indian Housing Authority v. Gerstner*, 3 NICS App. 250 (Hoopa, 1993)

Respondent: Gerstner, the Director of Hoopa Valley Indian Housing Authority, who was terminated from her position.

Appellant: Hoopa Valley Indian Housing Authority.

Summary: Respondent appealed her termination to the TERO Commission. TERO Commission reinstated her. Housing Authority appealed to trial court. Trial court affirmed TERO decision.

App. Ct: Affirmed trial court holding, *inter alia*, that Respondent's job is a protected property interest and, therefore, the due process rights required under ICRA apply to any termination proceedings. Fundamental rights under ICRA include: timely and adequate notice of reasons for termination; effective opportunity to cross-examine witnesses and present case; impartial decision-maker; written record and decision; the initial burden of proof imposed on employer.

*In re the Welfare of D.D.*, 3 NICS App. 269 (Port Gamble S'Klallam, 1994)

Appellant: Child's maternal grandmother.

Respondent: Child's father.

Summary: 1988 Order of Guardianship appoints Appellant guardian of minor child. In 1992, child's father petitioned trial court for determination of guardianship. Trial court ordered that child remain with grandmother. In 1993, father moved for termination of guardianship, which the trial court granted.

App. Ct: Holding that the ICRA applies to termination of guardianship proceedings, appellate court reversed and remands on ground that Appellant was not afforded the opportunity to be heard.

*Burns Paiute Indian Tribe v. Dick*, 3 NICS App. 281 (Burns Paiute, 1994):

Appellant: Donavon Dick, Ruppert S. Tom., Robert L. Tooke, tribal members

Respondent: Burns Paiute Indian Tribe

Summary: Trial court excluded Appellants from the tribal reservation on grounds that Appellants had violated tribal traffic and criminal laws and ordinances. Appellants are tribal members who live on reservation, are married to enrolled tribal members,

have close ties to the tribal community. Appellants appeal exclusion order on grounds that: (1) trial court denied Appellants equal protection because other person with similar crimes were not excluded; (2) the exclusion ordinance was overly vague; and (3) exclusion violates Appellants' liberty interests in maintaining close relationships with loved ones.

App. Ct.: Trial court exclusion order reversed upon finding that Appellants had established an equal protection claim by showing both selective enforcement and improper motive by the Tribe in seeking exclusion. Further, exclusion impinges on liberty interest of maintaining close relationships; and ordinance was overly vague because it did not inform persons of what conduct might result in exclusion.

*Baldy v. Hoopa Valley Tribal Council*, 3 NICS App. 286 (Hoopa, 1994)

Appellants: Lyle E. Baldy, Sr., et al

Respondent: Hoopa Valley Tribal Council

Summary: Appeal from trial court order which denied Appellants' motion for summary judgment and upheld Tribal approval of enrollment application. Appellants appealed, alleging denial of due process.

App. Ct.: Affirms summary judgment order, ruling that publishing and posting notice of hearing which includes time, date, place, and purpose of hearing is sufficient to protect the due process rights of unknown interested parties.

*Chehalis Indian Tribe v. Charles*, 3 NICS App. 292 (Chehalis, 1994)

Appellant: Patricia Charles, non-member resident of reservation

Respondent: Chehalis Indian Tribe

Summary: Chehalis Business Committee filed petition, pursuant to Chehalis Exclusion Ordinance, to exclude Appellant from the reservation for disturbing the peace and delivering alcohol to a minor. Any person not a member of the Chehalis Tribe is subject to exclusion. Neither party submitted any evidence to the court. The trial court affirmed the Business Committee's exclusion of Appellant.

App. Ct.: Held that burden of proof rests with Tribe to establish with reasonable certainty that exclusion is warranted. Remanded to tribal court upon finding that trial court abused its discretion in upholding exclusion despite a lack of evidentiary support for the order.

*Tulalip Housing Authority v. Alcombrack*, 3 NICS App. 320 (Tulalip, 1994)

Appellants: Chad and Cindy Alcombrack, homebuyers

Respondent: Tulalip Housing Authority

Summary: Tulalip Housing Authority brought an action against Appellants for failure to pay rent and failure to abide by terms of a payback agreement. Both parties had signed a Mutual Help and Occupancy Agreement, which contained specific requirements regarding notice of termination of that agreement. Trial court entered an Order of Eviction and Judgment for back rent owed.

App. Ct.: Reversed on grounds that THA had failed to provide proper notice of termination



as required under the MHO Agreement. Tenant has property interest in housing which triggers ICRA due process protection.

*Parks v. Tulalip Gaming Commission*, 3 NICS App. 326 (Tulalip, 1994)

Appellant: Elida Parks, employee of Tulalip Casino

Respondent: Tulalip Gaming Commission

Summary: Tulalip Gaming Commission revoked Appellant's Class III Gaming license, as a result of which Tulalip Casino terminated Appellant's employment. Appellant appealed the license revocation to the Commission, which affirmed its earlier decision.

Appellant subsequently filed a civil complaint against the Gaming Commission in tribal court, alleging wrongful termination and unlawful revocation of her gaming license. Trial Court affirmed the revocation and dismissed Appellant's petition.

App. Ct.: Holding that tribal employment is a property interest which triggers ICRA protection, appellate court reversed trial court. Commission's failure to provide employee with adequate notice, fair hearing, and a written decision constitutes reversible error.

*Hatch v. Cultee*, 3 NICS App. 372 (Tulalip, 1995)

Appellant: Roy E. Hatch, tribal member

Respondent: Harry C. Cultee, tribal member

Summary: Appellant signed as guarantor on bank loan to Respondent. After Respondent's default on the loan, and upon Bank's demand, Appellant paid Bank. Appellant subsequently filed a complaint against Respondent in Tulalip Tribal Court, seeking repayment of monies which Appellant had paid to Bank. Trial court dismissed complaint for lack of subject matter jurisdiction.

App. Ct.: Trial court decision affirmed. Tulalip Tribal Code provides that the court must dismiss any claims before it when it appears that the court lacks jurisdiction over the subject matter. There is no tribal ordinance specifically governing the subject matter of this dispute, i.e., contracts; therefore, tribal court lacks jurisdiction.

*Lopez v. Chehalis Tribe*, 4 NICS App. 8 (Chehalis, 1995)

Appellant: Ray Lopez, non-tribal member

Respondent: Chehalis Tribe

Summary: Based on witness testimony, trial court entered an Order of Exclusion against Appellant for selling drugs in violation of Chehalis Tribal Code. Trial court found exclusion of Appellant was necessary to protect health, safety, and welfare of Chehalis community.

App.Ct.:

*Quileute Indian Tribe v. LeClair*, 1 NICS App. 50 (Quileute, 1989)

Appellant: Valerie Le Clair

Respondent: Quileute Indian Tribe

Summary: After a jury trial at which she was not represented by counsel, Appellant was convicted of driving under the influence. Appellant moved for a new trial, alleging that she had not been properly advised of the charges against her, nor of her right to counsel.

App. Ct.: Reversed and remanded for retrial. Held that procedural due process is fundamental to the operation of a tribal court, and the onus is on the tribal court to explain a defendant's rights to her and to afford defendant an opportunity to exercise those rights.

*Lummi Indian Nation v. Kinley*, 2 NICS App. 130 (Lummi, 1991)

Appellant: Lummi Indian Nation

Respondents: Rick Kinley and Carl Lane, Lummi Indian Nation members

Summary: Respondents were cited by tribal authorities for illegal fishing. They were charged with violating Lummi Business Council Resolution 89-108 (Count I), Lummi Fisheries Regulation No. 89-58, para. 2 (Count II), and Lummi Fisheries Regulation No. 89-58, para. 5 (Count III). Respondents were ultimately acquitted of all three charges. The Lummi Indian Nation appealed the trial court's dismissal of Count I. Respondents opposed the appeal on double jeopardy grounds.

App. Ct.: Dismissed the appeal. In the absence of language in the tribal code specifically granting the Nation the right to appeal in a criminal case, the appellate panel has no jurisdiction to hear the appeal. Even assuming the existence of specific statutory authority for the appeal, once the defendants had been tried and acquitted on Count III of the charge, double jeopardy barred re-trial on Count I because the elements necessary to establish a violation under either count were identical under the facts of the case.

*Johnny v. Tulalip Housing Authority* 4 NICS App. 16 (Tulalip Tribes, 1995)

- Appellant:** Tenants of the Tulalip Housing Authority  
**Respondent:** Tulalip Housing Authority  
**Summary:** The appeal originated as an unlawful detainer action filed by the Tulalip Housing Authority against the appellants. Among others, the issue of the adequacy of notice of termination was raised.  
**App Ct:** Held that according to the record, the notice of termination did not provide reasonable notice to appellant of the reason that the Housing Authority was seeking to terminate their right to continue to occupy the property. The decision of the trial court was reversed.

*Hoopa Valley Tribal Council v. Risling* 4 NICS App. 66 (Hoopa Valley 1996)

- Appellant:** Hoopa Valley Tribal Council  
**Respondent:** Tribal employee  
**Summary:** Both parties appealed from a Hoopa Valley Tribal Court Order affirming a Tribal Employment Rights Ordinance (TERO) Commission decision not to recuse TERO two Commission Chairpersons from deciding a grievance before the Commission. The grievance concerned an appeal to the Commission of a decision by the Tribal Council to suspend and terminate respondent's employment with the tribe.  
**App Ct:** Employees are assured due process which includes certain minimal rights including adequate notice; a hearing by an independent arbiter, and the initial burden of proof is imposed on the employer. This court held that sufficient facts existed upon which the appearance of impartiality might reasonably have been questioned. Reversed and remanded.

*Paul v. Taylor* 4 NICS App. 73 (Tulalip 1996)

- Appellant:** Filed a defamation action in the trial court  
**Respondent:** ?  
**Summary:** Appellant filed a defamation action in trial court. The trial court dismissed the action without prejudice for failure to exhaust administrative remedies. Appellant filed this appeal.  
**App Ct:** The appellate court held that this case was an action in tort, the merits of which had not been addressed. If subject matter jurisdiction exists (personal and territorial jurisdiction were found) then "the litigants in this matter should be allowed an opportunity to fully develop the record." The order dismissing the defamation action was reversed and the matter remanded to trial court.

*Metlakatla Indian Community v. Lang* 4 NICS App. 86 (Metlakatla 1996)

- Appellant:** Lang, charged with liquor possession and resisting arrest.  
**Respondent:** Metlakatla Indian Community  
**Summary:** When appellant failed to appear for trial, the Magistrate's Court found him guilty by default and issued an arrest warrant. When the appellant appeared that same day he was found guilty of disobedience to a lawful court order, and a fine was imposed.  
**App Ct:** Reversed the trial court decision. The appellate court found that the appellant did not receive a meaningful opportunity to be heard in a full and fair hearing and that the decision that the appellant violated section 46 of the criminal code was also in error.

*In the Matter of Dario F. Robertson* 4 NICS App. 111 (Hoopa Valley 1996)

- Appellant:** Mr. Robertson  
**Summary:** Mr. Robertson appealed an order of the Hoopa Valley Tribal Court finding that he had been practicing law on the reservation prior to March 4, 1996 and ordered that he be admitted to the tribal court bar. Appellant alleges, among other issues, that he was denied due process by the trial court's failure to hold a de novo hearing prior to issuing its order. The appellate court determined that appellant had a fair opportunity to respond to the charges against him. (He submitted a twenty-page brief.)  
**App Ct:** The court held due process requirements were satisfied.

*Reyay v. Chehalis Tribe* 4 NICS App. 133 (Chehalis 1996)

Appellant: Former casino employee

Respondent: Tribe

Summary: The appellate appealed the trial court order finding him guilty of fraud. The trial court denied employee's motion to dismiss, and proceeded to trial over employee's objections that he had not received the discovery requested (per subpoena) from the Tribe. The issue was whether the trial court erred in proceeding with trial over appellant's objections that he had not received the discovery he requested per the court's subpoenas and that he claimed was necessary for preparation of his defense. There was little or no relevant tribal law for the appellate court to review, it therefore, looked to federal and state authority for guidance.

App. Ct.: The appellate court reversed the trial court decision. "This Court finds that although there was no error in denying defendant's motion to dismiss, once it became clear that defendant had not received all the material which he requested and for which that trial court had issued subpoenas, the trial court erred in allowing the hearing to proceed."

*Hoopa Valley Tribal Council v. Hoopa Valley Tribal Court* 4 NICS App. 167 (Hoopa Valley 1997)

Appellant: Tribal Council

Respondent: Tribal Court

Summary: Hoopa Valley Tribal Council filed a petition for writ of mandate to reverse trial court's denial of petitioner's motion for summary judgment.

App. Ct.: The court held that issuance of writ of mandate is an extraordinary measure which is discretionary and reserved for those exceptional circumstances in which no other form of relief is available. This matter had not yet proceeded to trial. The court favors a determination on the merits, after which the parties have available the appeals process. The court denied the petition.

*Hoopa Health Association v. Hoopa Valley Tribal Court* 4 NICS App. 169 (Hoopa Valley 1997)

Appellant: Hoopa Health Association

Respondent: Hoopa Valley Tribal Court

Summary: A Mr. Short was terminated from employment with the Health Association, filed a written complaint and was told by the Director that the complaint was not timely and that there would not be an investigation. Mr. Short obtained a writ of mandate from the trial court to compel the investigation. The Health Association filed a motion requesting the trial court to vacate the writ order. The trial court denied the motion. Appellant then petitioned to the court of appeals for a writ of mandate directing the trial court to vacate its decisions denying the motion to vacate.

App. Ct.: Court held that denial of motion to vacate is a discretionary act from which writ of mandate does not lie. The court favors a determination on the merits. The petition for writ of mandate was denied.

*Teeman v. Burns Paiute Indian Tribe* 4 NICS App. 185 (Burns Paiute 1997)

Appellant: Appealing from a guilty verdict and sentencing order

Respondent: Tribe

Summary: The issue was whether the trial court erred by denying the defendant a critical justification argument when she could not provide the court with evidence of federal legal authority recognizing self-defense.

App. Ct.: Reversed the trial court ruling. The appellate court found that due process rights were denied to the appellant (criminal defendant).



**TESTIMONY OF JOHN DANIELS, JR.  
CHAIRMAN  
OF THE  
MUCKLESHOOT INDIAN TRIBE**

**BEFORE THE  
SENATE COMMITTEE ON INDIAN AFFAIRS**

**REGARDING SENATE BILL 1691  
TRIBAL SOVEREIGN IMMUNITY**

**APRIL 7, 1998  
WASHINGTON STATE**

Mr. Chairman, and members of the Committee, I am pleased to submit this testimony on behalf of the Muckleshoot Indian Tribe (hereafter "Muckleshoot" or "Tribe"). In the view of the Muckleshoot Tribe, this bill seeks to remedy a problem that does not exist. Senate Bill 1691 denies the Muckleshoot Tribe, and all tribes, the right to make their own laws that affect their lands and resources. It abrogates the social and legal contract made between the United States and tribes when reservations were reserved in treaties as the homelands for tribes and their members. And, S.1691 unfairly singles out tribes among all sovereign governments for unfavorable and discriminatory treatment. The Muckleshoot Tribe opposes S. 1691.

This testimony will primarily address the issues of property and civil rights protection and how those matters would be affected by this bill. I will concentrate on the practical effects of sovereign immunity on the Muckleshoot Reservation. My goal is to provide by example testimony that shows that this bill is unnecessary. The Muckleshoot Tribe believes, however, that the broad destructive impact of this bill can not be overlooked or diminished by looking at discreet areas. Therefore, I will comment briefly on some additional matters that the Muckleshoot Tribe believes will assist the Committee in evaluating the merits of this bill.

#### **Sovereign immunity is a recognized protection enjoyed by all governments**

It is simply false to argue that tribes are the last governments to possess and rely on sovereign. All governments—state, local, federal and tribal—possess and rely on sovereign immunity where appropriate. The United States Supreme Court recently affirmed the absolute immunity of local and municipal governmental officials.<sup>1</sup> States rely on their immunity found in the eleventh amendment to the Constitution to avoid their federal duty under the Indian Gaming Regulatory Act to compact with tribes.<sup>2</sup> State governments have used their immunity from suit to extort a larger share of profits from Indian gaming operations. Those profits would otherwise be available to tribes to provide essential governmental services.

The Ninth Circuit Court of Appeals just last month affirmed the sovereign immunity of state

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<sup>1</sup>Boganet et. Al v. Scott-Harris, No. 96-1560 (March 3, 1998)

<sup>2</sup>Seminole Tribe v. Florida, 116 S.Ct. 1114 (1996)

officials in tribal court.<sup>3</sup> Thus, Congress' continued respect and support for tribal sovereign immunity is not an anomaly nor does it treat tribes in a manner different from other governments. Rather, the bill now under consideration would result in tribes being the only governments stripped of their immunity. This result is neither fair nor just.

It is not accidental that all governments possess and rely on sovereign immunity. It is a necessary protection of self government, not just for tribes but for all governments. Any government has broad responsibilities to those it governs. Indeed, it has a duty to persist as a government so that essential governmental services may be provided. No government, much less a tribal government which is often the most vulnerable, can withstand the onslaught of claims that might make it impossible for governments to carry out their broader duties to their citizens. As a result, tribes act to accommodate the needs of their citizens and the duties of government in the same way as other governments act - through the judicious and **knowing** waiver of immunity in appropriate cases coupled with appropriate protections for the safety of the government.<sup>4</sup>

This bill is all about sovereignty and whether the United States will continue to recognize tribes as governments and address issues that affect tribes and other sovereigns on a government-to-government basis consistent with the laws passed and policies articulated by this Congress since 1968 with the passage of the Indian Self Determination and Education Act. Senate bill 1691 is reminiscent of the legislative actions of the termination era. During that time, the United States attempted to undermine tribal governments. The attempt was a dismal failure as tribes refused to accede to the federal invitation to cease to exist. Termination did not work then and its most recent incarnation in the form of S. 1619 will not work now.

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<sup>3</sup>State of Montana v. Gilham, 133 F.2d 1133 (9th Cir. 1988)

<sup>4</sup>This, of course is exactly how the federal government operates. It, too, has sovereign immunity. It has waived that immunity, but only in limited circumstances and in limited forums. Tort claims can only be brought under the Federal Torts Claims Act, 28 U.S.C. 1346(b) §§ 2671 *et. seq.* Other claims against the federal government must be brought under 28 U.S.C. §§ 1491 *et. seq.* The United States has acted to accommodate its immunity and the need to protect the essence of government with the need to protect citizens. This is exactly what tribes do. And, it is exactly what S. 1691 would destroy in Indian country.

**A Congressional waiver of sovereign immunity is not necessary  
to address tort claims.**

An asserted goal of S. 1691 is to provide remedies to non-Indians who might be injured or otherwise have a tort claim against a tribe. The solution proposed in S. 1691 is to give those persons a right to sue tribes in federal and state court accompanied with a blanket waiver of a tribe's sovereign immunity. This provision attempts to address a problem that does not exist. Congress has provided protection by extending the Federal Torts Claims Act to tribal employees working under a federal 638 contract who cause such harm.<sup>5</sup> Since the inception of self-determination, tribes have assumed control over more and more federal programs under 638 contracts. As a result, a large number of accidents that might occur involving tribal employees are covered by the Federal Tort Claims Act. As a result, an injured party has the same rights and remedies as a person injured by a federal employee.

Senator Gorton's example, which attempts to show why a waiver is needed, proves just the opposite. Senator Gorton uses the example of a person injured on the Yakama Reservation by a Yakama law enforcement officer who, the Senator asserts, was left without a remedy. In fact, in that case the person injured made a claim under the Federal Torts Claims Act. The claim was resolved and the injured party was compensated. Under the Federal Torts Claims Act tribes are the ones that are disadvantaged, not persons who make claims. It often takes a long time for the appropriate federal bureau to determine whether the Act will apply. During the period between the time the claim is filed and the decision is made, a tribe is often required to defend its employee.

Where the Federal Torts Claims Act might not apply, many tribes have purchased liability insurance. This is exactly what the Muckleshoot Tribe has done. Liability insurance coverage is in place with respect to claims that arise on Muckleshoot tribal sites and at its enterprises. The Muckleshoot Reservation's prime asset is its location. The Tribe depends on and encourages trade with non-Indians. Not only is providing protection for the safety of its non-Indian visitors the correct course, it is absolutely essential to the success of the Tribe's enterprises. The Muckleshoot Tribe

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<sup>5</sup>The Federal Torts Claims Act applies only when the tribal actor is working under a federal contract. However, under the policy of self determination, and the contracting by tribes of federal activity, this act has broad applicability.



spends over \$191,000, every year on liability coverage. It has provided a limited waiver of its sovereign immunity to the limits of its insurance coverage. On the Muckleshoot Reservation, and we expect on most Indian reservations, there is existing protection for those who might be injured by a tortious act of a tribal employee. There is no need to change federal law or impose a blanket waiver of sovereign immunity.

The bill is focused on alleged impacts to non-Indians. However, I want to inform the Committee that on the Muckleshoot Reservation our concern is for all persons who might be affected. Some tribes are able to administer a workmen's compensation program on their own. Others join a state program. The Muckleshoot Tribe, on the other hand, protects its employees by purchasing private workmen's compensation insurance. Benefits equal to those allowed by the state are provided. The cost of this program is \$264,043 per year. Finally, the Muckleshoot Tribe provides health benefits to its employees. This benefit costs the Tribe \$3,141,751 per year. Health insurance is provided even though those employees who are Indian would qualify for federal health programs. The Muckleshoot Tribe feels it is important that all of our employees have access to quality health care. No matter what road a tribe takes, the result is the same: workers are protected. Once again tribes have found ways to accommodate immunity and tribal responsibility.

#### **Contracting is not affected by tribal sovereign immunity**

The Muckleshoot Tribe simply has never experienced any difficulty in contracting as a result of its sovereign immunity. Each time that the Muckleshoot Tribe needs to contract with another private party or government, it does what any contracting party would do: it negotiates the terms of the transaction. In the course of those negotiations sovereign immunity often arises. In the context of a particular transaction the Tribe and its contracting partner can determine whether and to what extent a waiver would be appropriate. No private party is required to contract with the Tribe. Likewise, the Tribe is not required to contract. It is when both parties find benefit that there will be a contract. In evaluating the relative benefit of a transaction, sovereign immunity is properly evaluated by all parties. To the extent that a party feels that a waiver in the particular transaction is needed it will be negotiated or the deal will not be made.

The Muckleshoot Tribe enters into contracts involving hundreds of thousands, even millions

of dollars each year. Contracts to construct Tribal buildings, provide Tribal services, and employ needed Tribal consultants and professionals occur daily. None are impeded by the fact that the Muckleshoot Tribe has sovereign immunity. The Muckleshoot Tribe has developed a thriving gaming enterprise that employs hundreds of members and non-members and utilizes numerous vendors without any concern for or with sovereign immunity.

Sovereign immunity is simply not problematic and certainly need not be addressed in federal legislation. Waivers are specific to each contract. The waiver is tailored to the needs of the Tribe and to the other parties involved. This insures that the needs of all of the parties are met and that the overall interests of the Tribes are not inadvertently or adversely affected.

A Congressionally mandated blanket immunity will undermine the system of contracting that has developed in Indian country. It will disrupt the balance now struck in these negotiations. The parties to contracts with a tribe are generally sophisticated and knowledgeable. Each party enters the transaction with open eyes and the ability to defend its interest. In short, the contracting arrangement now in place in Indian country is not broken. It does not need to be fixed.

#### **Fairness and due process exist in Indian country**

Senator Gorton's bill implies, indeed states, that fairness and due process do not exist with tribes and in tribal courts and as a result these matters need to be addressed in federal and state courts. This is simply a false premise. It reflects Senator Gorton's failure to look closely at how tribes govern. The Muckleshoot Tribe provides a good example of what actually goes on in Indian country. The Muckleshoot experience is a particularly good "snap shot" of Indian country because the Muckleshoot Tribe is not a large tribe with a wealth of natural resources to support its government. Yet, it has developed a system of government that protects Tribal interests and at the same time assures that all who come to the Muckleshoot Reservation or deal with the Tribe will be treated fairly. Our experience is not unique among tribes.

The Muckleshoot Tribes has established a Tribal Court system with both trial and appellate divisions. The Muckleshoot Tribe was faced with the dilemma of establishing an efficient court system for a smaller tribe on a relatively small reservation. Despite the size of the Muckleshoot Tribe, its legal needs are equal to any government and the need to have an effective court is no less

important. The Muckleshoot Tribe solved this problem by joining with other similarly situated tribes in the Puget Sound area to form the Northwest Intertribal Court System. This system provides circuit riding judges that are available to many tribes. At the same time each tribe formulates its own laws and rules to meet the unique need of the particular tribe and reservation. The Muckleshoot Tribe has its own criminal code and rules of court. The court utilizes law-trained judges and specially trained advocates. The court system on the Muckleshoot Reservation mirrors courts found in any jurisdiction. Of course, when matters involve only Tribal members or particularly sensitive internal matters, particular attention is paid to the traditions of the Muckleshoot people.

The Muckleshoot Tribe deals with non-Indians every day. Non-Indians pass through the reservation and patronize its gaming facilities and other economic enterprises. Non-Indians often seek to develop lands on the reservation. The Muckleshoot Tribe has developed its laws to reflect a need to insure fairness for all who seek to live on or pass through the Reservation. One example of how the Muckleshoot Tribe approaches its responsibility is the Tribe's zoning code. The code provides several layers of process to insure that any person with a land use issue is treated fairly. The Tribe's Planning Commission is responsible for administering the Tribe's zoning code. If an issue arises a party is entitled to a hearing in front of an impartial hearing officer. That decision may be appealed to the Tribal Council. Finally, if a party still feels that he or she is aggrieved by the decision, the matter may be appealed to Tribal Court. There, a judge from the Intertribal Court System hear the case. It certainly defies credulity to say that a party on the Muckleshoot Reservation is denied due process of law in dealing with the Tribe.

Tribal governments exist within wider communities that include both on- and off-reservation interests. Tribes have and continue to craft tribal laws that address the needs and rights of those with whom they have contracts. This bill fails to recognize that tribes have already taken steps to insure fairness and due process to all who live on or have contact with them. The Muckleshoot Tribe is but one example of how tribes have met this challenge.

People who complain about tribes and couch those complaints in the guise of due process do not really complain about process. There is plenty of "process." They complain simply because they do not like the fact that they do not always win. Tribal law will often not allow them to build or develop in a way that damages natural resources, harms wildlife, threatens cultural resources, or

ignores treaty and other federal rights. Their complaint would be as strong against any government that sought to reign in their unfettered private development desires. But what is clear is that the problem is not one of lack of due process or fairness.

Similarly, many Indian people feel that they will not be treated fairly in state courts. Yet, no one is advocating that the state waive its immunity in tribal court. The proper inquiry in either case is to insure that there is fairness in all forums. A waiver of tribal sovereign immunity is no more necessary than a waiver of state immunity.

Non-Indians do not lack remedies when they feel that a tribe has wrongly affected their interests. Federal court now--without new legislation--will review an assertion that a tribe lacks jurisdiction over a party or claim. All that is required is that tribal remedies be exhausted prior to initiating the federal court action.<sup>6</sup> In those cases where an affected party feels that a tribal official is acting outside his or her authority immunity, there may not be a bar in a federal court action against the tribal official even though it remains as a bar to an action against the tribe itself.<sup>7</sup> Whether the remedies have been crafted by a tribe, or are present as a result of existing law, there simply is no credible argument that members or non-members of a tribe, Indians or non-Indians lack due process in dealing with tribes.

**The right and duty to regulate property use on Indian reservations  
is an integral aspect of tribal sovereignty**

In our testimony we have been asked to address the issue of property rights on an Indian reservation. The issue is not one of a lack of process or fairness. Nor is it a matter of a lack of remedies. For the Muckleshoot Tribe, the issue generally takes the form of non-Indian interests both on and off the Muckleshoot Reservation trying to stop needed Tribal development. I would like to address this issue by discussing the Tribe's Amphitheatre. This discussion needs to begin with a brief history of the Muckleshoot Reservation and the efforts of the Tribe to develop its Reservation.

The Muckleshoot Reservation was reserved in 1855 under the Treaty of Medicine Creek. The

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<sup>6</sup>National Farmers Union Insurance v. Lodge Grass School District \_\_ U.S. \_\_, (1985)

<sup>7</sup>Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).



Reservation was enlarged in 1874 and today includes only 3600 acres. It was reserved for the Indian people that lived along the Cedar, Black, Green and White Rivers. These people refused to move to other reservations. As a result, the United States reserved a separate reservation for the people now known as the Muckleshoot Tribe. The reservation, while it lacked great size, had the advantage of being close to the rivers and lands where the Tribal members gathered, fished, hunted and engaged in religious rites. This was to be the homeland for the Muckleshoot people. It had on it or nearby all that would be needed to sustain the Muckleshoot people. While the Muckleshoot people had given up title to thousands of acres of land, its home on the Muckleshoot Reservation coupled with its retained treaty right to hunt and fish off-Reservation would sustain them into the future. Or so they thought.

Time was not to be on the side of the Muckleshoot Tribe and its people. The Tribe and its Reservation were caught in the tidal wave of off-Reservation development. Its fisheries were polluted or destroyed by the development of central Puget Sound and the growth of Seattle and Tacoma. The State unlawfully interfered with the treaty right to fish on those fish that remained.<sup>8</sup> The forests that had been the ancestral hunting and gathering places for the Muckleshoot people were now logged over or turned into suburban developments. What had been promised in 1855 was no longer available to the Muckleshoot Tribe and its members. Yet, the Tribe still had the obligation and duty to provide jobs and services to its members. It turned to its reservation.

The Muckleshoot Reservation has no great abundance of natural resources. The White River that passes through the Reservation had been diverted at the turn of the century by a private power company. Little water was left to support a fishery on the Reservation. The Tribe's only resource was its location and ability to provide services to those who would come to the Reservation. Yet, each time the Tribe tried to develop its reservation it was faced with unceasing opposition from its

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<sup>8</sup>It was not until 1974 that the federal courts finally ruled that the State's pattern of discrimination against the tribes in their exercise of treaty fishing was to stop. United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9<sup>th</sup> Cir. 1975). The United States Supreme Court, which had originally refused to review the case revisited and affirmed the decision in 1979. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). The belated Supreme Court review was occasioned by the refusal of the State to comply with the law.

off-reservation neighbors and other non-Indian interests.

The Tribe developed a small trailer park to house persons of limited means. It was opposed. The Tribe began a modest bingo business. It, too, was protested. The Tribe expanded its bingo operation into a tasteful and now successful gaming operation. This again was protested and opposed. Thus, every time the Tribe tried to develop its limited land resources the surrounding non-Indian communities protested and opposed the development. The reasons were different, but they amounted to the same refrain: the development would adversely affect the lifestyles of the non-Indians in the area. What is both unique and surprising in the case of the Muckleshoot projects is that much of the most vocal opposition came and continues to come from off-reservation non-Indian interests.

To the Muckleshoot Tribe there was no small irony in this objection to Tribal development. No similar objection was made when the Muckleshoot way of life was destroyed, its lands were sold, subdivisions developed, and fish and wildlife destroyed. Yet, any Tribal action is seen as a threat to the non-Indian residents of the surrounding area.

It is in this context that one must see the Tribal Amphitheatre project. The Amphitheatre is merely the most recent Tribal effort to provide for its members from its small reservation that is again being opposed by non-Indian interests. From this history, it is clear that no Tribal project, no matter what its scope or content, would find favor with our non-Indian neighbors.

The Amphitheatre is the largest economic project ever undertaken by the Muckleshoot Tribe. It is intended to be a performing arts pavilion that will provide a wide variety of musical and other cultural events to the community. We intend to make these presentations available in a park-like setting suitable for family entertainment. Our season will only amount to about 30 or 40 events per year. At other times, the facility will be available to expose youth to Coast Salish culture and for tribal cultural events.

The Amphitheatre will provide jobs for Tribal members as well as much needed non-gaming revenues to assist in meeting Tribal needs in the areas of social services, health care, education, youth programs and other services that have been (and we expect will continue to be) the subject of drastic federal budget cuts. The Tribe sees the Amphitheatre as one viable way for the Tribe to continue to meet the needs of its members as we enter the next century.

That the Muckleshoot Tribe chooses to develop a small parcel of land on its reservation does not mean that it is unmindful of potential environmental consequences. The Muckleshoot Tribe knew that this project would require solid environmental planning. We believe we have met this challenge. Sound levels from all events will meet the requirements of all neighboring jurisdictions. The U.S. Army Corps of Engineers is currently reviewing a wetlands permit application for the Amphitheatre project and is conducting a comprehensive environmental review of the entire project. A comprehensive traffic mitigation and management program were developed as part of the project to minimize traffic impacts. The Washington State Department of Transportation is currently reviewing the traffic aspects of this project in order to issue required permits. Environmental review is part of that process.

The Tribe has consulted and continues to consult with those local governments that will meet with the Tribe to discuss the potential impacts of the project and ways to mitigate any adverse consequences. We are pleased that King County has elected to meet with the Tribe and to work with us to resolve potential difficulties. The type of governmental discussions that are taking place between the County and Tribe are the government-to-government discussions that are needed to solve matters that exist between any governments. It is these problem solving activities that the Congress should be supporting. Congress should not be attempting to enact legislation that will undermine the willingness and ability of local governments to work together. This is exactly what S.1691 would accomplish.

Of course if an opposing community or group has no other agenda then to stop the project they will refuse to meet with the Tribe and address honest issues of mutual concern. Unfortunately, this is the case with some of the smaller communities off of the Reservation and with certain individuals. They have chosen to bring belated law suits to stop the project. Our efforts to engage these groups and communities have proven unsuccessful. There is again a certain irony to this refusal to meet with the Tribe. For example, Enumclaw, a small community adjacent to the Muckleshoot Reservation and not directly affected by the project, stands in opposition. Yet, each summer Enumclaw hosts the King County fair, one of the largest in the State. It invites tens of thousands of visitors to the fair. Each of these visitors must pass of over the same roads that Enumclaw says cannot handle the traffic for our Amphitheatre. The fair will directly benefit

Enumclaw while the Amphitheatre will benefit the Muckleshoot Tribe. Apparently, therein lies the difference. Other private parties who opposed the Amphitheater are most likely being supported by the only competing Amphitheater in Washington located in George, Washington. One cannot help but question the motives of such support.

The Muckleshoot Tribe relates this story for several reasons. First, we will and must continue to develop our Reservation. We have little land and virtually no natural resources. At the same time, we have the same need to provide for our members. Needed services must be provided. Unlike other communities we cannot travel to other locations in order to meet the needs of our members. Our home is the Muckleshoot Reservation. It is there that our needs must be met. Second, the Tribe has the right to preserve its society. That non-Indian interests see Tribal progress as an adverse impact on their lifestyle is no reason that the Tribe must forgo steps needed to meet the needs of the Tribe. As noted above, the Muckleshoot Tribe does not have the luxury of moving to a new suburb, town or city. Its home is and will always be on the Muckleshoot Reservation. Its choice is simple: to use the limited land it has available for the benefit of its people or lose the ability to meet their needs. Finally, we are now and have always been willing to meet with local governments to address real issues of mutual concern. When King County came forward to address these issues we were ready to meet with the County. Several meetings have occurred at a staff level to educate King County staff about all aspects of the Amphitheatre project. This is the proper way to address land use matters on an Indian reservation. Misguided legislation to strip tribes of their regulatory power or to subject them to suits in a manner different from any other government is not needed. It will only embolden those who oppose any Indian advancement and who refuse to meet with tribes.

Thank you for the opportunity to present this testimony.



# **NATIVE AMERICAN COMMISSION ON CHILDREN AND FAMILIES**

39015 - 172nd Ave. SE  
Auburn, WA 98092  
(253) 939-6648, Ext. 145

April 3, 1998

## **TESTIMONY OF**

### **Andy de los Angeles, Tribal Chairman of the Snoqualmie Tribe PRESENTING A POSITION STATEMENT OF THE Native American Commission on Children and Families**

Mr. Chairman and Members of the Committee, my name is Andy de los Angeles. I am the Tribal Chairman of the Snoqualmie Indian Tribe. The Snoqualmie Tribe is one of 17 Indian Tribes and Urban Organizations that are members of the Native American Commission on Children and Families, NACCF.

The Commission is organized to provide a united voice on behalf of Native American children and families in Washington State. NACCF promotes and encourages effective working relationships with local, state and federal agencies to improve opportunities for Native American children and families.

NACCF believes that S. 1691 has serious ramifications and consequences for all Native American families in this state both on and off Indian reservations. The Tribes and the State have a strong history of cooperatively working out many problems. Most current and past governors have opened dialogue to arrive at agreements in many arenas that impact all Indian families.

As an example, the Tribes, NACCF and the State have pioneered and developed cooperatively state law and policy in implementing the Indian Child Welfare Act. This work has affected how social work is being managed across the nation for Native Americans and non-Natives today.

Washington State Governor Locke has already made his opinions known about weakening Tribal Governments. He stated that, in his view, those provisions (H.R. 2107: waiver of Tribal sovereign immunity upon receipt of TPA funds) "would undoubtedly weaken the political, social and economic infrastructure needed to ensure healthy, stable Tribal communities." He concluded by stating that he believed that the provisions "would negatively impact all of Washington's citizens, as well as Tribes and communities throughout the country."

The history of Native American families is a poor one. This history is reflective of the development and evolution of Tribal governments and the services they provide. Should S. 1691 pass, and sovereign immunity be limited or wiped out, the Tribe's right to govern themselves would be undermined and would adversely affect services to Native American families everywhere.

Tribes losing lawsuits would be devastated. Tribes would be forced to reduce social, health, educational or employment services to their members. Many families would have no choice but to leave the reservations, essentially abandoning the only cultural home they have ever known.

Native American children and families individually may not understand sovereign immunity and perhaps that is not what S. 1691 is really all about. It is ultimately about forcing Indian families and children off the reservations because that will be the result.

S. 1691 is an old, paternalistic scheme approach to make Native American children and families dissolve into the melting pot. This bill is a vicious attempt to eliminate Tribes of their status as sovereign Nations and violates the trust responsibility of the U.S. government.

This Commission is strongly opposed to this bill, and is urging this Committee to stay the course in providing support for Tribal self-determination and self-governance.

TESTIMONY OF BRADLEY G. BLEDSOE DOWNES, MICHAEL G. PHELAN  
AND THOMAS P. SCHLOSSER, ATTORNEYS FOR HOOPA VALLEY TRIBE OF  
CALIFORNIA AND SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

BEFORE THE U.S. SENATE COMMITTEE ON INDIAN AFFAIRS OVERSIGHT  
FIELD HEARINGS ON TRIBAL GOVERNMENT SOVEREIGN IMMUNITY AND  
S. 1691, APRIL 7-9, 1998

April 20, 1998

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I. INTRODUCTION

Bradley Bledsoe Downes is the Senior Attorney, Office of Tribal Attorney, Hoopa Valley Tribe, Hoopa, California. Mr. Downes has represented the Hoopa Valley Indian Tribe since 1995. Michael G. Phelan is General Counsel for the Saginaw Chippewa Indian Tribe of Michigan. Mr. Phelan has represented the Saginaw Chippewa Indian Tribe since 1992. Thomas P. Schlosser is a member of the law firm Morisset, Schlosser, Ayer & Jozwiak. Since 1975, Mr. Schlosser's law practice has exclusively involved federal Indian law issues and representation of Indian tribes and tribal organizations, including the Hoopa Valley Tribe of California and the Saginaw Chippewa Indian Tribe of Michigan.

As tribal attorneys we have first hand experience with assertions of federal, state and tribal sovereign immunity. As a result, we strongly oppose S. 1691. Sovereign immunity is a complex web of statutory provisions and judicial interpretations; it is often misunderstood both by lawyers and laymen. First, it is plain to us that many of the witnesses who supported S. 1691 in the Committee's March 11, April 7, April 8 and April 9, 1998 hearings were concerned about matters having nothing to do with sovereign immunity, such as limits on state regulatory authority over Indian trust lands and other federal property (a result of statutes, treaties and the Supremacy Clause of the U.S. Constitution), or were describing situations where relief is available under existing law and sovereign immunity is not a bar, *e.g.* suits to stop tribal officials or others from violating law.

Second, supporters of S. 1691 fail to recognize that Indian tribal governments, like other governments, require protection for the exercise of lawful discretion and protection from claims that arise from normal government functions, such as provision of police and fire protection. Unless governmental property is protected by sovereign immunity and unless legislative bodies can draft provisions that strike a reasonable balance between the

compensation of claimants and the protection of the public, government cannot function. In short, S. 1691 would foreseeably halt governmental operations on Indian reservations by denying Indian tribes the protections retained by other governmental entities and, instead, treating them as individuals or corporations.

Third, S. 1691 changes substantive law. This bill does not merely create new forums for litigation, it changes the law applied by the courts. Accordingly, our testimony will define sovereign immunity, discuss S. 1691 section by section, and conclude with a suggestion to clarify the procedure by which federal claims arising within Indian County are heard and reviewed.

## II. WHAT IS SOVEREIGN IMMUNITY?

It is distressing to observe racially tinged animosity mustered to support a measure which will overturn two centuries of federal Indian law. Complaints voiced at the hearings that Indians fail to remit state tax revenues, or that Indians enter private lands to take shellfish, or that tribal officials construct an amphitheater contrary to the Washington Growth Management Act have nothing to do with sovereign immunity.

The doctrine of sovereign immunity is critically important *where* it truly applies. As Alexander Hamilton famously observed: "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." *The Federalist* No. 81, p. 130 (H.S. Commager, ed. 1949) (original emphasis).

But what suits by an individual are against the sovereign? The answer is that a suit is against the sovereign *if* "the judgment sought would expend itself on the public treasury or domain." *Land v. Dollar*, 330 U.S. 731, 738 (1947) (suit to compel U.S. Maritime Commission to return pledged stock, was not a suit against the sovereign; *Shermoen v. United States*, 982 F.2d 1312, 1319-21 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2993 (1993) (suit challenging Act that divided land and funds among tribes impermissibly sought tribal property protected by sovereign immunity).

Thus, when an individual tries to capture monies and property owned by a tribe in its governmental capacity, sovereign immunity may protect the tribe unless there is an exception, of which there are many. With respect to land, this principle is ratified at 28 U.S.C. § 2409a(a). That section allows suits against the United States to adjudicate a disputed title to real property in which the United States claims an interest unless the suit involves "trust or restricted Indian lands." As Senator Gorton himself noted in the April 7, 1998 hearing, although people may get judgments against the United States they cannot seize federal property.



Sovereign immunity does not prevent suits challenging the acts of individuals who violate federal or other applicable law. Although sovereign immunity provides limited protection of the public treasury or domain, it does not protect the officers of the sovereign. Like States, tribes cannot clothe their officers with immunity to protect them from the supreme law of the land. The landmark case of *Ex Parte Young*, 209 U.S. 123 (1908), which established that States cannot authorize officials to enforce a tax that violated the Constitution or laws of the United States, was recognized as applying to Indian tribal officials in *Santa Clara Pueblo v Martinez*, 436 U.S. 49, 59 (1978), and other cases.

Of course tribal governments act through officials and other individuals, just as other governments do. That simple fact, coupled with the recognized right of anybody to sue government officials, demonstrates that the complaints voiced by proponents of S. 1691 generally have nothing whatever to do with sovereign immunity. Sovereign immunity protects the public domain and treasury from unauthorized suits; it neither authorizes nor protects persons who violate the rights of another. Sovereign immunity does not permit wrongdoers to continue their misconduct. To the extent that perceived misconduct motivates S. 1691, the bill is simply misdirected.

### III. SECTION BY SECTION ANALYSIS OF S. 1691

S. 1691 has four separate components which are evidently intended to be attached separately or together to other legislation. Broadly speaking, section 3 of the bill involves tax collection actions in federal court. Sections 4 and 5 involve federal court jurisdiction of federal claims and enforcement of contract and tort claims. Section 6 creates state court jurisdiction over federal claims, state claims and enforcement of contract and tort claims. Section 7 would create a direct enforcement remedy in federal court for provisions of the Indian Civil Rights Act of 1968. These four components of S. 1691 have different but overlapping problems. None should be adopted.

#### Section 1. Short Title; Findings; Purpose.

S. 1691 is emphatically not a bill that would provide "equal justice" for suits against Indian tribal governments as compared to suits against the federal government or state governments. This section asserts that the bill is warranted because the federal government and States have restricted their sovereign immunity from suit but tribes have not. Both halves of the assertion are wrong.

Sovereign immunity is often raised as a defense by the federal and state governments, as further explained below. The bill would remove from Indian tribes immunity defenses retained by the United States and by the States. The bill does not purport to make tribal sovereign immunity coextensive with that of either the federal or state governments but proposes a total abolition of the defense for tribal governments. Many tribes have limited their own governmental immunity by legislation or court

decisions. However, S. 1691 deprives tribes of the right held by States and the federal government, to define which courts and administrative procedures should be used to process certain kinds of claims against their government.

Tribal sovereign immunity is presently limited by existing federal law. "[I]t is an inherent implication of the superior power exercised by the United States over Indian tribes that a tribe may not interpose its sovereign immunity against the United States." *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988). In addition, Congress has permitted suits concerning Indian reserved water rights. 28 U.S.C. § 1345. However, particularly in the area of tort law, as discussed below, S. 1691 would abolish for tribes governmental immunities that are retained by the United States and the States.

### Section 3. Collection of State Taxes.

This section creates federal district court jurisdiction to hear cases brought by States to compel a tribe, tribal corporation, or member of a tribe to collect state sales, use and excise taxes that are "imposed by the State on nonmembers of the Indian tribe as a consequence of the purchase of goods or services by the nonmember."

Section 3 is based on ignorance about how lawful taxes may be enforced under present law. Also, it would change the substantive law concerning what state taxes may be enforced within Indian country.

A "member of an Indian tribe" within the meaning of section 3 is not now protected by tribal sovereign immunity because of the *Ex Parte Young* doctrine, discussed above. Also individual Indians in many States are subject to state court jurisdiction under Public Law 280, discussed below. Whether a tribal corporation can be sued varies from case to case depending upon the law creating the corporation and the corporate charter. For example, when Congress authorized incorporation of tribal entities in the Indian Reorganization Act of 1934, it authorized appropriate partial waivers of the immunity of the tribal corporations, as set forth in corporate charters. See 25 U.S.C. § 477 and case law construing that section.

Present law permits states to enforce the collection of lawful state taxes on nonmembers who purchase within Indian country, but the States have been reluctant to bring such suits, preferring instead to negotiate tax collection agreements. There is no reason to add another enforcement forum under these circumstances.

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), and subsequent cases, the United States Supreme Court has held that tribes are required to collect sales taxes on non-Indian purchases of cigarettes in certain situations. In *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and in *Department of Taxation and Finance of New York v. Milhelm Attea*

& *Bras.*, 512 U.S. 61 (1994), the Supreme Court pointed out that States have several alternatives for enforcing the requirement of tribal assistance in collecting lawful state taxes, including precollecting taxes from wholesalers and the right to sue individual agents or officers of the tribe for damages caused by their neglect or refusal to carry out that duty.

Tribal officials and retailers are not protected by sovereign immunity because of the *Ex Parte Young* doctrine. In *Bogan v. Scott-Harris*, 118 S.Ct. 966 (1998), the Supreme Court reaffirmed a case in which local legislators were held liable for violating a court order to levy a tax sufficient to pay a judgement. The Court noted that the order had created a "ministerial duty" on the part of the legislators and stated, "[t]he rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct." *Id.* quoting *Amy v. Supervisors*, 11 Wall. 136, 138 (1871). After *Bogan*, it is clear that tribal immunity need not be abolished simply to help States enforce the requirements (established by other Supreme Court cases) that tribal agents and officials create records and collect certain taxes lawfully imposed on non-members purchasing imported goods on Indian reservations.

Section 3 would also improperly change substantive law concerning taxation within Indian Country. Section 3 creates a right of enforcement of "any excise, use, or sales tax imposed by the State on nonmembers of the Indian tribe." This provision would change federal law by authorizing state taxation of all nonmember purchases of goods or services in Indian country regardless of whether that tax is expressly or impliedly preempted by other federal laws. By looking only to whether the tax is "imposed by the State," S. 1691 would override the preemptive effect of federal laws concerning Indian timber, gaming, and other areas where state taxation of non-Indian purchases or services within Indian Country is precluded. Several cases illustrate the sweeping effect of section 3.

In *Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965), the Supreme Court held that through statutes and treaties the federal government exercises sweeping and dominant control over federal Indian traders which precluded the State's imposition of a gross receipts tax on the nonmember business trading within the Navajo Reservation. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), Arizona imposed on a non-Indian enterprise organized to conduct tribal logging operations a gross receipts tax, a motor carrier license tax, and a fuel tax. The Supreme Court held that the harvest and sale of Indian timber was the subject of a comprehensive federal regulatory scheme which left no room for state taxation of the non-Indian purchases and activities within Indian Country. In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the Supreme Court rejected licensing fees sought to be imposed by the State on nonmembers who hunt and fish on that Reservation. The Court noted that:



Concurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources. The Tribe would thus exercise its authority over the reservation only at the sufferance of the State. The tribal authority to regulate hunting and fishing by nonmembers, which has been repeatedly confirmed by federal treaties and laws . . . would have a rather hollow ring if tribal authority amounted to no more than this.

462 U.S. at 338.

In sum, section 3 would offer the States a tool for tax collection absent any showing that the tools already available will not work. Section 3 also changes substantive law to lift the preemptive effect of federal statutes and regulations that exempt from taxation the purchases of goods or services by nonmembers of a tribe or tribal corporation under certain circumstances, such as where value generated on the reservation is intended to be preserved to accomplish federal goals. *See Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990). (California could not impose timber yield tax against non-Indian companies purchasing tribal timber due to federal pre-emption).

#### Sections 4 and 5. Indian Tribes As Defendants: Tort Claims Procedure

These sections supposedly parallel the Tucker Act and the Federal Tort Claims Act. In fact, unlike those acts, sections 4 and 5 would essentially eliminate the role for tribal courts under existing law and would deny to Indian governments the statutory protection for discretionary functions and the procedural protections of an administrative claims process that currently apply under the Federal Tort Claims Act.

Sections 4 and 5 give federal district courts original jurisdiction in civil actions arising under federal law. Under current law, Indian tribal courts exercise jurisdiction over such claims and, if a tribal court exceeds its authority, jurisdiction exists in federal district court under 28 U.S.C. § 1331. Thus, these provisions of S. 1691 would reverse the Supreme Court's rulings in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and subsequent cases, which require that such claims first be presented to Indian tribal courts. The Court stated:

Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal



Court before either the merits or any question concerning appropriate relief is addressed.

471 U.S. at 856 (footnotes omitted).

In *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), and in *Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), the Courts of Appeals have ruled that while federal courts may be guided by a tribal court's expertise, they have no obligation to defer to a tribal court's decision, and thus legal questions are reviewed *de novo*. In those cases, the Courts of Appeals dealt with whether a tribe had authority over a non-Indian employer on reservation and whether federal laws limited tribal authority to tax certain lands. There is no good policy reason to sideline tribal courts, the bodies with the most expertise concerning controversies arising on their reservations, yet that is the principal effect of the bill's provision concerning cases arising under federal law.

On the merits, S. 1691's failure to recognize normal governmental immunities from tort claims would produce disastrous effects. Sections 4 and 5 of S. 1691 would make a tribal government liable for injury or loss of property or death under circumstance in which "a private individual or corporation" would be liable. By contrast, the Federal Tort Claims Act preserves the "judicial or legislative immunity" defense to the United States in 28 U.S.C. § 2674 ("United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim") and has a series of itemized exceptions and defenses of the United States in 28 U.S.C. § 2680. Those defenses are currently available to most tribal employees because of the present applicability of the Federal Tort Claims Act, discussed below.

Whether a FTCA claim is barred by the discretionary function exception is determined by tests announced in *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). In general, administrative judgments involving the allocation and deployment of limited governmental resources are immunized from suit by the discretionary function exemption. See, e.g., *Dalehite v. United States*, 346 U.S. 15 (1953); *General Dynamics Corp. v. United States*, \_\_\_ F.3d \_\_\_, 1998 W.L. 136209, (9th Cir. 1998); *Kiehn v. United States*, 984 F.2d 1100, 1107 (10th Cir. 1993). Such administrative decisions are made by Indian tribal governments just like any other government.

Like the FTCA, most state tort claims acts expressly immunize the state treasury and domain from claims arising from normal governmental functions and exercises of discretion. A few cases from the California Court of Appeals illustrate this. In *Cairns v. County of Los Angeles*, 72 Cal. Rptr. 2d 460 (1997), plaintiffs' homes were damaged by a fire. California retains a statutory governmental immunity for failure to provide fire protection service. Cal. Gov. Code, §§ 850, 850.2, 850.4. Accordingly, plaintiffs

contended that a dangerous condition on public property was actually the cause of their damages, specifically the closure of a road which made it impossible for fire fighters to respond to the emergency. The court noted that under the California Tort Claims Act, a public entity is not liable for an injury unless that act specifically allows for that liability. In addition, the liability of a public entity is subject to immunities provided by statute. In *Cairns*, the county's failure to repair a damaged road simply amounted to a failure to provide fire protection, a situation in which the county is statutorily protected by immunity. Like counties, of course, Indian tribes provide fire protection within the limit of government resources and require immunity in connection with those activities.

In *Weaver v. State of California*, \_\_\_ Cal. Rptr. 2d \_\_\_, No. B112827, (April 16, 1998), a passenger in a car pursued by police officers sought damages for his injuries in the accident. The court rejected the claim, noting that California Vehicle Code § 17004.7 "was enacted in 1987 to provide immunity to governmental entities which previously had enjoyed only limited immunity while their police officer employees were entirely immune." Indian tribes, like States, provide police protection and, in the normal operation of police activities, injuries may occur. As discussed below, such injuries are now covered by the Federal Tort Claims Act. See 28 U.S.C. § 2680(h). However, the remedies available to injured parties do not and should not permit them to reach the public treasury or domain of tribal governments.

The bill would strip tribes of present coverage under the Federal Tort Claims Act. Most, if not all, activities of tribal governments are the subject of compacts and contracts under the Indian Self-Determination and Educational Assistance Act of 1975 ("ISDA"), 25 U.S.C. § 450 *et seq.* The ISDA enables tribes to carry out governmental functions which would otherwise be performed by the federal government and allows reallocation of limited federal funds, supplemented by tribal funds, to carry out governmental priorities selected by the tribe. See 25 U.S.C. §§ 450f, 458cc.

S. 1691 would transfer from the federal government to tribes the cost of compensating persons entitled to damages under the Federal Tort Claims Act because, under present law, while carrying out an ISDA-authorized activity, tribal employees are:

[D]eemed employees of the Bureau or Service while acting within the scope of their employment . . . [and] claims . . . shall be deemed to be . . . against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act.

Pub. L. 101-512, § 314, 104 Stat. 1959, as amended by Pub. L. 103-138, § 308, 107 Stat. 1416. Congress has moved carefully and incrementally to insure liability coverage for activities carried out by Indian tribes. When the ISDA was initially enacted in 1975, Congress authorized the Secretary of the Interior to require any tribe to obtain liability insurance as a prerequisite to exercising the authorities of the Act. Congress also prohibited the insurance carriers from using tribal sovereign immunity to defeat claims

within the coverage of the policy. In 1990, Congress required the Secretary of the Interior to obtain or provide liability insurance or equivalent coverage on the most cost-effective basis for tribes carrying out contracts and agreements. 25 U.S.C. § 450f(c)(1). Ultimately, in 1993, the language quoted above was made generally applicable. This makes it clear that the Federal Tort Claims Act applies. There is no good policy reason for transferring to tribes the burden of defending against claims and paying for injuries that result from carrying out functions that would otherwise be performed by the federal government. Yet that is the effect of these sections of S. 1691.

Additional differences between section 5 of S. 1691 and the Federal Tort Claims Act will also treat tribes less fairly than the federal government or the States. For example, the bill does not propose anything comparable to the FTCA procedure which requires submission of a claim to the federal agency involved and compliance with strict time deadlines in order for persons to recover. See 28 U.S.C. § 2675 (disposition by federal agency is a prerequisite to claim). Also, unlike the FTCA, the bill would not give tribes the benefit of the exclusiveness of remedy provisions which protect the United States and its employees. See 28 U.S.C. § 2679. In addition, the bill lacks the FTCA limitation on attorney fees, which Congress imposed to discourage the filing of non-meritorious claims. See 28 U.S.C. § 2678. S. 1691 is flawed legislation.

#### Section 6. Indian Tribes as Defendants in State Courts.

The most sweeping of the four "components" of S. 1691, section 6 would not only abolish Indian tribal governmental immunity but would also broadly extend the applicability of state law to Indian Country, going far beyond the discredited provisions of Public Law 280, the Act of August 15, 1953, 67 Stat. 588. This portion of S. 1691 shares the defects of sections 3, 4 and 5, discussed above, but in addition to sidelining tribal courts, ignoring existing federal court review functions, removing immunity for normal government operations and the procedural protections of a tort claims process, this section would overturn an additional body of Supreme Court authority and federal statutes. For example, as noted in proposed section 6(c), the provision of the Civil Rights Act of 1968, 25 U.S.C. § 1326, that requires the consent of an Indian tribe for a State to assume jurisdiction over matters of civil law, would be abrogated by this language.

Under present law, some lawsuits must be filed in tribal court because they arise on Indian reservations and concern Indian tribal affairs. *E.g. Williams v. Lee*, 358 U.S. 217 (1959) (trader's claim against Navajo Indian must be filed in tribal court because state court lacks jurisdiction); *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992) (suit concerning opinion letter must be filed in tribal court because reservation affairs were at issue); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) (auto repossession case must be filed in tribal court).



Public Law 280 enabled many States to assume criminal authority over persons within Indian Country and to apply state civil laws as the rule of decision in cases arising within Indian Country. However, as the Supreme Court found in *Bryan v. Itasca County*, 426 U.S. 373 (1976), Public Law 280 did not extend jurisdiction over tribal governments themselves. Nor has Public Law 280 given States civil regulatory jurisdiction over Indian Country. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). However, by granting state courts authority over cases in which the cause of action arises under "the law of a State" S. 1691 goes far beyond existing law and changes the substantive law that now applies to contracts and tort claims involving Indian tribes.

At present, tribal courts hearing claims arising within Indian Country, apply tribal law on torts and contracts and other matters. For example, many tribal governments have adopted versions of the Uniform Commercial Code, but these are not necessarily identical to the State's version of the UCC. Corporation codes may also vary from state law. Public Law 280 provided that tribal ordinances would be given full force and effect in the determination of civil causes of action unless "inconsistent" with applicable state civil law. Public Law 280 caused tremendous difficulty and conflict between states and the Indian tribes, resulting in part in its limitation by the Indian Civil Rights Act of 1968. However, section 6 of S. 1691 would go even further in the direction taken by the discredited 1953 Act.

#### Section 7. Indian Civil Rights.

This portion of S. 1691 would give federal district courts jurisdiction to hear cases asserting that the Indian Civil Rights Act of 1968 had been violated. This provision is not justified by present law. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), a case that would be overturned by the bill, the Supreme Court carefully construed the terms and legislative history of the Indian Civil Rights Act and concluded that the Act did not authorize actions for declaratory or injunctive relief in federal court against either the tribe or its officers. In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), the Court clarified that federal courts have jurisdiction under 28 U.S.C. § 1331 to hear claims that a tribe had exceeded its authority provided that tribal court remedies were first exhausted. These cases have had two effects: (1) developing case law within tribal courts enforcing the Indian Civil Rights Act; and (2) a broad right of federal court review of tribal court decisions challenged by nonmembers of the tribe who assert the tribal authority is limited by a provision of federal law, including the Indian Civil Rights Act. See *Burlington Northern Ry. Co. v. Red Wolf*, 106 F.3d. 868 (9th Cir.), vacated for consideration in light of *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997), 118 S.Ct. 37 (1997). A brief examination of these two effects points to the possibility that although section 6 of S. 1691 should not be adopted, the Senate should consider adoption of a related provision.



Tribal courts apply the Indian Civil Rights Act notwithstanding sovereign immunity claims. Developments in the Hoopa Valley Tribal Court in California illustrate that meritorious claims are being handled justly and on their merits.

The Hoopa Tribal Court has long recognized the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), that sovereign immunity does not give officials the power to violate or ignore federal or other applicable law. For example, *Marshall v. Colegrove*, HVTC No. C-89-003 (June 5, 1990), involved the claim that the tribal chairman enjoyed unauthorized salary increases and received reimbursement for unauthorized travel. The court noted the doctrine of sovereign immunity but held that "the immunity is lost when the tribal official is acting outside the course and scope of his official capacity."

In *Rowland v. Hoopa Valley Tribe*, Hoopa Ct. App. No. A-92-016, 21 Indian L. Rptr. 6087 (1992), a non-Indian business sought to restrain tribal interference with plaintiff's access to personal property left on tribal land. The court held: "Tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law." The court reversed the trial court's denial of a motion for a temporary restraining order, holding that the tribe should not have denied access when plaintiff attempted to remove its property.

*Gray v. Hoopa Valley Tribal Election Board*, HVTC No. C-97-036, involved an election appeal. The court construed *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), as affirming tribal court exclusive jurisdiction to construe the tribal constitution and to enforce the Indian Civil Rights Act "where tribal agencies or officers act outside the scope of their authority." The court rejected defendant's claim of sovereign immunity and claims that the Constitution made decisions of the Election Board unreviewable.

Sovereign immunity is also not a bar to recovery of "back pay" or damages from the Tribe and its departments, if they engage in unlawful employment practices. See *Ames v. Hoopa Valley Tribal Council*, Hoopa Ct. App. No. C-90-026, 21 Indian L. Rptr. 6039 (1991); *Hoopa Valley Indian Housing Authority v. Gerstner*, Hoopa Ct. App. No. C-92-035 (1993), 22 Indian L. Rptr. 6002 (1993); *Tribal Education Department v. Nixon*, Hoopa Ct. App. No. C-95028, 25 Indian L. Rptr. 6005 (1997).

It is thus clear under Hoopa tribal law that sovereign immunity will not prevent the enforcement of rights guaranteed by the Indian Civil Rights Act, nor will it shield tribal officials who act outside of their lawful authority under tribal or federal law. This we submit, is typical of the law applied in Indian tribal courts and points away from directing all such cases to federal district court.

#### IV. CLARIFICATION OF FEDERAL COURT REVIEW OF A TRIBAL COURT'S DISPOSITION OF FEDERAL CLAIMS MAY BE APPROPRIATE.

As noted above, the Supreme Court has ruled that after a party exhausts tribal court remedies, federal courts have jurisdiction under 28 U.S.C. § 1331 to determine whether a tribe has been divested of authority over the matter in issue. Because nonmembers generally argue that a tribal court has no jurisdiction over them, the only parties who may have difficulty establishing federal question jurisdiction are tribal members themselves.

Tribal courts have been vigilant in enforcing the Indian Civil Rights Act to protect both members and nonmembers, and have little to fear from the fact that federal court reviews sometimes occur. At the same, time, however, it is important that federal courts avoid intruding into areas governed by tribal custom and tradition or the tribal self-definition process that occurs in tribal enrollment.

The Hoopa Valley Tribal Council and the Saginaw Chippewa Tribal Council have endorsed Committee consideration of the following provision:

Any case in the highest court of an Indian tribe may be reviewed at the discretion of the Court of Appeals for the circuit in which the Indian tribal court is located, by writ of certiorari granted upon the petition of any party to the case after rendition of final judgment, where a claim or defense arises under the Constitution, laws or treaties of the United States; provided, however, that applicable tribal custom or tradition shall be given due consideration.

Tribal courts are an essential part of government within Indian Country and they provide an important forum for insuring public health and safety, political integrity and individual liberties. To end the uncertainty and anxiety which in part, fuels support for bills such as S. 1691, there may be a need to clarify the situations in which review of final decisions of the highest court on an Indian tribe can be obtained in federal court. We suggest this provision to the consideration of the Senate.

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Chairman  
Senate Committee on Indian Affairs  
United States Senate, SH 838  
Washington, D.C. 20510

***Re: Opposition to S. 1691--Waiver of Tribal Sovereign Immunity***

Dear Mr. Chairman:

The Native American Rights Fund (NARF) strongly opposes S. 1691, which would waive the sovereign immunity of 554 federally-recognized Indian tribes and subject them to suits in state and federal courts, and would require them to collect certain state taxes. This misguided legislation, illusively labeled the "American Indian Equal Justice Act," would drastically undermine the ability of Indian tribes to govern themselves and thereby provide essential government services to those residing in Indian Country. Equally objectionable, it would reverse two hundred years of federal Indian law and policy.

**I. S. 1691 IS BASED ON ERRONEOUS PREMISES**

In the first instance, S. 1691 is based upon two fundamental, albeit false premises, namely: (1) that tribal governments are "the only remaining governments that maintain and assert the full scope of immunity from lawsuits," and (2) tribal sovereign immunity threatens due process and legal remedies of those subject to tribal court jurisdiction. These assertions are unfounded.

A fundamental attribute of any government in our tripartite system--federal, state and tribal--is the doctrine of sovereign immunity, which enables governments to provide essential services by shielding them from lawsuits which could drain public treasuries. The record is clear in this matter that the federal and state governments--as well as tribal governments--have retained certain vital and necessary aspects of sovereign immunity to enable them to function in this litigious day and age.

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Contrary to a primary purported justification of S. 1691, the federal and state governments have not waived their immunity to suit to the radical extent that S. 1691 would effectuate a waiver of tribal sovereign immunity. This proposed justification of S. 1691 is therefore misleading. As Professor Chambers points out, S. 1691 would convert tribal governments to mere voluntary organizations.<sup>1</sup> It is therefore, in the final analysis, a Trojan Horse designed to terminate tribal existence--an antiquated, unworkable federal Indian policy attempted in the 1950s which both Congress and the Executive branch have long since rejected in unequivocal bipartisan fashion.

S. 1691 is also inherently, if not explicitly, based on the mistaken notion that tribal courts cannot evenhandedly administer justice. Aside from the fact that hundreds of tribes have waived their immunity to suit in varying circumstance--similar to the federal and state governments--both Congress and the Supreme Court, as well as the Executive branch of the United States government, have "repeatedly recognized tribal justice systems as the appropriate forums for adjudication of disputes affecting personal and property rights." *See, e.g.,* Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601(6). S. 1691, without justification, contradicts this well-reasoned Congressional policy. Moreover, Congress has found that the primary impediment to the operation of tribal courts is inadequate funding. *Id.*, 25 U.S.C. §3601(8). Accordingly, Congress should concern itself with providing adequate appropriations for the funding of tribal courts and personnel, rather than attempting to abrogate two centuries of federal Indian policy with the stroke of a pen--as S. 1691 in essence seeks to do.

## **II. TRIBAL/STATE COMPACTS FOR THE COLLECTION OF TAXES**

To a great extent, most states and tribes have resolved issues regarding application and collection of state taxes on Indian reservations by entering into tribal/state compacts. As the attached document indicates,<sup>2</sup> at least eighteen states have entered into successful

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<sup>1</sup> *Tribal Sovereign Immunity in Tribal Contracts and Concerning the Collection of State Retail Taxes: Hearing on S. 1691 Before the Senate Committee on Indian Affairs, 105th Cong., 2d Sess. (March 11, 1998) (statement of Reid Peyton Chambers at 4-5; hereafter "Chambers").*

<sup>2</sup> Rosenthal, Laura, "Annotation of State-Tribal Compacts/Agreements for the Collection of State Taxes," National Indian Law Library, Native American Rights Fund,

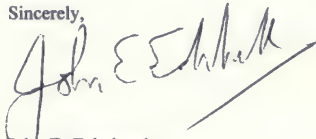


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compacts with some two hundred tribes. These agreements are the product of successful negotiations between states and tribes. As Professor Chambers further points out:<sup>3</sup> (1) the majority of these tribal/state tax agreements already result in states receiving taxes on all on-reservation sales to non-Indians; (2) S. 1691 would substitute contested litigation for such negotiated agreements; and (3) it makes no sense for Congress to undermine economic enhancement for tribes by meddling in an area already agreed to by a number of states.

For the reasons stated above, and as further set forth in the record, S. 1691 should not be enacted into law. We urge you to do everything in your power to defeat this misguided legislation. Thank you.

Sincerely,

A handwritten signature in dark ink, appearing to read "John E. Echohawk", with a long, sweeping horizontal line extending to the right.

John E. Echohawk  
Executive Director

Encs

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Boulder, Colorado (April, 1998).

<sup>3</sup> See Chambers, *supra*, at 16.

**STATE TRIBAL TAXATION**

**SUMMARY**

**AND**

**DOCUMENTS**

## SUMMARY: STATE-TRIBAL TAX STATUTES, REGULATIONS &amp; AGREEMENTS

## ARIZONA

- A. Tobacco tax levied and collected by State Department of Revenue on reservations.
1. Arizona Revised Statutes Annotated (1997).  
Title 42. Taxation.  
Chapter 7. Luxury Privilege Tax.  
Article 1.3. Indian Reservation Tobacco Tax.
    - a. *A.R.S. 42-1252. Levy of Indian reservation tobacco tax; rate; distribution of revenues; civil penalty; exemptions.* Provides for a tax to be levied and collected by the Department of Revenue, and paid to the State Treasurer, on the purchase of cigarettes, cigars, smoking tobacco, plug tobacco, snuff and other forms of tobacco on Indian reservations.  
Exemption: The above forms of tobacco sold by an Indian tribe or federally licensed Indian trader on an Indian reservation to Indians who are enrolled members of the Indian tribe for whose benefit the reservation was established.
    - b. *A.R.S. 42-1257. Indian reservation tobacco tax not to apply if similar tax is imposed by Indian tribe.* Provides that if Indian tribe imposes a luxury, sales, transaction privilege or other, similar tax on cigarettes, cigars, smoking tobacco, plug tobacco, snuff and other forms of tobacco at a rate lower than the state's, the state may charge and collect the difference. If the tax charged by the Indian tribe is equal to that of the state's, there is no balance due to the state.
- B. Severance Tax imposed on Indians by State.
1. Arizona Legislative Council, STARTED: State-Tribal Approaches Regarding Taxation & Economic Development (1995)(hereafter referred to as "STARTED"), p 15.
    - a. Severance Tax, which is assessed in lieu of transaction tax on business of mining metalliferous minerals and severing timber. Severance tax rate on mining is 2.5 percent of the value of the materials mined. Severance tax rate on timber is 1.5 percent of the value of the timber severed.
- C. Motor Vehicle License Tax is not paid by tribal members, but they must pay state vehicle registration fees.
1. STARTED, pp. 17-18.
    - a. Motor Vehicle License Tax - tribally-enrolled members living on their native reservation are not subject to this tax; however, tribal members must

pay appropriate state vehicle registration fees.

- D. Motor Vehicle Fuel and Use Fuel Taxes paid to State by all Indians in state.
  - 1. STARTED, pp. 18-19.
    - a. Motor Vehicle Fuel and Use Fuel Taxes are paid for both on and off reservation driving by tribal members.

## COLORADO

- A. Personal/Real Property Compact between State and Southern Ute Indian Tribe for payments in lieu of property taxes to be made to state by tribe.
  - 1. Colorado Revised Statutes Annotated (1997).
    - Title 24. Government-State Interstate Compacts and Agreements.
    - Article 61. Taxation Compact Between the Southern Ute Indian Tribe, La Plata County, and the State of Colorado
    - Part 1. Approval and Text of Compact.
      - a. *C.R.S. 24-61-102. Taxation compact between the Southern Ute Indian Tribe, La Plata County, and the State of Colorado.* Compact operates to resolve valuation disputes; declares the interest and authority of the general assembly to act to assist in the resolution of a dispute between the state, La Plata County, and the Southern Ute Tribe concerning the taxation of property held by the tribe. Approves the taxation compact between the parties. Sets forth the provisions of the compact, including provisions requiring the tribe to make payments in lieu of taxes based on the value of property owned by the tribe. Authorizes property tax administrator to resolve all valuation disputes as set forth in compact.
- B. Cigarette sales on Indian reservations are exempt from state sales tax.
  - 1. Colorado Revised Statutes (1997).
    - Title 39. Taxation; Specific Taxes; Tobacco Tax.
    - Article 28. Cigarette Tax.
      - a. *C.R.S. 39-28-11. Exempt sales.* Exempts from taxation on sales of cigarettes "in interstate commerce" or "the taxation of which is prohibited by the constitution of the United States."

## CONNECTICUT

- A. Gambling revenues to be reimbursed by Mashantucket Pequot Tribe to State as "regulatory costs" incurred by state agencies.
  - 1. Connecticut General Statutes Annotated (1997).
    - Title 12. Taxation.
    - Chapter 226C. Administration of Tribal-State Compacts.
      - a. *C.G.S.A. 12-586f. Assessment of Mashantucket Pequot Tribe for expenses of administering Tribal-State Compact. Fingerprinting of applicants for*



*casino gaming license*. Provides for payments of "regulatory costs incurred by any state agency" are to be reimbursed by the tribe if such costs are incurred in accordance with the Tribal-State Gaming Compact.

- B. Gambling revenues from casinos run by Mohegan and Mashantucket Pequot Tribes to be shared with State per state-tribe gaming compact
  - 1. Zelio, Judy, "State-Tribal Revenue Agreements, NCSL Legisbrief, Volume 5, No. 29 (June/July 1997) (hereafter referred to as "NCSL Legisbrief"), p. 1.
    - a. In Connecticut, the Mohegan and Mashantucket Pequot Tribes agreed to give the state \$80 million or 25 percent of their casino revenues per year, whichever is greater, in exchange for the promise that no nontribal gaming machines will be permitted in the state.

## FLORIDA

- A. Cigarette dealers may sell stamped, untaxed cigarettes to Seminole Indian tribe.
  - 1. Florida Statutes (1997).
    - a. *F.S. 210.05(5). Preparation and sale of stamps; discount*. Provides that agents or wholesale dealers can sell stamped, but untaxed, cigarettes to the Seminole Indian tribe or members of the tribe for retail sale.
- B. Cigarettes sold to Seminole Indian tribe are subject to State's stamping, registration, and inventory regulations.
  - 1. Florida Administrative Code Annotated (1998).
    - Title 61. Department of Business and Professional Regulations.
    - Subtitle 61A. Division of Alcoholic Beverages and Tobacco.
    - Chapter 61A-10. Cigarette Tax Division Rules.
    - a. *F.A.C. 61A-10.026. Sale of stamped, untaxed cigarettes by stamping agents or wholesale dealers to Indians for retail sale, reporting*. Provides for placement of designated stamps on non-taxed cigarettes sold to Seminole Indian tribe or enrolled members for retail sale, and sets forth registration and inventory requirements.

## LOUISIANA

- A. Gambling revenues of Louisiana Indian Tribes to be shared with State.
  - 1. Louisiana Statutes Annotated
    - Title 33. Municipalities and Parishes.
    - Chapter 6. Taxation and Fiscal Affairs.
    - Part V. Appropriations for Special Purposes.
    - a. *La.R.S. 33:3005. Avoyelles Parish Local Government Gaming Mitigation Fund; allocation and use of monies in the fund*. Provides for payment into

fund of monies received by the state of Louisiana under the provisions of the gaming compact between the state and the Tunica-Biloxi Indian Tribe of Louisiana; financial contributions are to "offset and defray the expenses of certain political subdivisions within Avoyelles Parish" due to the conduct of Class III gaming in that parish.

- b. *La.R.S. 33:3006. Allen Parish Local Government Gaming Mitigation Fund; allocation and use of monies in the fund.* Provides for payment into fund of monies received by the state of Louisiana under the provisions of the gaming compact between the state and the Coushatta Indian of Louisiana; financial contributions are to "offset and defray the expenses of certain political subdivisions within Allen Parish" due to the conduct of Class III gaming in that parish.
- c. *La.R.S. 33:3007. St. Mary Parish Local Government Gaming Mitigation Fund; allocation and use of monies in the fund.* Provides for payment into fund of monies received by the state of Louisiana under the provisions of the gaming compact between the state and the Chitimacha Tribe of Louisiana; financial contributions are to "offset and defray the expenses of certain political subdivisions within St. Mary Parish" due to the conduct of Class II gaming in that parish.

B. Tribally-Owned Vehicles are not subject to state sales and use tax, but tribe must pay registration and license fees, and comply with state motor vehicle safety inspections.

1. STARTED, p. 83

- a. Ten-year tax agreements entered into between State of Louisiana and two of its three Indian tribes provide that vehicles owned by tribe and used for tribal purposes are exempt from state sales and use tax normally applicable to all motor vehicles. In return, tribe agrees to pay vehicle registration and license fees, and comply with state motor vehicle safety inspections. Exemption not allowed for individual tribal members, per court decision.

C. Cigarette and Tobacco products sales on Indian reservations are exempt from state taxes provided these products are purchased from Louisiana wholesalers only.

1. STARTED, p. 83

- a. Ten-year tax agreements entered into between State of Louisiana and two of its three Indian tribes provide that all tobacco sales on the reservation, whether to Indians or non-Indians, are exempt from state tobacco excise tax. In return, tribe agrees to impose an equivalent tax on all sales, and to purchase stamped but tax-free cigarettes and tobacco products from Louisiana wholesalers only. Wholesalers may apply for refund or credit from state for any taxes prepaid on exempt sales to Indians.

D. Motor Fuel sales on Indian reservations are exempt from state motor fuel tax provided that the tribe impose its own equivalent tax.

## 1. STARTED, p. 83

- a. Ten-year tax agreements entered into between State of Louisiana and two of its three Indian tribes provide that all gasoline sales on reservations, whether to Indians or non-Indians, are exempt from state's motor fuel tax. In return, the tribe agrees to impose its own equivalent tax. State distributors may apply to the state for a credit or refund on their tax-exempt sales of motor fuel to Indians.

## MICHIGAN

## A. Gambling revenues of seven tribes' casinos to be shared with the State of Michigan per compact.

- 1.
  - i. NCSL Legisbrief, p. 1
  - ii. Tiger Stadium Fan Club, Inc. v. Governor, 553 N.W.2d 7 (1996).
  - iii. State of Michigan Gaming Control Board web site:  
<http://www.state.mi.us/mgcb/overview.htm>
  - a. The State of Michigan, through its governor, John Engler, entered into gaming compacts in 1993 with seven Michigan tribes: 1) Bay Mills Indian Community; 2) Grand Traverse Band of Ottawa & Chippewa Indians; 3) Hannahville Tribal Community; 4) Keweenaw Bay Tribal Community; 5) Lac Vieux Desert Band of Superior Chippewa Indians; 6) Saginaw Chippewa Tribal Community; and 7) Sault Ste. Marie Band of Chippewa Indians. Under those compacts, the seven tribal governments agreed to pay to the state 8 percent of total revenues from 14 total tribal casinos. However, in November 1996, state voters approved the establishment of nontribal casinos in Detroit, MI. The tribes filed suit in federal court, stating that they were relieved of having to share gaming revenues because they lost the exclusive right to conduct electronic gaming within state borders. The tribes will cease making payments to the state once the Michigan Gaming Control Board issues its first nontribal casino license. As of the end of 1997, the tribes had paid nearly \$110 million to the state from their gaming revenues.

## MINNESOTA

## A. Sales and Use Tax on Indian reservations collected by State and a predetermined amount is refunded to each compacting tribe.

- 1. Minnesota Statutes Annotated (1997).  
Taxation, Supervision, Data Practices.  
Chapter 270. Department of Revenue.  
State Board of Assessors.
- a. *M.S.A. 270.60. Tax refund agreements with Indians.* Provides that all

transactions on a reservation, whether with Indians or a non-Indians, are subject to tax imposed by the reservation tribe that is equivalent to the corresponding state tax. The state collects the taxes, then refunds a predetermined amount to each compacting tribal council.

- B. Revenue sharing with State from Lower Sioux Indian Community's tax proceeds on: 1) Sales and Use; 2) Cigarettes and tobacco products; 3) Liquor; and 4) Motor fuel.
  - 1. Tax Agreement Between the Minnesota Department of Revenue and the Lower Sioux Indian Community in Minnesota (March 24, 1995).
    - a. Tax agreement provides for revenue sharing with the State of Minnesota of 50% of tribal tax base for sales and use tax, cigarette and tobacco products tax, liquor tax and motor fuel tax.
- C. Revenue sharing with the State from White Earth Band of Chippewa Indians' tax proceeds on: 1) Sales and Use; 2) Cigarettes and tobacco products; 3) Liquor; and 4) Motor fuel.
  - 1. Agreement Between the State of Minnesota and the White Earth Band of Chippewa Indians (April 4, 1995).
    - a. Tax agreement provides for revenue sharing with the State of Minnesota of 50% of tribal tax base for sales and use tax, cigarette and tobacco products tax, liquor tax and motor fuel tax.

## MISSISSIPPI

- A. Agreements between State and Mississippi Band of Choctaw Indians for collection of sales or gross receipts tax allowed by state law.
  - 1. Mississippi Code 1972 Annotated (1997).
    - Title 27. Taxation and Finance.
    - Chapter 65. Sales and Tax
    - Tribal Tax by Mississippi Band of Choctaw Indians.
    - a. *MS.St. 27-65-211, et seq.* Provides that the State of Mississippi may enter into tax agreements with the Mississippi Band of Choctaw Indians.

## MONTANA

- A. State and Indian tribes may enter into cooperative agreements under state law.
  - 1. Montana Code Annotated (1997).
    - Title 18. Public Contracts.
    - Chapter 11. State-Tribal Cooperative Agreements.
    - Part 1. General Provisions.
    - a. *M.C.A. 18-11-101, et seq.* "State-Tribal Cooperative Agreements Act." Allows public agencies to enter into agreements with any of Montana's seven Indian tribes in any necessary area, including taxation.



- B. Annual quota of tax-free cigarettes sold at Fort Peck Reservation per agreement with State.
  - 1. Fort Peck - Montana Agreement on Distribution of Untaxed Cigarettes on the Fort Peck Reservation (March 30, 1992).
    - a. Establishes a maximum annual quota of cigarettes to be sold tax-free on the Fort Peck Indian Reservation. Cigarettes are to be stamped by the State, and tribe agrees not to sell any non-stamped cigarettes on the reservation, and to prohibit sales of tax-free cigarettes to non-Indians.
- C. Alcoholic Beverages tax to be imposed by Fort Peck tribes and collected by the State, and a percentage remitted to the tribes.
  - 1. Fort Peck - Montana Alcoholic Beverages Tax Agreement (March 30, 1992).
    - a. Provides that the Tribes will adopt and keep in force an ordinance imposing taxes on alcoholic beverages in an amount equal to the Montana liquor excise tax on reservation sales. The state collects this tax and remits a percentage to the Tribes.
- D. Gasoline tax to be imposed by Fort Peck tribes and collected by the State, and a percentage remitted to the tribes.
  - 1. Fort Peck - Montana Gasoline Tax Agreement (March 26, 1992).
    - a. Provides that the Tribes will adopt and keep in force an ordinance imposing taxes on gasoline in an amount equal to the Montana gasoline license tax on reservation sales. The state collects this tax and remits a percentage to the Tribes.

## NEVADA

- A. Cigarettes and tobacco products must be taxed on reservation by tribe at same rate as state's tax to be exempt from state tax.
  - 1. Nevada Revised Statutes (1997).  
Title 32. Revenue and Taxation.  
Chapter 370. Tobacco: Licenses and Taxes.
    - a. *N.R.S. 370.210, et seq. Sales on Indian Reservations and Colonies.*  
Provides that a tribe that is imposing an excise tax on tobacco products sold on reservation equal to or greater than the state excise tax is exempt from tax on the same sales, provided that a copy of the tribal ordinance is submitted to the state. Allows for reimbursement of precollected state tax to retail dealers who sell and deliver cigarettes on an Indian reservation or colony.
- B. Refund of taxes paid on motor fuels by tribal members will be made by State for on-reservation driving, provided requirements are met.
  - 1. Nevada Revised Statutes (1997).

## Title 32. Revenue and Taxation.

## Chapter 365. Taxes on Fuels.

- a. *N.R.S. 365.060. Indian tribes.* Provides for refund of taxes paid on actual motor fuel sales to individual tribal members on reservation if tribal council maintains appropriate documentation and files requests with the Department of Transportation.

C. Sales and use tax imposed by tribe on reservation must be equal to or greater than state tax to be exempt from state tax.

1. Nevada Revised Statutes (1997).

## Title 32. Revenue and Taxation.

## Chapter 372. Sales and Use Taxes.

- a. *N.R.S. 372.800. Indian reservations and colonies: Imposition and collection of sales tax.* Permits governing body of Indian reservation or colony to impose and collect tax on privilege of retail selling of tangible personal property on reservation or colony.
- b. *N.R.S. 372.805. Indian reservations and colonies: Restriction on collection of tax by department.* State tax may be collected only if tax imposed by Indian colony or reservation is not equal to or greater than state tax on particular transaction.

## NEW MEXICO

A. Cigarette sales to tribe or licensed member are state tax-free.

1. New Mexico Statutes 1978, Annotated (1997).

## Chapter 7. Taxation.

## Article 12. Cigarette Tax.

- a. *N.M.S.A. 7-12-4. Exemption.* Provides for tax-free cigarette sales to the governing body of a tribe or an enrolled tribal member licensed by the governing body of a tribe for use and sale on reservation.

B. State gross receipts and compensating tax may not be imposed where tax burden would ultimately fall on tribal organization for properties constructed for use by tribe.

1. New Mexico Statutes 1978, Annotated (1997).

## Chapter 7. Taxation.

## Article 9. Gross Receipts and Compensating Tax.

- a. *N.M.S.A. 7-9-14. Exemption; compensating tax; governmental agencies; Indians.* Exempts from state gross receipts tax construction of properties to be used by Indian pueblo, tribe, nation, or governmental body.

- i. Tax ultimately falling on tribal organization impermissible (where non-Indian contractor was building Indian school). *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed. 2d 1174 (1982).

C. Indians and/or tribes are subject to four separate state oil and gas severance taxes.

1. New Mexico Statutes 1978, Annotated (1997).

Chapter 7. Taxation.

- a. *Article 29, Oil and Gas Severance Tax - N.M.S.A. 7-29-4. Oil and gas severance tax imposed; collection; interest owner's liability to state; Indian liability.* All interest-owning Indians or tribes are liable for payment of state oil and gas severance tax.
- b. *Article 30, Oil and Gas Conservation Tax - N.M.S.A. 7-30-4. Oil and gas conservation tax levied; collected by department; rate; interest owner's liability to state; Indian liability.* All interest-owning Indians or tribes are liable for payment of state oil and gas conservation tax.
- c. *Article 31, Oil and Gas Emergency School Tax - N.M.S.A. 7-31-4. Privilege tax levied; collected by department; rate; interest owner's liability to state; Indian liability.* All interest-owning Indians or tribes are liable for payment of state oil and gas emergency school tax.
- d. *Article 32, Oil and Gas Ad Valorem Production Tax - N.M.S.A. 7-32-4. Ad valorem tax levied; collected by division; rate; interest owner's liability to state; Indian liability.* All interest-owning Indians or tribes are liable for payment of state ad valorem production tax.

D. Gambling revenues from tribal casinos to be shared with the State.

1. New Mexico Statutes 1978, Annotated (1997).

Chapter 11. Intergovernmental Agreements and Authorities.

Article 13. Indian Gaming Compact.

- *N.M.S.A. 11-13-2. Revenue sharing of tribal gaming revenue.* In return for exclusive right to provide Class III Gaming in the state, any New Mexico Indian nation entering into a compact with the Governor of the State of New Mexico must make quarterly payments to the State of New Mexico of 16% of its "net win" casino proceeds (total amount less overhead and regulatory costs). If the state violates its part of the agreement in any way, i.e. by allowing nontribal Class III Gaming, the tribe is released from its obligation to make the quarterly revenue-sharing payments, but the Compact remains valid, and the regulatory fees the tribe must pay to the state will automatically INCREASE by 20%.

## OKLAHOMA

A. State may enter into compacts with Oklahoma tribes to allow state tax-free cigarette and tobacco product sales on reservation in return for an in-lieu payment.

1. Enrolled Senate Bill No. 759 (enacted May 28, 1992), codified as Oklahoma Statutes, Title 68, Section 346.

- a. SB 759 provides that Governor may enter into compacts with Oklahoma

tribes to allow state-stamped, tax-free cigarette and tobacco products sales on reservations, in return for a payment from the compacting tribe in lieu of state sales and excise tax.

- B. Cherokee Nation may sell cigarettes and tobacco products on reservation state tax-free in return for a payment of 25% of all applicable state taxes at time of wholesale purchase.
  - 1. Tribal/State Tobacco Tax Compact (June 8, 1992) between State of Oklahoma and Cherokee Nation.
    - a. The Compact with the Cherokee Nation allows for payment to the State of Oklahoma of 25% of all applicable state taxes on cigarettes and tobacco products purchased by the nation, due at the time of wholesale purchase.
- C. State motor fuels tax to be imposed on all sales of fuel by compacting tribes, collected by State, and a refund of portion of these taxes.
  - 1. i) Oklahoma Statutes Annotated (1997).  
Title 68. Revenue and Taxation.  
Chapter 1. Tax Codes.  
Article 5. Motor Fuels Tax Code.
  - ii) Summary and Explanation: "Motor Fuel Tax Contracts Between the State of Oklahoma and Federally Recognized Indian Tribes," Oklahoma House Bill 2208. Senator Enoch Kelly Haney (Effective October 1, 1996).
    - a. *Ok.St.Ann. 500.63. Sale of motor fuels by Indian tribes.* Any Tribe who enters into motor fuel tax agreements with the State of Oklahoma collects all state motor fuels taxes on sales of fuel by the Tribe. The State then refunds to the tribe of a portion of the taxes based on formula including the tribe's population and motor fuel sales made, with the caveat that the refund may only be used for certain specified purposes i.e. road building and education.

## OREGON

- A. State may enter into agreements with Indian tribes for refund of motor vehicle fuel taxes.
  - 1. 1996 Oregon Revised Statutes (1996).  
Title 29. Revenue and Taxation.  
Chapter 319. Motor Vehicle and Aircraft Fuel Taxes.
    - a. *O.R.S. 319.382. Agreements for refunds to Indian tribes.* State may enter into agreements with tribes to provide refunds to tribe of state motor vehicle fuel taxes for fuel purchased on reservation and used by tribal members on reservation land.
- B. State may enter into agreements with Indian tribes for partial refund of cigarette and tobacco product taxes.



1. 1996 Oregon Revised Statutes (1996).  
 Title 29. Revenue and Taxation.  
 Chapter 323. Cigarette and Tobacco Products Tax.
  - a. *O.R.S. 323.401. Department authorized to make refund agreement with governing body of Indian reservation; contents, financing.* Provides that refund agreement may be entered into for mutually agreed amount (based on population and consumption formula) for prepayment of cigarette sales tax to state.
  - b. *O.R.S. 323.615. Refund agreement with governing body of Indian reservation; appropriation for refunds.* Provides that refund agreement may be entered into for mutually agreed amount (based on population and consumption formula) for prepayment of tobacco products sales tax to state.

## **SOUTH DAKOTA**

- A. State may enter into tax collection agreements with tribes, whereby state collects taxes and remits percentage back to tribe for: 1) Sales tax; 2) Cigarette tax; and 3) Contractors' Excise tax.
  1. South Dakota Codified Laws (1997).  
 Title 10. Taxation.  
 Chapter 10-12A. Tax Collection Agreements with Indian Tribes.
    - a. *S.D.C.L. 10-12A-4. Agreement to collect taxes for tribes - Department of Revenue fee.* Provides that State Dept. of Revenue may enter into tax collection agreements with tribes and may retain a fee for collection.
    - b. *S.D.C.L. 10-12-A-5. Percentage of state and tribal tax proceeds remitted to tribe.* Provides that fixed percentage of tax collected per tax collection agreement with tribe will be remitted to tribe in lieu of exact amount of revenue collected.
- B. Refund of state motor fuel tax may be made to Indian tribes, and motor fuel purchased for Indian school use may be purchased tax-free.
  1. Administrative Rules of South Dakota (1997).  
 Title 64. Department of Revenue.  
 Article 64:15. Fuel Taxes.  
 Chapter 64:15:07. Tax Refund Provisions.
    - a. *S.D. Admin.R. 64:15:07:03. Sale of fuel to and refund of motor fuel tax to Indian tribes.* Allows Indian tribe to purchase tax-unpaid motor fuel for exclusive use at school funded and operated by tribe.
- C. State collects tax on Rosebud Indian Reservation for: 1) Sales and Use; 2) Cigarettes; and 3) Contractors' Excise Tax and remits portion of tax proceeds back to tribe.
  1. Tax Collection Agreement between the State of South Dakota and the Rosebud

Sioux Tribe of the Rosebud Indian Reservation (December 15, 1977).

- a. Provides that the State of South Dakota Department of Revenue will collect taxes imposed by the Rosebud Sioux Retail Sales, Service and Use Tax Ordinance, and the Rosebud Sioux Tribal Cigarette Tax Ordinance; will issue stamps, licenses, permits, keep records and necessary reports; and collect fees. The State will remit to the tribe quarterly an amount equal to 75% of the total proceeds collected by the Department.
- D. State collects tax on Cheyenne River Sioux Indian Reservation for: 1) Sales and Use; 2) Cigarettes; and 3) Contractors' Excise Tax and remits portion of proceeds to tribe.
- 1. Tax Collection Agreement between the State of South Dakota and the Cheyenne River Sioux Tribe of the Cheyenne River Sioux Indian Reservation (June 17, 1976).
    - a. Provides that the State of South Dakota Department of Revenue will collect taxes imposed by the Cheyenne River Sioux Tribal Retail Sales, Service and Use Tax Ordinance, and the Cheyenne River Sioux Tribal Cigarette Tax Ordinance and will issue permits and licenses. The State will remit to the tribe quarterly an amount equal to 50% of the total proceeds collected by the Department.
- E. All taxes for sales and use and all retail sales to be collected by tribe (modification of original agreement) and percentage remitted to State.
- 1. Modification of Sales, Service and Use Tax Collection Agreement between the State of South Dakota and the Oglala Sioux Tribe of the Pine Ridge Indian Reservation (October 10, 1975).
    - a. Provides that the Tribe imposes a sales, service and use tax on sales by Indian retailers on the reservation. Previously, the State of South Dakota Department of Revenue collected taxes, and remitted 83% of the total proceeds quarterly to Tribe. By this modification, tribe agrees to collect taxes on its own behalf, and remit to the State on a quarterly basis an amount equal to 17% of the total proceeds collected.

## UTAH

- A. State oil and gas severance tax on properties on Ute Indian land to be collected by State and placed in trust for tribe.
  - 1. i) Utah Code, 1953.
    - Title 59. Revenue and Taxation.
    - Chapter 5. Severance Tax on Oil, Gas and Mining.
    - Part 1. Oil and Gas Severance Tax.
  - ii) Memorandum of Understanding between State of Utah and Ute Indian Tribe (December 1994).

- a. *U.C.A. 1953 59-5-116. Disposition of certain taxes collected on Ute Indian land.* Provides for 33% of taxes imposed and collected on wells existing on Ute Indian Land since 6/30/95 to be placed in trust with United States for benefit of tribe and its members.

B. Tribes are exempt from payment of state motor fuels tax when fuel is purchased in bulk amount.

1. Utah Administrative Code (1997).

- a. *U.T.A.D.C. R865-13G-10. Exemption for collective purchase of motor fuels by State and Local Government Agencies pursuant to Utah Code Ann. Section 59-13-201.* Provides that tribal governments may purchase tax-free gasoline when fuel is purchased in 750 gallon quantities for tribal government use.

## WASHINGTON

A. Motor vehicles owned by Indians having principal residence on reservations are exempt from state excise tax.

1. Washington Administrative Code (1997).

Title 308. Licensing, Department of.

- a. *W.A.C. 308-93-160. Excise tax exemption - Indians.* Vessels owned by Indians having principal residence on recognized Washington reservation are exempt from excise tax.
- b. *W.A.C. 308-96A-400. Excise tax exemption - Indians.* Motor vehicles owned by enrolled Indians have principal residence on recognized Washington reservation are exempt from excise tax; including motor homes, travel trailers and campers.

B. State tax is due on the following on Indian reservations if transaction is with a non-Indian: 1) Business and Occupation Tax; 2) Retail Sales Tax; 3) Use Tax; and 4) Cigarette Tax.

1. Washington Administrative Code (1997).

Title 458. Revenue, Department of.

Chapter 458-20. Excise Tax Rules.

- a. *W.A.C. 458-20-192. Indians - Indian reservation.* Sets out state tax liability for the following: 1) business and occupation tax - business conducted between Indians on reservation not subject to tax; 2) sales of taxable services and things between Indians on reservations not subject to tax; 3) tax on use of tangible personal property not applicable to Indians on reservation; and 4) cigarettes - must be stamped by state for non-Indian sales; sales to non-Indians are taxed by state; unstamped cigarettes for sale to Indians on reservation only (tax-free).

- C. A quota of state tax-free liquor will be provided to tribal liquor vendors under agreement with State of Washington.
  - 1. Washington Administrative Code (1997).  
Title 314. Liquor Control Board.  
Chapter 314-37. Liquor Vendors.
    - a. *W.A.C. 314-37-010. Liquor sales in Indian country - Appointment of tribal liquor vendors - Qualifications.* Provides for a quota of tax-free liquor to be sold by tribal vendors pursuant to an agreement with the State of Washington, which maintains jurisdiction over all liquor sales.

## WISCONSIN

- A. Cigarette tax refunds may be made to tribes for sale of cigarettes on reservation, to enrolled members of tribe, per agreement with state.
  - 1. Wisconsin Administrative Code (1997).  
Department of Revenue.  
Chapter 9. Cigarette Tax.
    - a. *Wis.Admin.Code. Tax 9.08. Cigarette tax refunds to Indian tribes.* Refund of 70% of tax paid may be made to tribes for sale of state-stamped cigarettes to enrolled members of tribe on tribe's reservation, with appropriate paperwork.
- B. State collects excise taxes on sale of cigarettes on Indian reservation and refunds a percentage to tribe.
  - 1. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (July 28, 1988) between State of Wisconsin and Oneida Tribe.
    - a. Tribal council will be reimbursed 70% of excise taxes paid on all cigarettes, and 30% of tax paid on cigarettes sold to enrolled members on reservation.
  - 2. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (August 10, 1988) between the State of Wisconsin and the Ho-Chunk Nation (formerly the Wisconsin Winnebagoes).
    - a. Tribal council will be reimbursed 70% of excise taxes paid on all cigarettes, and 30% of tax paid on cigarettes sold to enrolled members on reservation.
  - 3. Procedures for Bad River Retailers under the Wisconsin Cigarette Tax Law (June 28, 1984), established by Bad River Band of Lake Superior Tribe of Chippewa Indians.
    - a. Tribal member retailers who have tribal council letter of approval may purchase both stamped and unstamped cigarettes, as long as unstamped cigarettes are sold only to enrolled tribal members. Retailers may apply for refund of \$1.50 per carton from tribal accounting office.
  - 4. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (August 25, 1988) between State of Wisconsin and Lac du Flambeau Band of Lake Superior Chippewa Indians.



- a. Tribal council will be reimbursed 70% of excise taxes paid on all cigarettes, and 30% of tax paid on cigarettes sold to enrolled members on reservation.
- 5. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (August 25, 1988) between State of Wisconsin and the Lac Courte Oreilles Tribe.
  - a. Tribal council will be reimbursed 70% of excise taxes paid on all cigarettes, and 30% of tax paid on cigarettes sold to enrolled members on reservation.
- 6. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (August 25, 1988) between State of Wisconsin and the Menominee Tribe.
  - a. Tribal council will be reimbursed 70% of excise taxes paid on all cigarettes, and 30% of tax paid on cigarettes sold to enrolled members on reservation.
- 7. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (September 14, 1988) between State of Wisconsin and the Red Cliff Band of Lake Superior Chippewa.
  - a. Tribal council will be reimbursed 70% of excise taxes paid on all cigarettes, and 30% of tax paid on cigarettes sold to enrolled members on reservation.
- 8. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (September 19, 1988) between State of Wisconsin and the Mole Lake Band of the Sokaogon Chippewa Community.
  - a. Tribal council will be reimbursed 70% of excise taxes paid on all cigarettes, and 30% of tax paid on cigarettes sold to enrolled members on reservation.
- 9. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (July 25, 1988) between State of Wisconsin and the St. Croix Tribe.
  - a. Tribal council will be reimbursed 70% of excise taxes paid on all cigarettes, and 30% of tax paid on cigarettes sold to enrolled members on reservation.
- 10. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (July 25, 1988) between State of Wisconsin and the Forest County Potawatomi Community, Inc..
  - a. Tribal council will be reimbursed 70% of excise taxes paid on all cigarettes, and 30% of tax paid on cigarettes sold to enrolled members on reservation.
- 11. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (August 25, 1988) between State of Wisconsin and the Stockbridge-Munsee Community.
  - a. Tribal council will be reimbursed 70% of excise taxes paid on all cigarettes, and 30% of tax paid on cigarettes sold to enrolled members on reservation.

## WYOMING

- A. Indian traders may obtain untaxed, unstamped cigarettes from State wholesalers and remit the tax due to the state from sales to non-Indians on reservations.
  - 1. STARTED, p. 99.
    - a. Cigarette taxes are usually precollected by state and cigarettes at stamped at time of sale to wholesale distributors; however, sales to Indian traders may be made of untaxed, unstamped cigarettes, and those traders are

responsible for remitting tax to state on sales of same cigarettes to non-Indians on reservation.

- b. Per agreement between the State of Wyoming and the Arapaho Tribe, the tribal council pays tax on 26% of all taxes it receives from wholesalers, which is the estimated value of taxes on cigarettes sold to non-Indians on the Wind River reservation.

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3. **ARIZONA**
  - a. *A.R.S. 42-1252. Levy of Indian reservation tobacco tax; rate; distribution of revenues; civil penalty; exemptions.*
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  - a. *C.G.S.A. 12-586f. Assessment of Mashantucket Pequot Tribe for expenses of administering Tribal-State Compact. Fingerprinting of applicants for casino gaming license.*
  - b. *Zelio, Judy, "State-Tribal Revenue Agreements, NCSL Legisbrief, Volume 5, No. 29 (June/July 1997), p. 1. ("Legisbrief")*
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  - a. *F.S. 210.05(5). Preparation and sale of stamps; discount.*
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- a. *La.R.S. 33:3005. Avoyelles Parish Local Government Gaming Mitigation Fund; allocation and use of monies in the fund.*
- b. *La.R.S. 33:3006. Allen Parish Local Government Gaming Mitigation Fund; allocation and use of monies in the fund.*
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## 8. MICHIGAN

- a. NCSL Legisbrief, p. 1
- b. Tiger Stadium Fan Club, Inc. v. Governor, 553 N.W.2d 7 (1996).
- c. State of Michigan Gaming Control Board web site:  
<http://www.state.mi.us/mgcb/overview.htm>

## 9. MINNESOTA

- a. *M.S.A. 270.60. Tax refund agreements with Indians.*
- b. Tax Agreement Between the Minnesota Department of Revenue and the Lower Sioux Indian Community in Minnesota (March 24, 1995).
- c. Agreement Between the State of Minnesota and the White Earth Band of Chippewa Indians (April 4, 1995).

## 10. MISSISSIPPI

- a. *MS.St. 27-65-211, et seq.* Provides that the State of Mississippi may enter into tax agreements with the Mississippi Band of Choctaw Indians.

## 11. MONTANA

- a. *M.C.A. 18-11-101, et seq.* "State-Tribal Cooperative Agreements Act."
- b. Fort Peck - Montana Agreement on Distribution of Untaxed Cigarettes on the Fort Peck Reservation (March 30, 1992).



- c. Fort Peck - Montana Alcoholic Beverages Tax Agreement (March 30, 1992).
- d. Fort Peck - Montana Gasoline Tax Agreement (March 26, 1992).

## 12. NEVADA

- a. *N.R.S. 370.210, et seq. Sales on Indian Reservations and Colonies.*
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- a. *N.M.S.A. 7-12-4. Exemption.*
- b. *N.M.S.A. 7-9-14. Exemption; compensating tax; governmental agencies; Indians.*
- c. *Article 29, Oil and Gas Severance Tax - N.M.S.A. 7-29-4. Oil and gas severance tax imposed; collection; interest owner's liability to state; Indian liability.*
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- g. *N.M.S.A. 11-13-2. Revenue sharing of tribal gaming revenue.*

## 14. OKLAHOMA

- a. Enrolled Senate Bill No. 759 (enacted May 28, 1992), codified as

Oklahoma Statutes, Title 68, Section 346.

- b. Tribal/State Tobacco Tax Compact (June 8, 1992) between State of Oklahoma and Cherokee Nation.
- c. *Ok.St.Ann. 500.63. Sale of motor fuels by Indian tribes.*
- d. Summary and Explanation: "Motor Fuel Tax Contracts Between the State of Oklahoma and Federally Recognized Indian Tribes," Oklahoma House Bill 2208. Senator Enoch Kelly Haney (Effective October 1, 1996).

## 15. OREGON

- a. *O.R.S. 319.382. Agreements for refunds to Indian tribes.*
- b. *O.R.S. 323.401. Department authorized to make refund agreement with governing body of Indian reservation; contents, financing.*
- c. *O.R.S. 323.615. Refund agreement with governing body of Indian reservation; appropriation for refunds.*

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- a. *S.D.C.L. 10-12A-4. Agreement to collect taxes for tribes - Department of Revenue fee.*
- b. *S.D.C.L. 10-12-A-5. Percentage of state and tribal tax proceeds remitted to tribe.*
- c. *S.D. Admin.R. 64:15:07:03. Sale of fuel to and refund of motor fuel tax to Indian tribes.*
- d. Tax Collection Agreement between the State of South Dakota and the Rosebud Sioux Tribe of the Rosebud Indian Reservation (December 15, 1977).
- e. Tax Collection Agreement between the State of South Dakota and the Cheyenne River Sioux Tribe of the Cheyenne River Sioux Indian Reservation (June 17, 1976).
- f. Modification of Sales, Service and Use Tax Collection Agreement between the State of South Dakota and the Oglala Sioux Tribe of the Pine Ridge Indian Reservation (October 10, 1975).

## 17. UTAH

- a. *U.C.A. 1953 59-5-116. Disposition of certain taxes collected on Ute Indian land.*
- a. *UT A.D.C. R865-13G-10. Exemption for collective purchase of motor fuels by State and Local Government Agencies pursuant to Utah Code Ann. Section 59-13-201.*

## 18. WASHINGTON

- a. *W.A.C. 308-93-160. Excise tax exemption - Indians.*
- b. *W.A.C. 308-96A-400. Excise tax exemption - Indians.*
- a. *W.A.C. 458-20-192. Indians - Indian reservation.*
- d. *W.A.C. 314-37-010. Liquor sales in Indian country - Appointment of tribal liquor vendors - Qualifications.*

## 19. WISCONSIN

- a. *Wis.Admin.Code. Tax 9.08. Cigarette tax refunds to Indian tribes.*
- b. *Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (July 28, 1988) between State of Wisconsin and Oneida Tribe.*
- c. *Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (August 10, 1988) between the State of Wisconsin and the Ho-Chunk Nation (formerly the Wisconsin Winnebago).*
- d. *Procedures for Bad River Retailers under the Wisconsin Cigarette Tax Law (June 28, 1984), established by Bad River Band of Lake Superior Tribe of Chippewa Indians.*
- e. *Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (August 25, 1988) between State of Wisconsin and Lac du Flambeau Band of Lake Superior Chippewa Indians.*
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- g. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (August 25, 1988) between State of Wisconsin and the Menominee Tribe.
- h. Agreement Relating to the Refund of Precollected Excise Taxes on Cigarettes (September 14, 1988) between State of Wisconsin and the Red Cliff Band of Lake Superior Chippewa.
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20. **WYOMING**

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NILL COLLECTION NO:

7009280/1981

STATE-TRIBAL AGREEMENTS:  
A COMPREHENSIVE STUDY

Commission on State-Tribal Relations

May 1981

COMMISSION ON STATE-TRIBAL RELATIONS

## CHAPTER TWO: TAX COLLECTION

Under federal law, the delineation of state and tribal taxing powers is fairly straightforward. Indian tribes have authority to tax property and individuals on the reservation; states may not tax reservation Indians or their property. The Supreme Court has also ruled that states are barred from imposing taxes on non-Indians who live on the reservation if it would interfere with tribal self-government. However, in some instances, state taxes may be applied to non-Indians on the reservations.

Although these general guidelines appear simple, their application to on-reservation business transactions raises complications because commercial activities often involve both Indians and non-Indians. Implementing the guidelines is further complicated by the way some state taxes are collected, particularly those taxes applied to distributors as opposed to retailers, as tax may have been paid before the item reached the on-reservation Indian store.

In the past, states and tribes relied almost exclusively on the courts to answer questions concerning the exercise of their taxing authority. In the 1970's, however, South Dakota and the Oglala Sioux Tribe of Pine Ridge pioneered a process for coordinating their separate tax policies, which later became a model for other agreements. Very simply, the tribe adopted a sales tax scheme compatible with the state's. The state collected all taxes on the reservation and shared a predetermined percentage of the revenue with the tribe. In that way the state was able to collect taxes from non-Indians on the reservation; the tribe raised its own revenue without creating a costly system to administer the tax; and the system for collecting taxes from Indians and non-Indians living on the reservation was easily administered.

Similar arrangements have since been initiated in Oregon, Minnesota and Michigan.

MICHIGAN

Indian Community of the L'Anse Reservation and Keweenaw Bay and the Michigan Department of Treasury: In 1977, the Keweenaw Bay Tribe and the state of Michigan signed tax refund agreements for sales, use, cigarette, gas and diesel taxes paid by the tribe. Under the agreement, the state refunds the sales tax collected on the reservation based on a formula that includes the number of Indian families, the amount of sales tax per federal income tax, and a percentage of on-reservation purchases. Individual tribal members are eligible for refunds or exemption certificates if they purchase large items like cars, trucks or homes. The agreement also exempts tribal members from use taxes on telephone service and taxes on vehicle transfers, watercraft and snowmobiles.

Included in the package was a one-time refund of past taxes paid by tribal members for cigarettes and gas. Now that the refunds have been made, the reservation's store purchases tax-free cigarettes from a licensed primary wholesaler. To prevent non-Indians from taking advantage of the tribe's special tax status, Keweenaw Bay agreed to pay a cigarette tax on any amount that exceeds an annual consumption figure set by the state and tribe. Likewise, the tribe's future gas and diesel fuel station will collect taxes on sales to non-Indians.

For further information, contact: Garfield Hood, Attorney, 5 E. Baraga Avenue, L'Anse, Michigan 49946, 906/524-6227; and Michigan Department of Revenue, Treasury Building, Lansing, Michigan 48922, 517/373-1912.

#### MINNESOTA

Minnesota Chippewa Tribes (Bois Fort, Fond du Lac, Grand Portage, Leech Lake, Mille Lac and White Earth) and the Minnesota Department of Revenue: Following the U.S. Supreme Court decision in Bryan v. Itasca County in 1976 that the state could not impose sales taxes on Indians who lived on the reservations, the legislature adopted a law authorizing the commissioner of revenue to enter into tax refund agreements with the governments of any Minnesota reservations for sales and excise taxes (Minnesota statutes 270.60). Individual agreements have been signed with each of the Chippewa tribes in which the tribes adopt a tariff equivalent to the state sales, use and motor vehicle excise tax for all sales transacted on the reservation. Through the agreement, the tribes' taxes are subject to the same collection procedures, penalties, interest and enforcement provisions in state law, and the state then refunds to the tribal council an amount equal to \$60 per person, based on the latest certified population count. Refunds are made quarterly to the larger tribes and annually to the smaller groups. The agreement must be renewed each year and can be terminated upon ninety days written notice.

For further information, contact: Minnesota Department of Revenue, Second Floor, Centennial Office Building, St. Paul, Minnesota 55145, 612/296-3401.

All Seven Minnesota Chippewa Tribes and the Four Sioux Reservations (Lower Sioux, Prairie Island, Shakopee Mdewakanton and Upper Sioux) and the Minnesota Department of Revenue: In Minnesota, excise taxes on cigarettes and liquor are collected by wholesalers and paid before the merchandise is delivered to the reservation. By authority in Minnesota statutes (16A.48) allowing refund of money paid into the state treasury following a verified claim, it was agreed that the state make annual or quarterly refunds to tribal governments for previously collected taxes. The amount is based on a formula equaling the statewide annual per capita consumption times the total reservation population times the tax rate. These refund and tax agreements must be renewed annually, but the refund contracts may be cancelled upon thirty days notice.

Additionally, the state has refund agreements with the reservation business committees for gasoline taxes paid for tribal vehicles. The state refunds the actual tax paid according to claims filed by the tribal councils on a quarterly basis.

For further information, contact: Minnesota Department of Revenue, Second Floor, Centennial Office Building, St. Paul, Minnesota 55145, 612/296-3401.

#### OREGON

Warm Springs Confederated Tribes and Oregon Department of Revenue: Following the Supreme Court decision in Moe v. Confederated Salish and Kootenai tribes of the Flathead Reservation (1976), Oregon negotiated an agreement with the Warm Springs Council to refund the previously collected tax on cigarette sales to the reservation Indians.

The terms of the agreement differ from those of Minnesota and South Dakota because the tribal ordinance allows only the tribe or its licensees to sell cigarettes and collect the Oregon cigarette tax. The Department of Revenue agreed to refund the amount due the tribe based on a computation using the per capita cigarette consumption, the number of enrolled tribal members and the current tax rate.

Refund payments are made annually except for the first year's payment which included a retroactive amount for the preceding three years.

For further information, contact: Commission on Indian Services, 454 State Capitol, Salem, Oregon 97310, 503/378-5481; or Dennis Karnopp, Warm Springs Attorney, Panner, Johnson, Marceau, Karnopp and Kennedy, 1026 N.W. Bond Street, Bend, Oregon 97701, 503/382-3011.

#### SOUTH DAKOTA

Oglala Sioux Tribe of Pine Ridge, Cheyenne River Sioux Tribe and Rosebud Sioux Tribe, and South Dakota Department of Revenue: In 1968, the Oglala Sioux Tribe enacted a tribal sales tax, which was parallel to the state tax. Because the tribe had difficulty in administering and collecting the tax, however, it entered negotiations with the state in 1970 for the first of the state-tribal tax collection agreements.

Under the agreement, the state collects all retail taxes and returns the tribe's share of the revenue quarterly. During the initial negotiations, retailers on the reservation were surveyed to estimate the percentage of transactions that involved nonIndians which the state could therefore tax. As a result, the state retains 17 percent of the collected revenue, plus 1 percent for administrative costs.



At the time the agreement was negotiated, South Dakota law contained no specific authorization for such agreements. However, the attorney general issued an opinion that the tribe qualified. During this interim, the South Dakota legislature created a task force to study Indian and state government relations. One of the results, in 1974, was a law specifically authorizing tax collection agreements between the state and Indian tribes (South Dakota Code of Laws 10-12A). The law was later amended, requiring approval of each agreement by the governor and attorney general.

Pine Ridge later adopted a cigarette tax and signed a separate agreement with the state for collecting and refunding tribal taxes. The tribe receives quarterly refunds based on a percentage of the per capita tax revenue for the counties in which the reservation lies.

After the agreement on collecting retail, sales, service, and use taxes was reached between the Oglala Sioux Tribe and the state, the Cheyenne River Sioux and the Rosebud Sioux tribes also entered into similar agreements. These negotiations involved an attempt to develop a more accurate measure of how to divide the revenue, but the final solution was to divide the revenue according to the ratio of Indian to non-Indian population on the reservation. As with the first agreement, the state retains 1 percent for administrative costs.

For further information, contact: Division of Departmental Services, Department of Revenue, Capitol Lake Plaza, Pierre, South Dakota, 57501, 605/773-3311; or Fried, Frank, Harris, Schriver, and Kampleman, attorneys, 600 New Hampshire Avenue, N.W., Washington, D.C. 20037. 202/342-3500.

**STARTED**  
***State-Tribal Approaches Regarding***  
***Taxation & Economic Development***

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## CHAPTER TWELVE

### B. 16. "Identifying and evaluating alternative methods of approaching taxation both by this state and Indian nations and tribes and summarizing the methods of taxation by states where similar activities occur."

—SB 1440

The authority to tax has frequently been an issue of contention between states and tribes. Two key issues generally are central to the debate: (1) the level of the imposition of a state tax (when an excise tax is imposed at the wholesale level and is subsequently passed on to tribes or tribal members who are exempt from state tax) and (2) a state's requiring a tribe or tribal business to collect state taxes on sales to non-Indians who are not exempt from state taxes. The latter scenario poses a problem for states in that they may be hindered in efforts to enforce collection of taxes to non-Indians since tribes are immune from lawsuits.<sup>a</sup> While the debate centers primarily on who and what is taxable by states, tribes, or both, it is further complicated by the principles of federal preemption and tribal sovereignty.

Various sources contend that successful tax cooperation endeavors depend on a change in attitudes on both sides. With respect to taxation agreements, "[t]he basis for [successful] agreements is recognition that tribal tax revenues are essential to tribal governments' ability to serve the needs of reservation residents and businesses, and that a healthy tribal economy benefits the state as well as the tribe."<sup>10</sup> Harley Duncan, director of

the Federation of Tax Administrators, suggests that tribal governments must recognize that a tribe has a need for the stable source of revenue provided through agreements or other cooperative endeavors with the state. Likewise, a state must recognize that its best interests may not be in collecting *all* the tax due on sales to non-tribal members. A key to this understanding is to examine the issues on an economic rather than a purely legal basis.<sup>11</sup>

In an attempt to resolve the problems of taxing authority, collection, and enforcement, some states, often in conjunction with individual tribes, have considered and implemented "alternative taxation methods" including state-tribal tax agreements, tax exemptions implemented pursuant to state statute or regulation, and informal arrangements between the state and tribes. It is not possible to make simple or tidy "groupings" of these methods, since nearly all agreements, exemptions, or arrangements differ significantly depending on the state and tribes involved. Tax agreements, in particular, are tremendously diverse, both in terms of their ultimate taxation effect as well as the degree of flexibility states have in what may or may not be addressed within such agreements. Likewise, tax exemptions differ with respect to the goods, types of transactions, or parties that may be exempt.

a. Sovereign immunity bars states from pursuing lawsuits against tribes. (See *Oklahoma Tax Comm'n v. Pottawatomie Tribe*, 496 U.S. 585, 514.) However, as alternative remedies, states may bring lawsuits against individual agents or officers of a tribe, may seize untaxed cigarettes from wholesalers, or may enter into agreements with tribes for mutually agreeable methods of enforcing the collection of taxes. *Id.*

LC researchers gathered examples of state-tribal alternative taxation methods from state personnel and tribal officials via telephone conversations over a four-month period. Each state's summary includes, where known, (1) the types of taxes addressed by the method; (2) existing taxation practices in that state resulting from use of the particular method or methods; (3) the perception of the method's successes or advantages by both the state and the tribes, including any impact on business or economic development; (4) any problems cited by tribal or state sources that have resulted from the method; and (5) any recent or pending legislation or state or tribal activity pertaining to Indian taxation issues. LC researchers attempted to portray both the state's and tribe's perspective regarding these taxation issues. Tribes, however, were often hesitant to discuss these issues.

## STATE-TRIBAL ALTERNATIVE METHODS OF TAXATION

### A. Colorado

**Types of Taxes Addressed**—In lieu of any formal legislation or agreement, the state Department of Revenue and the state's two tribes have established informal cooperative arrangements regarding the following taxes: (a) sales and (b) cigarette.

**Existing Taxation Practices**—The state of Colorado has no statutes providing exemptions with respect to its Indian reservations, nor does it have written tax agreements with either of its two tribes. As noted above, informal cooperative arrangements exist between the state Department of Revenue and the two tribes that focus on reservation sales

or transactions involving non-Indians.

**(a) Sales Tax**—Indian or tribally-owned businesses located on reservations do not collect state sales taxes if they are small businesses run from the home or if they have predominantly Indian customers. Non-Indian and non-tribally owned retail businesses located on reservations are responsible for collecting state taxes involving transactions with non-Indians. These businesses collect state sales taxes either by taxing all transactions (where the majority of sales are to non-Indians) or by estimating and remitting tax due from non-Indians (where the majority of taxable sales are to exempt reservation Indians). Colorado's enforcement is made somewhat simple because the state's sales tax does not apply to groceries, residential utilities, or restaurant employee meals. Until recently, the number of non-Indian customers in these remote tribal areas was limited primarily to permanent non-Indian residents.

**(b) Cigarette Tax**—Retail businesses are required to inventory stamped cigarettes when sales are made to non-Indians. Indian employees and Indian guests have access to unstamped cigarettes.

**Advantages of Existing Taxation Practices**—None reported.

**Disadvantages of Existing Taxation Practices**—None reported.

**Recent Taxation Activity**—None reported.

### B. Florida

**Types of Taxes Addressed**—A statute is in place implementing a cigarette excise tax exemption for

purchases made on Seminole tribal lands.

**Existing Taxation Practices**—In the late 1970s, Florida enacted a statute (F.S. 210.05(5)) to allow the state a means of controlling the purchase of out-of-state cigarettes by the tribe.

**(a) Cigarette Tax**—The statute permits wholesalers to sell stamped, untaxed cigarettes to the Seminole tribe or to tribal retailers for retail sale to both Indians or non-Indians. This effectively allows the tribe to impose its own tax on cigarette sales to all purchasers. Administrative regulations (Rule 61A-10.026 F.A.C.) require the wholesaler to place Indian tax-free stamps on all cigarettes sold to the tribe.

**Advantages of Existing Taxation Practices**—Some of the benefits of the exemption to the state are as follows:

- Successful deterrence of bootlegging from out-of-state, resulting in additional in-state wholesale business;
- Minimal administrative cost to the state;
- Easier identification and tracing by state enforcement authorities of illegally possessed untaxed cigarettes by off-reservation retailers due to the distinctive stamp placed on untaxed cigarettes sold to the tribe. [Note: This proved to be somewhat of a problem initially as non-Indian retailers attempted to purchase major quantities of cigarettes on the reservations. A state inspection program, however, is now in place to counter this type of activity, and Indians have imposed a three-carton limit on the purchase of cigarettes.]; and



- No state-tribal litigation in this area of taxation.

Officials from the *Seminole Tribe* reported the following:

- The Seminole Tribe has authority to impose and collect its own 10 percent tax on all cigarette sales. The tax is collected by an authorized wholesaler and is remitted to the Seminole Tribe on a weekly basis.

**Disadvantages of Existing Taxation Practices**—The only disadvantage reported by the state as a result of the exemption involves the following:

- An inability of the state to collect an estimated \$10 to \$21 million annually it might otherwise collect from sales to non-Indians. Despite this, the exemption overall has been well-received by the state.

**Recent Taxation Activity**—None reported.

## C. Louisiana

### Types of Taxes Addressed—

Louisiana's Governor, Secretary of Revenue, and Secretary of Public Safety and Corrections entered into similar 10-year tax agreements with two of Louisiana's three tribes regarding (a) sales and use taxes on tribally-owned vehicles, (b) cigarette and tobacco excise taxes, and (c) motor fuel taxes.

**Existing Taxation Practices**—The taxation agreements are not governed by, or made in conjunction with, any statutes, but were negotiated and signed solely by tribal and state officials. Under the tax agreements, the state agrees to exempt certain goods and transactions on the reservation from state taxes when the tribe imposes a tribal tax at a rate equivalent to that of the state's.

[Note: While the agreements mandate the imposition of a tribal tax at the same rate as the state tax, no parish (i.e., county) taxes are applicable on the reservations, creating a competitive advantage for the tribe.] The following state taxes are exempted by the compacts:

### (a) Sales and Use Tax on Tribally-Owned Vehicles—Each agreement provides that vehicles owned by the tribe and used for tribal

governmental purposes are exempt from the state sales and use tax normally applicable to all vehicles. In return, the tribe agrees to register its vehicles pursuant to state law, pay the vehicle registration fees and attach state license plates, and comply with state motor vehicle safety inspections. [Note: The issue of exemptions for vehicles owned by individual tribal members was not addressed in the agreement but was left for the courts to decide. At the time of this writing, the federal appeals court has denied this exemption for individuals and it appears unlikely that this will be reversed.]

### (b) Cigarette and Tobacco Tax—

All tobacco sales on the reservation, whether to Indians or non-Indians, are exempt from the state's tobacco excise tax. In exchange, the tribe agrees to enact an equivalent tribal tax on all sales and to purchase stamped but tax-free cigarettes and tobacco products only from Louisiana wholesalers. Wholesalers may apply for a refund or credit from the state for any taxes that have been prepaid on exempt sales to Indians.

(c) Motor Fuel Tax—All gasoline sales on the reservation, whether to Indians or non-Indians, are exempt from the state's motor fuel tax. Under the terms of the agreement, the tribe imposes its own gasoline tax

equivalent to the state tax rate, and the revenues generated are used at the discretion of the tribe. State distributors pay the state tax without passing it on to the tribes, and they may apply to the state for a credit or refund on these tax-exempt sales of motor fuel.

**Advantages of Existing Taxation Practices**—Benefits of the taxation agreements include the following:

- Explicit recognition of tribal sovereignty;
- Avoidance of litigation between the state and tribes and better state-tribal relations; and
- Ability of tribes to collect revenue and maintain self-sufficiency, as evidenced by generation of \$80,000 to \$100,000 annually in revenue for the Chitimacha Tribe. This is used to support such improvements as the tribe's public works department, governmental facilities and grounds maintenance, and street lighting.

**Disadvantage of Existing Taxation Practices**—A disadvantage is associated with current taxation agreements.

- The state Department of Revenue and Taxation reports some loss of revenue in the tax being credited to the cigarette wholesalers, but overall there is a minimal economic impact.

### Recent Taxation Activity—

Increased gambling activity on the reservations has created considerable potential for a greater volume of retail sales to non-Indians to escape state taxation. The Louisiana Department of Revenue and the Office of the Governor have initiated efforts with tribal leaders to renegotiate the existing compacts. As

a result, the Couchatta Tribe reportedly has submitted a proposed alternative compact for consideration by the state, and the chairman of the Chitimacha Tribe indicates that the tribe has voluntarily implemented a 4 percent state sales tax on all non-gambling activity at the casino.

#### D. Michigan

##### Types of Taxes Addressed—

Agreements currently are in place between the Michigan Department of Treasury and four of the more commercially successful of Michigan's 10 Indian tribes. First initiated in the early 1970s, the agreements address (a) business, (b) sales, (c) use, (d) cigarette, (e) gasoline, and (f) diesel fuel taxes.

**Existing Taxation Practices—**The agreements officially have expired but have been operating under an interim extension since 1994. They generally are valid for three-year terms and may be terminated by either party with 30 days written notice. State and tribal leaders currently are in the process of renegotiating the agreements to create a single uniform "model" agreement for use by any of the tribes. In the interim, the agreements make the following provisions with respect to these tax types:

(a) **Business Tax**—The single business tax, a value-added tax that substitutes for Michigan's corporate income tax, is not imposed on business activity conducted within tribal lands by the tribe, tribal council, or enrolled tribal members living on the reservation. However, this tax is applicable when the business activity occurs outside reservation boundaries.

(b) **Sales Tax**—Tribal members pay sales tax to all sellers, whether

located on or off the reservation, with three exceptions: (1) purchases made at a tribally-operated retail outlet; (2) purchases made at a tribal gaming establishment; and (3) purchases made on such large items as houses, boats, cars, or materials used to build a new home (when the seller is furnished with a valid exemption certificate). The state annually refunds to tribal councils the sales tax paid by tribal members on purchases made off the reservation, using a formula based on the average income and average size of Indian families, minus the amount owed by the tribe to the state from on-reservation sales to non-Indians (as indicated by records maintained by tribal retailers). Tribal councils, at their discretion, then distribute this to individual tribal families. In theory, tribes could owe the state for the amount of taxes owed on purchases by non-Indians that exceed the sales tax refund amount for Indians.

Finally, tribal councils can purchase tangible personal property for governmental purposes from off reservation retail businesses without being subject to the state sales tax.

(c) **Use Tax**—Enrolled tribal members living on Indian land and tribal councils are exempt from paying the use tax on telephone services, as well as on title transfers for motorized vehicles, watercraft, and snowmobiles that occur on reservation lands.

(d) **Cigarette Tax**—Agreements provided for a one-time state refund to tribal councils of past taxes paid by tribal members on cigarettes. Following this transaction, the agreements provide for tribal retailers to buy all cigarettes tax-free when purchased from a licensed primary wholesaler. The tax-free cigarettes are for purchase by enrolled tribal members only; any non-Indian

purchasing from a tribal retailer is subject to the state tax. To ensure that non-Indians do not benefit from the tribe's exempt status, the tribe annually remits to the state taxes owed on any cigarettes purchased that exceed a per capita ceiling amount.

(e) **Gasoline Tax**—Tribal stores may purchase tax-free gasoline from licensed distributors (although a mechanism is in place whereby the tribal council may claim a refund from the state for any tax that might be paid on gasoline ultimately sold to an exempt tribal entity). This tax-free gasoline is for purchase by enrolled tribal members only; any non-Indian purchasing from a tribal retailer is subject to the state tax. To ensure that non-Indians do not benefit from the tribe's exempt status, the tribe agrees to refund to the state any tax owed on gasoline sales exceeding the consumption ceiling amount.

(f) **Diesel Fuel Tax**—The agreements provide that should a tribe establish a diesel fuel outlet, the agreements will be amended at that time to address the diesel fuel tax.

**Advantage of Existing Taxation Practices**—A benefit resulting from the agreement is:

- The ability of both the tribes and state to generate additional revenue. The state is receiving taxes due on transactions involving non-Indians on reservations, while tribal members remain exempt from taxes on these sales.

**Disadvantages of Existing Taxation Practices**—Drawbacks to the agreements are as follows:

- A belief by some tribes that their exemption from state taxes should be

greater than that currently being granted;

- Additional administrative and paper work for governmental agencies; and
- Diminished state-tribal relations due to the recent inability of state and tribal entities to agree on renegotiations.

**Recent Taxation Activity**—As noted earlier, efforts currently are underway to develop and negotiate a uniform agreement with all 10 tribes in Michigan. Two issues have been central to negotiations. First, tribes want a tax exemption on materials used for tribal construction projects, regardless of whether the constructors are Indian or non-Indian. At this time, the state has not conceded on this issue. Second, tribes do not want to collect and remit the use tax on room accommodations. Of the 10 tribes, only four have sufficient reservation-based commercial activity to allow the state to collect the revenue due on sales to non-Indians. If an agreement cannot be reached with these four tribes, there is no real benefit to the state to enter into an agreement with the remaining tribes.

## E. Minnesota

**Types of Taxes Addressed**—Tax refund agreements are in place between the Minnesota Department of Revenue and each of the 11 Chippewa and Sioux tribal governments with respect to at least one of the following types of taxes: (a) sales and use tax (including a motor vehicle excise tax), (b) cigarette and tobacco products excise tax, (c) liquor tax, and (d) motor fuel tax.

**Existing Taxation Practices**—Reservation taxation practices are governed by agreements with each of the state's 11 tribes, although not all of the tribes have agreements addressing each of the previously noted taxes. Negotiations currently are underway to revise the agreements to make them as uniform as possible since, over time, they have become more individualized and difficult to administer. The trend to uniformity, along with the comprehensive nature of addressing all tax types in one agreement, already is evident in three of the newest renegotiated agreements. The new agreements also may provide for various changes pertaining to the different tax types and administration procedures, as discussed below.

(a) **Sales and Use Tax**—Authorized by statute (MS §270.60), the agreements provide that *all* transactions on a reservation, whether they involve an Indian or non-Indian, are subject to a tax that is equivalent to the rate of the corresponding state tax. The state collects these taxes and periodically refunds a predetermined amount to each compacting tribal council pursuant to the terms of the agreement covering that particular tax and tribe. Refunds under the old agreements were per capita (*i.e.*, designed to approximate the tax paid by tribal members based on a population formula). The new sales tax agreements, however, have two parts: (1) per capita refunds and (2) revenue sharing (where a percentage of *all* taxes collected on a reservation are refunded to each tribal council, thereby representing a portion of tax collected on sales to non-Indians). In sum, these new agreements provide for a refund of 100 percent of the estimated tax collections from Indians as well as an identified percentage of the collections from non-Indians (currently a 50/50 split).

(b) **Cigarette Tax**—Both Indians and non-Indians purchasing cigarettes from any on-reservation retailer must pay a cigarette excise tax. Three kinds of cigarette tax agreements exist at present, although, as noted above, many agreements are being renegotiated. The first—a 70/30 revenue sharing agreement—involves a 70 percent tax refund to tribal councils on *all* cigarettes sold by a tribe or tribal retailer. The second—using a per capita refund—reimburses to tribal councils a predetermined amount per Indian living on or near the reservation. These two methods were used in the old agreements and continue to be in effect pending renegotiation of the cigarette agreements. However, new agreements involve a 50 percent tax refund to tribal councils on *all* cigarettes sold on the reservation, as well as a refund of a predetermined amount per Indian living on or near the reservation. The renegotiated agreements are using *only* 50/50 revenue splits, not the 70/30 or per capita refunds.

(c) **Liquor Tax**—Both Indians and non-Indians must pay the liquor excise tax on all reservation-based retail sales. In return, the state remits a negotiated amount of precollected excise taxes paid on all liquor sales to each compacting tribe based on a per capita consumption formula.

(d) **Motor Fuel Tax**—There were no per capita refunds or sharing of taxes on sales to non-Indians under the old agreements. Tribal councils were reimbursed for actual taxes paid on fuel for tribal government use only. Tax paid by *individual* Indians was not refunded. Some of the recently renegotiated agreements, however, not only reimburse all motor fuel taxes paid by tribal governments and individual Indians,



but also provide for the state and tribes to share revenues from the collection of motor fuel taxes generated from on-reservation sales.

**Advantages of Existing Taxation Practices**—Some of the benefits of the agreements are as follows:

- The agreements provide consistent and orderly administration of the tax exemption to which tribes are entitled while collecting non-exempt taxes from non-Indians;
- In recognizing the powers of each sovereign, the agreements have curtailed disagreements and confusion surrounding the tax system. This is particularly beneficial for non-Indian parties who do business with reservation Indians, either on or off the reservation, by providing consistent and easily understood answers to questions of taxing authority and collection;
- The cigarette agreements (first implemented in 1989) ended a state-tribal dispute that ensued with the widespread publicizing of sales of untaxed cigarettes on reservations;
- The agreements have reduced litigation between the state and tribes with respect to these taxes and have resulted in better state-tribal relations in general; and
- In most cases, the agreements provide tribes with a substantial and consistent source of revenue, which has been used by some tribes to assist in building the tribal infrastructure, to finance loans, or to commingle with other revenue to start businesses or construction projects.

**Disadvantages of Existing Taxation Practices**—The agreements, apparently successful from the standpoint of both state and tribal

entities, have nonetheless been the source of some contention. Some of the drawbacks associated with the agreements are as follows:

- Questions remain regarding audit and compliance remedies, since it is unclear under current agreements whether the Department of Revenue may audit tribal businesses. As it now stands, the Department is leery to even suggest auditing a tribal business to ensure compliance. This issue is almost certain to be addressed in the new agreements;
- Some non-Indians complain that the per capita refunds to tribes are too high, especially in light of the increasing popularity and profitability of reservation gaming;
- Frequent changes in tribal government leadership often result in a lack of continuity between administrations;
- Some tribal leaders are reluctant to enforce compliance by individual Indians or Indian businesses since this would be unpopular from a political standpoint;
- The motor vehicle excise tax initially posed a problem in that tribal members were escaping state taxation by registering their vehicles with the tribe and not the state. This issue is being addressed by removing the motor vehicle excise tax from all future agreements; and
- The sales tax agreements have met with resistance by some tribal members who refuse to comply based on sovereignty issues.

**Recent Taxation Activity**—The state has indicated its desire to have the new agreements negotiated no later than the end of 1995, as the old agreements will not be extended

indefinitely. As the agreements undergo renegotiation, a number of issues will be addressed or changes implemented, including:

- A more consistent approach with uniform terms for all tribes;
- Auditing and collection rights for the state may be implemented in exchange for expansion of the percentage split agreements to include liquor, sales, and gasoline taxes, in addition to cigarette taxes;
- The percentage split agreements will likely be renegotiated to a more equitable 50/50 split; and
- More explicit recognition of each party's sovereignty.

Other new activity in Minnesota includes recent legislative authorization for the Department of Revenue to enter into revenue sharing (percentage split) agreements for all four types of taxes, not just cigarettes. However, legislation introduced in the 1995 session that failed to pass would have repealed the Department's authority to enter into anything except per capita agreements with the tribes.

## F. Mississippi

### Types of Taxes Addressed—

Pursuant to statute, the state exempts all transactions on the reservation lands of the Band of Choctaw Indians from state sales or gross receipts taxes, subject to the restrictions below.

**Existing Taxation Practices**—In 1986, the Mississippi legislature enacted a statute (MCA §27-65-215) whereby the state relinquished any jurisdiction it had to levy and collect state sales or gross receipts taxes on reservation lands of the Mississippi



Band of Choctaw Indians (the sole tribe in Mississippi) when merchants are authorized to do business on the reservation and are paying tribal sales taxes. Another statute (MCA §27-65-217) authorizes the state Tax Commission to enter into agreements with the tribe for the state to collect any tribal sales or gross receipts taxes. However, no agreements currently exist since the tribe administers collection of its own tax.

This procedure was not implemented as a response to any particular controversy between the state and tribe, but rather to clarify the taxing situation and to prevent any future state-tribal conflict. Both the tribe and the state report extremely good working relations with the other.

**Advantages of Existing Taxation Practices**—The Mississippi Tax Commission reports no significant complaints or problems resulting from the exemption. The Choctaw Tribe does note several benefits of the exemption in addition to the continuation of excellent state-tribal relations. Prior to passage of the law that enacted the exemption, the tribe experienced little economic growth. Subsequently, however, the Choctaw Tribe has generated more than \$75 million in annual payroll that is largely subject to state income tax as these funds are expended off-reservation by thousands of Indian and non-Indian employees of tribal non-gaming enterprises. These funds circulate through the state's retail sales tax collections, benefiting the state's overall economy.

**Disadvantages of Existing Taxation Practices**—None reported.

**Recent Taxation Activity**—None reported.

## G. Montana

**Types of Taxes Addressed**—In 1981, the Montana legislature passed the State-Tribal Cooperative Agreements Act (MCA §§18-11-101 through 18-11-111) that allowed any public agency to enter into agreements with any of Montana's seven tribes in any area deemed necessary, including—although not specifically mentioned—taxation. In the subsequent 10 years, agreements arising from this law did not address taxation issues. It was not until 1991 that the legislature passed a law specifically allowing for motor fuel agreements with the tribes (MCA §15-70-234). In 1993, the State-Tribal Cooperative Agreements Act was amended to allow the state to specifically enter into taxation agreements with tribes for the collection and revenue sharing of any type of tax the state imposes. While the cooperative agreements may address cigarette taxes, the 1993 legislature also implemented the cigarette allocation system (MCA §16-11-111), whereby participating tribes receive a quota of tax-free cigarettes each year for disbursement among tribal retailers. Currently, agreements are in place that address the following taxes: (a) cigarette, (b) liquor, and (c) motor fuel.

**Existing Taxation Practices**—Under the Cooperative Agreements Act, the Montana Department of Revenue (or the Department of Transportation, for agreements pertaining to motor fuel taxes) may enter into agreements with tribes for the collection and revenue sharing of any or all types of taxes imposed by the state. This includes cigarette taxes, which also may be addressed under the allocation system. The cooperative agreements provide for the state to collect an equivalent tribal tax on all reservation

transactions and then remit to the compacting tribes their respective portions as determined pursuant to the per capita formula negotiated in the agreement.

Under the cigarette allocation system, a quota of tax-free cigarettes for purchase by any of the tribes in Montana is determined in one of two ways. The quota may be negotiated by the Department of Revenue and the tribes through a cooperative agreement. For those reservations choosing not to compact with the state, the amount is statutorily computed pursuant to a population and consumption formula.

The cigarette allocation system and revenue sharing agreements for cigarette, alcohol, and motor fuel taxes are described below.

(a) **Cigarette Tax**—Under the allocation system, tribal retailers receive tax-free cigarettes from wholesalers based on a pre-determined quota. All exempt sales to a tribal retailer must be pre-approved by the Department of Revenue and are tracked through the Department's computerized quota program that notes the reservation, retailer, wholesaler, and number of cartons requested. If the amount requested exceeds the quota for the reservation or retailer, the sale is denied by the Department. If requests are approved and delivered, tribal retailers are authorized to sell these untaxed cigarettes to either Indians or non-Indians. However, regardless of who purchases these, the tribes receive only a limited amount of tax-free cigarettes per year. Wholesalers, who prepay the tax prior to shipment of tax-exempt cigarettes to tribal retailers, may submit a refund or credit request to the Department of Revenue for the amount of taxes precollected on cigarettes sold tax-

free to the tribal retailers, minus an administration fee. As previously noted, the allocation amount either may be determined through a cooperative agreement between the state and tribe, or is statutorily computed.

In lieu of participating in the allocation system, tribes may opt to enter into revenue sharing agreements with the state, whereby the state collects an equivalent tribal tax on cigarette sales and remits to the tribes their respective portions (as determined by a per capita formula). Currently, two tribes have agreements with the state for the sharing of cigarette taxes. Four other tribes have cooperative agreements providing for their participation in the allocation system, while the remaining tribe's cigarette allocation is determined pursuant to the "default" statutory computation.

(b) **Liquor Tax**—The state collects an equivalent tribal tax on all reservation-based retail liquor transactions and remits to the tribes their respective portions (as determined by a per capita formula). Currently, two tribes have agreements for the sharing of alcohol taxes.

(c) **Motor Fuel Tax**—The state collects an equivalent tribal tax on all reservation-based retail motor fuel transactions and remits to the tribes their respective portions. Five of the participating tribes receive amounts determined by a per capita formula, while a sixth agreement calls for a gallon formula whereby 100 percent of the tax paid is reimbursed to that tribe.

**Advantages of Existing Taxation Practices**—As the agreements and the cigarette allocation system have been effective for only a short period

of time, it is too soon to determine the exact impact they have had, economic or otherwise, on either the state or the participating tribes. General advantages cited by state and tribal sources include:

- The elimination of state-tribal litigation;
- The elimination of dual taxation;
- Increased tribal revenues due to the cooperative agreements, which resulted in increased tribal self-sufficiency (one tribe's motor fuel agreement generates more than \$500,000 annually, and its liquor agreement provides approximately \$77,000 per year);
- Less immediate revenue for the state as a result of the motor fuel agreements, but fewer long-term state expenditures in social services to tribes are needed as a result of greater tribal self-sufficiency;
- Increased revenue to the state on cigarette taxes from reservation-based retail sales to non-Indians;
- Less bootlegging of out-of-state cigarettes; and
- Greater tribal control of smokeshops operating on the reservations, since tribes may supply the Department of Revenue with lists of tribally-approved smokeshops and the amounts of tax-free cigarettes each can receive.

**Disadvantages of Existing Taxation Practices**—Drawbacks to the agreements or cigarette allocation system include:

- A reluctance by the state to relinquish control of tax collection to the tribes in cooperative agreements. Overall, this has not been a serious

source of conflict since the majority of the tribes lack the administrative means and resources to do this. However, one of the more financially sophisticated tribes appears to have the capability to administer its own tax collection and had, at one point, expressed an interest in doing so:

- An initial concern that counties would not receive funds from the state for county roads as a result of the cooperative motor fuel agreements. To address this issue, the motor fuel agreements specifically exclude mention of taxes to counties, and tribes and counties may opt to enter into their own separate agreements for these funds;
- One tribe's dislike for the formulas in the cooperative agreements, which are calculated using BIA population figures and not the tribe's own census figures;
- Extra administrative work and confusion for the Department of Revenue in maintaining two different cigarette allocation quota years. Four of the tribes have agreements operating on a calendar-year basis, while the remaining three operate under the statutory time frame which runs from October 1 to September 30 each year. Department sources suggest that a calendar-year basis used by all participating tribes might result in a more efficient and less confusing system;
- Administrative costs to the tribe for administering the cigarette allocation system while receiving no economic benefit from it; and
- Difficulty for tribes attempting to enforce recordkeeping by retailers of exempt cigarette sales to Indians.

**Recent Taxation Activity**—One tribe has expressed interest in

establishing a severance tax agreement with the state, although nothing conclusive has been determined despite preliminary discussions between the parties. There has, however, been ongoing litigation between the state and Crow Tribe regarding severance taxes, with the 9th Circuit Court of Appeals holding that Montana cannot impose its 30 percent severance tax on coal extracted from land owned by the tribe outside of its reservation. Dispute over the amount of backtaxes owed by Montana to the tribe remains before the court.

## H. Nevada

### Types of Taxes Addressed—

Statutes and regulations are in place regarding the following taxes:

(a) sales and use, (b) cigarette and tobacco, and (c) motor vehicle fuel.

### Existing Taxation Practices—

Various statutes and regulations pertaining to sales and use and cigarette/tobacco taxes provide that the state will not attempt to impose or collect these taxes on reservations where the governing tribal body has imposed its own corresponding tax that is equal to or greater than the state tax. While there is no statutory mandate that a state-tribal agreement be negotiated for this purpose, some agreements have been implemented primarily for information or clarification purposes and for greater tribal security. However, tribes imposing their own tax must notify the state Department of Taxation by filing a copy of their ordinance establishing the tax. Currently 13 out of 24 tribes have imposed their own cigarette and tobacco excise tax, and 10 have their own tribal sales tax.

(a) **Sales and Use Tax**—The state sales and use tax is not imposed on any transaction, whether to an Indian

or non-Indian, on reservations where the tribal governing body has imposed its own corresponding tribal tax that is greater than or equal to the state tax and has filed a copy of its ordinance establishing the tribal tax with the state Department of Taxation. All retail businesses located on a reservation must obtain a state sales tax permit and must periodically remit a state sales tax return indicating any taxable sales and exempt sales. This procedure is implemented pursuant to NRS §372.805 and NAC §320.271 and 320.272. For those tribes not imposing their own tribal sales tax, the state may collect taxes due on sales to non-Indians.

### (b) Cigarette and Tobacco Tax—

The state cigarette and tobacco excise taxes are not imposed on any cigarette or tobacco sale—whether to an Indian or non-Indian—on reservations where the tribal governing body has imposed its own corresponding tribal tax that is greater than or equal to the state tax and has filed a copy of its ordinance establishing the tribal tax with the state Department of Taxation. This process is established pursuant to NRS §370.515. For those tribes not imposing their own tribal cigarette tax, the state may collect taxes due on sales to non-Indians.

All but one of the 13 participating tribes receive their cigarettes tax-free from licensed state wholesalers with a tribal stamp affixed. The remaining tribe prepays the state cigarette excise tax at the wholesale level and must apply for a refund as provided by statute and regulation (NRS §270.280 and NAC §§370.220 and 370.230). Under this process, the tribal council must obtain a statement from the tribal retailer indicating the type and amount of products that were purchased, as well as from

whom they were purchased. The tribal council is then reimbursed after submitting a refund claim with the state Department of Taxation.

### (c) Motor Vehicle Fuel Tax—

Pursuant to regulation (NAC §365.060), tribal councils may apply for a refund of taxes paid on actual motor fuel sales to individual tribal members on the reservation. If a tribal council fails to maintain the required documentation or files fraudulent refund requests, the Department of Taxation may alter the refund procedure to make direct refunds to tribal members.

### Advantages of Existing Taxation Practices—

While no specific advantages were reported, neither were any major problems. Both state and tribal sources indicate a good working relationship with the other.

### Disadvantages of Existing Taxation Practices—

None reported.

### Recent Taxation Activity—

None reported.

## I. New Mexico

### Types of Taxes Addressed—

A statute is in place recognizing the exempt status of all Indian and non-Indian cigarette purchases on Indian reservations.

### Existing Taxation Practices—

Pursuant to a statute enacted in 1992 (NMS §7-12-4), New Mexico exempts sales of cigarettes to tribal and on-reservation Indian retailers from the cigarette excise tax.

(a) **Cigarette Tax**—Under the exemption, all cigarette sales by wholesalers to tribes or licensed Indian retailers are untaxed and unstamped regardless of whether the sale is ultimately made to an Indian



or a non-Indian. Further, there is no limit to the number of tax-free cigarettes that can be sold to a tribe. Since wholesalers themselves sell the cigarettes unstamped and untaxed to Indians, they have no need to apply for a credit or refund from the state.

**Advantages of Existing Taxation Practices**—This exemption has met with mixed reaction. Implemented as an effort to curtail the out-of-state purchase of cigarettes by tribes in New Mexico, the exemption has, as expected, been viewed favorably by tribes, smokers, and in-state distributors, if not the state Department of Revenue. Improved state-tribal relations and keeping the cigarette wholesale shipments in-state, however, might be considered as indirect benefits to the state.

**Disadvantages of Existing Taxation Practices**—Some state entities regard the cigarette tax exemption as having little or no beneficial value for the state, particularly from an economic standpoint.

**Recent Taxation Activity**—A bill passed by the 1995 legislature gives oil and gas producers a 75 percent credit against state severance taxes for any tribal taxes imposed on that same production. Intended to address the issue of dual taxation, the bill as originally introduced would have authorized a 100 percent credit.

## J. New York

An allocation system was proposed that would address (a) cigarette and (b) motor fuel taxes, as well as (c) the sales tax on these items. Under this proposed system, wholesalers would precollect taxes on cigarettes and motor fuel on all but the quota amount being shipped to approved tribal retailers. The allotment, administered by means of a coupon

system, would provide a way to inform wholesalers of the state-approved amount of tax-free product.

The state Department of Taxation and Finance is in the process of amending its existing regulations to reflect the outcome of the 1994 *Attea* decision, where such an allocation system was held to be constitutional (see Chapter 1). At this time, however, the administration has not formulated an official policy regarding this issue.

## K. North Dakota

**Types of Taxes Addressed**—An agreement is in place between the state and one of its five tribes regarding cigarette and tobacco taxes.

**Existing Taxation Practices**—North Dakota provides statutory authority allowing public agencies to enter into tax collection agreements with tribes (NDCC §§54-40.2-02 through 54-40.2-09). Currently, the state has done so with just one tribe, the Standing Rock Sioux. This agreement, somewhat modeled after the agreement between South Dakota and the Standing Rock Sioux in that state, became effective on July 1, 1993.

**(a) Cigarette and Tobacco Tax**—The Standing Rock agreement provides for the state to collect from wholesalers a tribal cigarette and tobacco tax that is identical to the state tobacco tax. The state then remits 75 percent of this amount back to the tribe, minus an administrative fee, as provided by the terms of the current agreement. (This amount was determined pursuant to population estimates of Indians to non-Indians living on the North Dakota portion of the reservation as being three to one). The tribe initially approached the

state in an effort to rectify a problem under the old system in which only Indian retailers—not the state or the tribe—benefitted from the sale of tax-free cigarettes. Tribal sources report that their working relationship with the state has been exceptionally cooperative and positive.

**Advantages of Existing Taxation Practices**—Overall, the cigarette and tobacco tax agreement has been well-received by both the state and the Standing Rock Sioux Tribe. Benefits resulting from the agreement are as follows:

- While the agreement addresses only the cigarette and tobacco tax, it leaves open further state-tribal negotiations for other types of taxes (it is expected that negotiations on motor fuel and sales tax provisions will occur in the future);
- Increased and consistent revenues for both the state and the tribe. This is particularly important for the tribe, as the funds are redistributed among its local governments. This distribution directly benefits tribal members, even though the overall effect on the tribal economy is not significant;
- Increased business for licensed cigarette wholesalers and North Dakota retailers; and
- Better accounting procedures for tobacco sales by non-Indian retailers.

**Disadvantages of Existing Taxation Practices**—Drawbacks to the agreement include:

- Resistance on the part of some individual tribal members or Indian business owners who oppose the agreement as an imposition on tribal sovereignty or who object to the tax as hurting their business. Also, Indian



retailers were initially reluctant to pay the required annual licensing fee; and

- Charges by Indians of prejudice from non-Indians resulting from perceived favoritism towards Indians.

**Recent Taxation Activity**—As noted earlier, the Standing Rock Tribe is currently the only tribe in North Dakota to compact with the state on taxation issues. While the Fort Berthold Tribe had at one time expressed an interest in entering a similar agreement, this has not materialized.

Although the Standing Rock agreement is relatively new, changes to its terms have been suggested. One possibility involves the tribe itself collecting the tax instead of having this done by the state. Another involves efforts to renegotiate the 75/25 percentage split between the state and tribe to reflect what might be perceived by non-Indians as a more equitable distribution, especially in light of the growth and success of reservation gaming.

## L. Oklahoma

### Types of Taxes Addressed—

Currently, state-tribal compacts deal solely with cigarette and tobacco taxes.

**Existing Taxation Practices**—In 1992, the Oklahoma legislature passed a law (OS tit. 68, §346(1)(C)) allowing the state to enter into compacts with its 39 tribes regarding state cigarette and tobacco taxes. The law further provides for the tax procedure to be followed in the absence of a state-tribal compact. The compacts, negotiated between the Governor's office and the individual tribes, were initiated in 1993 when four tribes approached

the legislature to implement the compacts as a means to halt the seizure by the state of out-of-state cigarette shipments to tribes. To date, 16 tribes have negotiated nearly identical compacts with the state.

(a) **Cigarette Tax**—Under the compacts, tribes make "in lieu" payments to the state equal to 25 percent of the state tax rate on all reservation sales of cigarettes and tobacco, regardless of whether the ultimate purchaser is Indian or non-Indian. This payment is in lieu of excise and sales taxes normally collected on off-reservation sales of cigarettes and tobacco in Oklahoma. Wholesalers sell the specially-stamped cigarettes at the reduced 25 percent tax rate to Indian retailers, who may then increase the price of the cigarettes to their customers. The compacts provide that all Indian-owned retailers agree to comply with the compact's provisions as a condition of licensing by the tribe. Further, compacting tribes agree to purchase their cigarette and tobacco products only from distributors licensed by the state. Both parties agree that cigarettes not carrying the recognized state stamp or the special tribal stamp are contraband and may be seized as such.

Under the statutory provisions for non-compacting tribes, tribal retailers pay 75 percent of the state tax rate on all cigarette and tobacco sales. However, if more than 25 percent of the sales are to Indians, the tribes may apply for a refund of the additional tax that was paid on sales to Indians. The state Tax Commission reports that many of the non-compacting tribes also are not complying with these provisions, but instead are bootlegging untaxed cigarettes from out-of-state sources.

**Advantages of Existing Taxation Practices**—While the compacts are relatively new, the state reports overall satisfaction with the compacts. Some specific benefits to the state are as follows:

- State revenues have increased substantially since the statute was passed, netting approximately \$5 million annually for the state;
- The Tax Commission reports less incidence of out-of-state, contraband cigarettes;
- There is less state-tribal litigation in this area;
- The Tax Commission reports the compacts as providing a more effective enforcement mechanism; and
- There is less conflict between the tribes and non-Indian businesses (such as convenience stores and wholesalers), since less of a competitive advantage exists for the tribal retailers.

Among the tribes that have entered into agreements with the state, the reaction is mixed as to how beneficial the compacts have proven to be for them. Advantages cited by some tribal sources include:

- Better control of tribal smokeshops;
- The ability of compacting tribes to carry out their business without the threat of seizures and lawsuits by the state (the Sac and Fox Nation cites this as being the primary, if not the only, benefit resulting from its compact with the state);
- The compacts' explicit recognition of tribal sovereignty and

the right of tribal members not to be taxed; and

- Less state-tribal litigation in this area.

**Disadvantages of Existing Taxation Practices**—While the compacts have apparently achieved their intended goal from the state's perspective, all has not been smooth in their implementation. Drawbacks to the compacts, as indicated by various tribal sources, include:

- Bitter opposition by many of the tribes or individual tribal members to the concept of compacting as an imposition on tribal sovereignty. Even within a tribe, reaction often is mixed, creating internal conflict on the issue;
- Complaints by both non-Indian businesses and compacting tribes regarding tribes that refuse to cooperate with the statute or to compact with the state;
- Opposition by some tribes to the uniform use of "one-size-fits-all" standards and terms in the current compacting process;
- A decreased ability to operate tribal government due to lowering of the tribal tax base resulting from the in lieu payments made to the state;
- Impediments to the development of new smokeshops and other potential businesses in Indian country since non-Indians are reluctant to deal with two governments; and
- Additional administrative work for tribal accounting staff that did not exist prior to implementation of the compacts.

The Chickasaw Nation, one of four tribes to initially compact with the

state, indicates that while the tribe has not experienced any significant problems as a result of the compact, neither has it experienced new business or increased economic development as a result. The Sac and Fox Nation, initially opposed to the compacts as an infringement on tribal sovereignty, nonetheless signed an agreement with the state under protest so that it could continue to receive uninterrupted cigarette shipments. This tribe indicated that overall the compact has been more problematic than beneficial.

**Recent Taxation Activity**—A bill introduced in the 1995 legislative session would have allowed the state to enter into cooperative agreements with tribal governments regarding "issues of mutual interest." However, at the time of this writing, the bill appears to have died in the House Rules Committee and is not likely to be revived this session. Several sources indicated that a motor fuel tax will be the next issue addressed by the state and tribes.

In July 1995, the U.S. Supreme Court invalidated an Oklahoma law imposing motor fuel taxes on fuel sold by tribal retailers on tribal trust lands. The court found the law unconstitutional because it imposed the taxes directly on Indian retailers, rather than on their non-Indian customers (see Chapter Two).

## M. Oregon

**Types of Taxes Addressed**—Cigarette and tobacco tax agreements have been negotiated between the Oregon Department of Revenue and two of the state's nine tribes.

**Existing Taxation Practices**—The Warm Springs Confederated Tribe and the Umatilla Tribe have cigarette and tobacco tax refund agreements

with the state. The agreements, first negotiated in 1979, are effective until either party terminates them by giving 60-day written notice.

(a) **Cigarette and Tobacco Tax**—Authorized by statute, (ORS §323.401 [cigarette] and ORS §323.615 [tobacco]), the agreements provide that all cigarettes, including those sold to Indians on reservations, are fully taxed and stamped pursuant to normal precollection procedures at the wholesale level. The tribes agree to adopt and enforce an ordinance permitting only the tribes or their authorized licensees to sell cigarettes on the reservation. The Department of Revenue in turn agrees to annually refund to the tribes an amount reasonably estimated to be equivalent to the precollected tax paid on tribal cigarette sales to Indians. This refund amount is determined on a population and consumption formula rather than actual sales made to Indians.

**Advantages to Existing Taxation Practices**—Benefits to the state include:

- Ability of the Department of Revenue to collect taxes from non-Indians with a minimum of administrative work while ensuring that Indians remain exempt; and
- Decreased likelihood of black market activities in the state.

While tribal officials were unavailable to comment on the agreements, there is no indication of significant tribal resistance to the agreements. Tribes would appear to benefit from the agreements in that:

- Tribes, and not individual retailers, receive the refund money, which is then used to fund various tribal programs; and

- There is a minimum of administrative work for the tribes, since the tax already has been precollected at the distributor level.

**Disadvantages of Existing Taxation Practices**—None reported.

**Recent Taxation Activity**—None reported.

## N. South Dakota

### Types of Taxes Addressed—

Agreements are in place between the state and four of its nine tribes with respect to the following: (a) sales and use taxes, (b) cigarette taxes, and (c) contractors' excise taxes.

### Existing Taxation Practices—

Given statutory authority to enter into agreements with Indian tribes since 1974 (SDCL §10-12A), the South Dakota Department of Revenue currently compacts with four tribes for the collection and revenue sharing of various taxes. Under the agreements, which are virtually identical among the four tribes, the tribes adopt a taxing structure that is parallel to that of the state. Every transaction on the reservation of a compacting tribe, whether involving an Indian or non-Indian, is subject to applicable sales, use, contractors' excise, or cigarette taxes. The agreements, subject to approval by the state's Governor and Attorney General, have been amended numerous times to include new taxes or to implement renegotiated percentage splits of revenues.

(a) **Sales and Use Tax**—The state collects all sales and use taxes on reservation transactions and redistributes a predetermined portion back to the tribes every two weeks based on a population formula stated

in the agreement, minus a one percent administrative fee.

(b) **Cigarette Tax**—The state collects all cigarette taxes on reservation transactions and redistributes a predetermined portion back to the tribes every two weeks based on a population formula stated in the agreement, minus a one percent administrative fee.

(c) **Contractors' Excise Tax**—The state collects all contractors' excise taxes on reservation transactions and redistributes a predetermined portion back to the tribes every two weeks based on a population formula stated in the agreement, minus a one percent administrative fee.

**Advantages of Existing Taxation Practices**—Benefits of the agreements, as perceived by the state, include the following:

- The state provides auditing and other administrative services for the tribes in collecting the tax; and
- Additional revenue for the state (for example, the state distributes revenue received from the motor fuel provisions into a transportation fund, which goes to the counties and is used for road maintenance and repairs for the benefit of Indians and non-Indians alike). Since South Dakota has no state income tax, its sales tax, including the state's portion from on-reservation sales, is the state's primary source of revenue.

Benefits perceived by the tribes include:

- Reduced incidence of discrimination (consumers are no longer asked whether or not they are Indians since all transactions and goods are taxed equally);

- One tribe indicates that its agreement allows for further negotiation for other taxes; and

- Steady sources of income are generated for the compacting tribes [Note: There has been a highly beneficial impact on various social programs where these funds are redistributed at the local tribal level. This indirectly helps to sustain Indian-owned businesses, since business funds can then be redistributed back into businesses and not into social programs. Overall, however, tribes have not redistributed these funds into specific economic development projects.]

Benefits perceived by both the state and tribes are as follows:

- There is greater stability and assurance regarding taxing practices for off-reservation businesses contemplating locating on a reservation;
- There is reduced state-tribal litigation over taxation issues;
- The terms of the agreements are easy to administer for both the state and the tribes, and they impose no difficulty or burden on tribal commerce and there is no competitive advantage for either party;
- There is less possibility of dual taxation; and
- Explicit provisions in agreement state that each tribe retains jurisdiction over its reservation members and the state has jurisdiction over non-Indians.

**Disadvantages of Existing Taxation Practices**—While the agreements initially were well-received, there currently appear to be a number of



substantial problems with the agreements from the perspective of both the state and the tribes. The state perceives the following disadvantages:

- The lax manner in which tribal governments enforce collection; and
- Slow and ineffective tribal councils due to internal tribal politics.

The tribes perceive the following disadvantages:

- A belief by at least one tribal revenue office that taxes have been a deterrent to economic development and growth of Indian businesses on reservations. Tribal members often are reluctant to assume the tax responsibilities inherent in ownership of a business, whether the taxes at issue are tribal or federal;
- The inability of one tribe to raise its current taxes or expand the terms of its agreement to cover additional types of taxes, since it is barred from doing so by its agreement. For example, this tribe would like to see motor vehicle excise taxes and fuel taxes addressed by the agreement;
- The failure of the agreement to cover trust lands on disestablished portions of the reservation (*i.e.*, former reservation lands), thereby making most sales in these areas fully taxable by the state and not subject to the percentage split;
- The failure of the state to diligently enforce the reporting by non-Indian businesses of on-reservation deliveries, which are subject to the percentage split;
- A general distrust of the state by tribal members and opposition to the agreements by some Indians on

sovereignty issues. This feeling is especially strong among providers of Indian tourism and artisan services who believe they should be tax-exempt. While some tribes have overcome these objections in light of the tribal revenue generated by the agreements, other tribes continue to view this as a substantial problem;

- A belief by Indian-business owners that tribes should be administering collection of the taxes, not the state [Note: Many Indian businesses file their tax returns with the tribal revenue office and not the state, forcing the office to assume a "liaison" role.];
- A lack of tribal access to state records regarding both tribal and non-tribal businesses;
- As cited by one tribe, use of the agreements by the state as leverage against the tribe on other, non-related issues; and
- As mentioned by one tribe, a general lack of understanding by Indian-owned businesses regarding reporting procedures for various taxes. The four compacting tribes are, however, currently discussing the need for reservation-based business seminars that would educate existing and potential business owners on taxation issues, and the state may eventually expand its tax-related educational seminars to include reservation locations.

A disadvantage perceived by both the state and tribes is:

- Disagreement between the parties regarding the actual percentage of revenue split.

**Recent Taxation Activity—**Legislation was passed in 1991 (SDCL §10-12A-4) allowing the

state to enter into agreements with the tribes for collection of any type of tax imposed by the state.

An increased awareness of tribal sovereignty has raised questions about the need for tribes to negotiate with the state at all. Thus, the agreements are not being renewed on a periodic basis as they once were. Tribes have grown more sophisticated than when the first agreements were negotiated twenty years ago, and they are able to afford better legal advice and to pursue litigation when they believe it to be necessary. While the state wants to continue the agreement process, tribes are indicating they want no state involvement at all. Both state and tribal respondents, however, indicated the importance of negotiation as an alternative to litigation in state-tribal taxation disputes, and there likely will be a significant amount of negotiation in the future.

Several tribes have proposed implementing their own tax collection system whereby they collect tribal taxes and remit a portion of this amount to the state. One tribe indicated it would like to retain all revenue collected under this type of system, while another said it would like to retain a portion of the tax revenue from non-Indians instead of it going entirely to the state.

Currently, litigation is pending on three federal lawsuits pertaining to Indians and taxation in South Dakota. One case, brought by a tribe that does not have an agreement with the state, deals with the state's jurisdiction to impose sales, use, contractors' excise, and motor fuel taxes on on-reservation sales to non-Indians in tribally-owned casinos. A second lawsuit involves motor vehicle registration and licensing. Currently,



if an Indian-owned vehicle is driven off a reservation, it must be registered in a county and be licensed by the state; this licensing fee, similar to the sales tax, is being challenged by a tribe. In the third case, a tribe is seeking to prevent the state from imposing state motor vehicle taxes on tribal members living on their native reservation.

## D. Utah

**Types of Taxes Addressed**—Utah has an administrative regulation providing for the exemption of motor fuel taxes for tribal government use for its eight tribes, as well as one state-tribal agreement in place relative to cigarette taxes.

**Existing Taxation Practices**—The tribal boundaries in Utah have changed a number of times over the years resulting in requests for tax-exempt status for "new" tribal areas. Court activity is ongoing with respect to final determination of the boundaries; however, despite this conflict the state has implemented an administrative regulation with respect to purchases of motor fuel on reservations. In addition, the state Tax Commission and the Ute Tribe have negotiated an agreement pertaining to cigarette taxation. These are outlined below.

**(a) Cigarette Tax**—Under the agreement negotiated between the Tax Commission and the Ute Tribe in 1990, the tribally-operated store (at this time, only one utilizes this procedure) records all tax-exempt cigarette sales to tribal members. These records are submitted to the wholesaler, who then submits them to the Tax Commission. The Tax Commission credits the wholesaler with tax-free cigarette stamps (which are identical to the regular tax-paid stamps) based on the tax-exempt

sales recorded; the wholesaler also uses this number to provide an amount of stamped, tax-free cigarettes to the tribal retailer. Thus, there is an ongoing exemption to the wholesaler and tribal retailer based on actual exempt sales.

**(b) Motor Fuel Tax**—Since the late 1980s, tribal governments have enjoyed tax-free gasoline when the fuel is purchased in 750-gallon quantities for tribal government use. This policy is established pursuant to administrative regulation (Admin. R. 865-13G-10).

**Advantages of Existing Taxation Practices**—Benefits of the motor fuel exemption and cigarette tax agreement are as follows:

- There is less state-tribal conflict in these areas of taxation;
- There is a minimum of recordkeeping and administrative work for the state since the cigarette tax agreement is not a quota system requiring an estimate of tax-free sales with later determination of actual exempt sales;
- The motor fuel tax exemption for tribal government use allows for treatment similar to that enjoyed by Utah state and local governments; and
- The cigarette agreement has successfully exempted tribally-enrolled members from taxation while allowing the state to collect the cigarette tax due from non-tribal members and non-Indians.

**Disadvantages of Existing Taxation Practices**—None reported.

**Recent Taxation Activity**—There has been a great deal of recent activity pertaining to taxation and

Indians in the state of Utah. In December 1994, a memorandum of understanding was signed by the Governor, the commission chairs of Duchesne and Uintah counties, and the business committee chair of the Ute Indian Tribe of the Uintah and Ouray Reservation. This document recognizes negotiation between the parties as the preferred method of resolving disputes and establishes the procedures to be followed in any negotiation efforts. Listed in the memorandum are some of the issues that will be discussed during initial negotiation stages, including distribution of severance tax revenue from production on tribal lands and creation of some entity to administer the expenditure of such funds.

In the 1995 legislative session, two bills were passed relevant to Indians and taxation. SB 47 made federally recognized tribes eligible to enter into interlocal (e.g., city, county, or local taxing units) cooperation agreements. SB 162 created the Uintah Basin Revitalization Fund and Board. Beginning July 1, 1996, 33 percent of all severance tax revenues collected from Ute Indian tribal wells prior to June 30, 1995, and 80 percent of taxes from new wells collected after July 1, 1995, will be deposited into the Uintah Basin Revitalization Fund. The Revitalization Board then will make recommendations as to how grants and loans should be disbursed from the Revitalization Fund to county agencies and the Ute Tribe (both of which are, or may be, socially or economically impacted by mineral resource development).

## P. Washington

**Types of Taxes Addressed**—The state of Washington has entered into agreements with several of its 26 tribes respective to (a) liquor taxes

and (b) motor fuel taxes, in addition to implementing a (c) cigarette allocation system.

**Existing Taxation Practices**—The liquor and motor fuel agreements and cigarette allocation system are administered as described below.

(a) **Liquor Tax**—An administrative regulation (WAC §314-37-010) requires state-tribal agreements for tribally-licensed retailers to sell liquor on reservations. Under the agreements, such retailers agree to buy all distilled spirits from the state's Liquor Control Board, which annually exempts from taxation the first three gallons for each tribal member over the age of 21, regardless of whether they live on the reservation. After the three-gallon per eligible person limit, sales to tribal retailers are at the regular, taxed rate. While the tax-exempt alcohol may be sold by the retailer to any Indian or non-Indian, it must be sold at the same price as that currently charged by the Board. The Liquor Control Board charges only a small markup on sales to the tribal stores, which allows tribes to make a profit since they are selling at rates identical to the Board prices that include all taxes. The liquor agreements have been used for more than 10 years, and currently seven of Washington's 26 tribes have liquor agreements with the state.

(b) **Motor Fuel Tax**—Two of Washington's 26 tribes, the Colville Tribe and the Yakama Nation, have agreements with the state Department of Licensing exempting tribal members residing on the reservation, Indian-owned or tribal businesses, and tribal governments from state taxes on motor fuel. Both agreements are court settlements of federal lawsuits between the tribes and the state. The Colville Tribe believed its

payment of state gasoline taxes was unfair since the tribe was maintaining and supporting its own road system for use by both Indians and non-Indians. The Yakama Tribe objected to the state's taxing all motor fuel sales, including those to tribal members, despite the state's claim that the tax was on the distributor and not the Indian purchaser. Both agreements are subject to court jurisdiction for a one-year period, at which time the state and the respective tribes will determine whether to modify or extend the agreements.

Because the state's motor fuel tax is levied on the distributor, the Colville agreement provides for on-reservation Indian retailers to record all motor fuel taxes paid on exempt sales, which are later refunded by the state to the tribe. Under the Yakama agreement, the tribe buys a percentage of tax-free fuel (representing exempt sales to Indians), while the remainder is taxed. Tribally-licensed retailers are required to maintain records on exempt sales; at the end of the year, they are audited by the tribe to determine the total actual exempt sales. This is reconciled with the amount of tax-free fuel purchased by the tribe and is the basis of any adjustments made by the state or tribe. The Yakama agreement is unique in that it exempts tribally-licensed retailers from taxation prior to the actual sale, rather than providing for a refund or rebate (which pursuant to state constitution, must be used solely for road-related purposes). The state maintains that both tribes' agreements stipulate that each must spend an *equivalent* amount of savings generated by the agreements in some kind of transportation-related area. The Yakama Nation, however, reserves the right to determine usage of the

revenue generated by its motor fuel agreement.

(c) **Cigarette Tax**—Washington's cigarette allocation system was implemented in 1980 pursuant to administrative regulation (WAC §§458-20-186 and 458-20-192). A quota of tax-free cigarettes (as determined by a per capita consumption formula) is set aside to be sold to tribal retailers. Wholesalers, who apply stamps to the cigarettes, pre-pay the cigarette taxes and receive refunds from the state for tax-free sales to tribes if they obtain approval from the state Department of Revenue prior to the sale. How a tribe chooses to distribute its allocated cigarettes is left to its discretion. Of the 26 tribes in the state, 18 participate in the allocation system. It is hypothesized that non-participating tribes are likely smuggling cigarettes from illegal sources.

**Advantages of Existing Taxation Practices**—Advantages of each respective procedure are outlined below.

(a) **Liquor Agreements**—Some specific benefits of the agreements to the state are as follows:

- The Liquor Control Board is able to curtail the supply of liquor to tribes from illegal sources;
- The state receives some revenue on sales to tribal stores (previously, tribes were receiving their supply from illegal sources);
- The level of enforcement needed for liquor control is reduced; and
- Litigation between the state and tribes in this area has been eliminated.

While officials from compacting tribes were unavailable for comment on the liquor agreements, a spokesperson from the Liquor Control Board reported that the seven compacting tribes collectively generate more than \$1 million a year from tribal markup resulting from the agreements, resulting in higher employment and additional revenue for the tribes.

(b) **Motor Fuel Agreements**—Since the agreements are so new, little feedback is available regarding their success. To date, however, neither the tribes nor the state have identified any significant problems. General benefits include:

- Avoiding the problems of bootlegging out-of-state fuel;
- Maintaining the state tax structure so as to collect taxes from non-Indians, while allowing tribes and tribal members to purchase tax-free fuel;
- Competitive fuel pricing between on-reservation tribal retailers and larger, off-reservation non-Indian retailers that benefits the state's consumers;
- Greater tribal input in decision-making (along with cities, counties, and to some extent, the state) regarding economic development and transportation issues due to increased funds coming under tribal control;
- The ability of tribes to better monitor and license tribal retailers; and
- Greater tribal self-sufficiency as a result of the tribal savings generated by the fuel tax exemption being redistributed for road-related or other tribal services.

(c) **Cigarette Allocation System**—The cigarette allocation system, somewhat successful from the state's perspective, has apparently met with mixed reaction on the part of tribes, who were unavailable for comment. Benefits of the system include:

- Less state-tribal litigation in this area; and
- Non-Indians being taxed on cigarette sales while Indians are able to obtain tax-free cigarettes for personal consumption.

**Disadvantages of Existing Taxation Practices**—The disadvantages of each of the procedures are described below.

(a) **Liquor Agreements**—None reported.

(b) **Motor Fuel Agreements**—While it is too soon to adequately determine the overall impact of the agreements, drawbacks noted by tribal officials to date are as follows:

- Complaints by some Indians regarding tribal sovereignty issues;
- An accounting burden exists on one tribe due to the requirement of having to record sales to non-Indians (further agreements may impose an administrative fee on the state for these costs incurred by the tribe); and
- The agreement is the product of a court settlement. One tribe would have preferred to negotiate its agreement on a government-to-government basis outside of the court. Also, the tribe noted its preference for a single, comprehensive agreement addressing various types of taxes instead of having different agreements for each type of tax.

(c) **Cigarette Allocation System**—Complaints by the state include the following:

- Tribes not participating in the allocation system apparently are still smuggling cigarettes from out-of-state sources; and
- There remains an abundance of black market cigarettes, which may be due to the fact that the stamps are identical for both tax-free (Indian) cigarettes and for regular cigarette sales. A spokesperson from the state Department of Revenue indicated that use of a different stamp on tax exempt sales might lessen black market activity.

**Recent Taxation Activity**—HB 1273, passed during the 1995 legislative session, puts into statute the procedure already in place under the Colville model's motor fuel agreement, whereby tax on motor fuel is pre-paid and later refunded to the tribe. Prior to passage of this legislation, the state had been somewhat hampered by a lack of statutory authority to compact with the tribes. This legislation paves the way for new agreements of this nature to be negotiated in the future.

The Puyallup Tribe, which has long refused to participate in the cigarette allocation system, recently negotiated an agreement with the state that would have served as an alternative to the cigarette allocation system. Under the proposed agreement, the tribe would have imposed its own cigarette tax at an agreed-upon minimum amount on all sales made by tribally-licensed retailers, whether to Indians or non-Indians. The tribal tax would have been less than the state tax, as negotiated by the parties, and the tribe would make a monthly payment to the state of a percentage of the tribal taxes actually received.



Implementation of the cigarette agreement was dependent on passage of HB 1955 in the 1995 legislative session; however, the bill died in committee. This bill would have done away with the current cigarette allocation system and would have authorized the Governor to enter into revenue sharing agreements such as this with any tribe. Advocates believed that passage of the bill would have (a) reduced the widespread illegal sale of tax-free cigarettes to non-Indians thereby producing an estimated \$1.5 to \$2 million annually for the state; (b) resulted in additional revenue for compacting tribes from their collection of taxes on sales to non-Indians; and (c) decreased litigation costs to both the state and the tribe regarding cigarette taxation.

#### Q. Wisconsin

##### Types of Taxes Addressed—

Wisconsin has entered into tax agreements with its 11 tribes for the revenue sharing of cigarette taxes. In addition, the state Department of Revenue exempts motor fuel sales to Indians from taxation.

**Existing Taxation Practices—**The cigarette and motor fuel taxes are treated as described below.

(a) **Cigarette Tax**—Pursuant to Wisconsin's administrative regulations (WAC §§9.01 through 9.09), cigarettes may be sold to Indians one of two ways. One way allows for the sale of untaxed cigarettes to tribal councils for sale to tribal members residing on their native reservation. The second way allows tribal councils to enter into revenue sharing agreements with the state Department of Revenue. Under the agreements, tribes purchase tax-paid, specially-stamped cigarettes and later apply for a refund of 70

percent of taxes paid regardless of whether the cigarettes were purchased by Indians or non-Indians (WSA §139.323). This can be done if the following conditions are met: (a) the tribe files a claim for the refund; (b) the cigarette retailer is approved by the tribe; (c) the land the cigarettes are sold on has been reservation land since before January 1, 1983; (d) cigarettes are not delivered by a common carrier, contract carrier, or the U.S. Postal Service; and (e) the retailer has not sold cigarettes to another retailer. Finally, tribes may get an *additional* 30 percent refund for cigarettes sold to resident tribal members; this process requires a written agreement between the Department of Revenue and a tribe (WSA §139.325).

(b) **Motor Fuel Tax**—As noted earlier, the state Department of Revenue does not attempt to tax sales of motor fuel to individual Indians or tribal governments. This exemption is not implemented by statute or regulation, but rather is utilized by the Department as a matter of policy pursuant to its counsel's interpretation of case law in this area.

**Advantages of Existing Taxation Practices—**There appears to be overall satisfaction with the cigarette agreements. While the tribes were unavailable to comment, they seem to benefit from them as well. Some of the benefits are as follows:

- Tribal councils—not individual Indians or tribal retailers—are receiving a legal, consistent source of income through cigarette refunds;
- Tribes collectively gain an estimated \$5 million annually in cigarette tax revenue. While the extent of the economic impact has varied among tribes, the agreements apparently have stimulated the

opening or expansion of at least some tribally-owned retailers;

- While the state "loses" approximately \$5 million a year to the tribes in cigarette tax revenue through the agreements, it is able to collect the taxes due on sales to non-Indians;
- There is less smuggling of out-of-state cigarettes, thereby requiring fewer expenditures by the state in investigative resources for contraband cigarettes;
- There is less litigation between the state and the tribes in the area of cigarette taxation;
- The distinctive stamp provides proof of tax payment and indicates a refund of tax for only those cigarette carrying the stamp;
- Tribes are able to conduct business freely with non-Indians without state interference; and
- Tribal retailers are not required to maintain records of exempt sales to Indians since all individuals are taxed equally.

**Disadvantages of Existing Taxation Practices—**Drawbacks of the agreements include:

- An initial negative impact on non-Indian owned businesses that were unable to match the lower pricing of tribal cigarettes;
- Complaints from non-Indians regarding the magnitude of the cigarette revenues being generated for tribes, particularly in light of the growing gambling profits that have greatly boosted tribal revenues; and



- Internal conflict within tribes regarding the issue of whether tribes should compact with the state at all.

**Recent Taxation Activity—None** reported.

## R. Wyoming

**Types of Taxes Addressed—**In Wyoming, tax collection agreements have been implemented between the state and tribes regarding (a) cigarette and (b) severance taxes.

**Existing Taxation Practices—**The cigarette and severance tax agreements are described below.

(a) **Cigarette Tax—**In Wyoming, cigarette taxes are precollected at the wholesale level and cigarettes are stamped at that time. However, pursuant to administrative regulations (*i.e.*, Indian Traders, vendors or retailers licensed by the tribe) may obtain untaxed, unstamped cigarettes from wholesalers and remit the tax due on sales to non-Indian customers (*State Board of Equalization regulations, Chapter 6, section (5)*). Under the regulations, payment is achieved in one of two ways. First, tribal retailers may record all exempt sales by taking a statement of exemption from the purchaser indicating the sale is exempt from the tax, and remit tax due only on cigarette sales to non-Indians for the month. Second, the tribal retailer and the Department of Revenue may enter into an agreement whereby the tax on sales to non-Indians is paid on a percentage basis.

The Wind River Tax Commission confirms the existence of an agreement between the state Department of Revenue and the Arapaho Tribe (originally the Northern Arapaho Trust). Under this

agreement, the tribal council pays tax on 26 percent of all cigarettes it receives from wholesalers (the estimated volume of sales to non-Indians and non-exempt Indians on the Wind River Reservation). Initially, the agreement procedure was the result of court stipulation from a 1984 U.S. Supreme Court case, later formalized under the administrative regulations described above.

(b) **Severance Tax—**There have been two different severance tax agreements between the state and the Shoshone and Northern Arapaho Tribes. One, pertaining to the Wind River Reservation Water Project, resulted in a statutory, one-year agreement in which the state reduced its severance tax from 6 percent to 1.5 percent and the tribes agreed to refrain from seeking to enjoin collection of any state or county taxes on reservation oil and gas production. This was done in conjunction with the water allocation issues of the case. This interim agreement, effective from April, 1989 through March, 1990, generated an estimated \$600,000 to \$1,000,000 for distribution to individual tribal members. While the tribes favored the permanent, statutory continuation of this agreement, it is no longer effective.

A second agreement is the outcome of a settlement involving the state Department of Revenue, the Shoshone and Northern Arapaho Tribes, and the Marathon Oil Company. Since 1983, Marathon Oil had been distributing the state severance tax payments into a protest tax account. The ensuing lawsuit was settled in August of 1993, whereby Marathon Oil agreed to continue paying a 1.5 percent state severance tax and all applicable state property taxes as well as a tribal severance tax.

This settlement, approved by the court, constitutes the terms of the current agreement and applies only to this particular lease for the remaining life of the applicable wells. It is not a "blanket" agreement applicable to all leases on the reservation.

**Advantages of Existing Taxation Practices—**Benefits of both the severance and cigarette tax agreements are as follows.

(a) **Cigarette Tax Agreement—**Advantages of the cigarette agreements are as follows:

- Better state-tribal relations;
- Increased number of tourist-related facilities on the reservation;
- Indians are exempt from the cigarette tax when purchased on a reservation;
- Wyoming cigarette retailers are now making in-state cigarette purchases that previously were going to out-of-state wholesalers; and
- An increase from one cigarette retail outlet in 1984 to three Indian Traders operating six retail outlets.

(b) **Severance Tax Agreement—**The 1993 Marathon Oil agreement has apparently met with approval from all parties involved. Specific benefits include:

- Avoidance of further state-tribal conflict;
- Reduction of the overall tax burden to the oil and gas industry;
- Increased cash flow to the tribes. The Wind River Tax Commission, a joint tribal revenue office for the Shoshone and Northern Arapaho Tribes, reports that the current

agreement has generated approximately \$50,000 for the tribe since its implementation in 1993. While these funds have not had a direct impact on the creation of new business on the reservation, they have indirectly benefited the state since tribal members redistribute these funds into the state and county economies;

- Recognition of tribal sovereignty;
- Increased economic life of oil wells; and
- Increased revenue for the state. The state anticipates the agreement will result in several million dollars from state taxes prior to the wells going dry. While these revenues have not had a substantial economic impact on the state's economy, the property taxes paid by Marathon Oil help support area schools, thereby decreasing the amount of aid required by the state.

**Disadvantages of Existing Taxation Practices**—Drawbacks to the agreements are outlined below.

(a) **Cigarette Tax Agreement**—None reported.

(b) **Severance Tax Agreement**—None reported.

**Recent Taxation Activity**—The Wind River Tax Commission indicates the tribe favors changing the terms of the 1993 severance tax agreement to a permanent status, so that its provisions would apply to all wells and leases on the reservation. There are, however, no efforts underway to do so at this time.

The 1994 legislature passed a bill exempting vehicles owned by members of the Shoshone and

Northern Arapaho tribes from county registration fees. Tribal members must reside on the reservation or in Indian country and file a claim with the county treasurer indicating a right to the exemption at the time of registration. The state may reimburse counties for all or part of the revenue lost as a result of the exemption.

The Shoshone and Northern Arapaho Tribes currently are discussing all taxes with the state.

## SUMMARY

Clearly, the many taxation methods described above not only vary extensively with respect to their objectives and means of obtaining those objectives, but also have met with varying degrees of success in their attempts to minimize or eliminate state-tribal disputes regarding taxation issues. Many contributors to this chapter attribute success in this endeavor to open minds or changes in attitudes on the part of *both* states and tribes. It is critical, they contend, that parties begin with an understanding that such cooperation benefits not only Indians, but ultimately the state as a whole in that tribal "savings" are redistributed by individual Indians into the state's economy and less state aid is required for reservations due to increased tribal self-sufficiency.

It also is important to note that one successful method may not be equally effective in another state or with other tribes. Various factors come into play and impact on the ultimate success or failure of a particular attempt to rectify problems related to taxation matters. Numerous variables, including existing state taxation practices, types of taxes addressed, tribal economic or

commercial activity, state and tribal tax bases, population on or near reservations, and attitudes of both state and tribal officials—particularly as to parties' perception of fairness—all must be carefully and thoroughly considered in each situation. Finally, while the development of workable solutions to tax problems is virtually never without some degree of conflict, a great deal of antagonism and adversity can be avoided by soliciting the input of interested parties and knowledgeable experts on both sides prior to attempting to implement a "solution."

**ARIZONA REVISED STATUTES ANNOTATED**  
**TITLE 42. TAXATION**  
**CHAPTER 7. LUXURY PRIVILEGE TAX**  
**ARTICLE 1.3. INDIAN RESERVATION TOBACCO TAX**

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Current through End of the 1997, 1st Reg. Sess.

§ 42-1252. Levy of Indian reservation tobacco tax; rate; distribution of revenues; civil penalty; exemptions

A. In addition to all other taxes, there is levied and shall be collected by the department and paid to the state treasurer a tax on the purchase on an Indian reservation of cigarettes, cigars, smoking tobacco, plug tobacco, snuff and other forms of tobacco, at the rates prescribed by § 42-1241, subsection A.

B. The taxes levied and collected pursuant to subsection A of this section shall be deposited in the tobacco tax and health care fund established by § 42-1241 and used for the purposes provided therein.

C. The taxes levied pursuant to this section are conclusively presumed to be direct taxes on the consumer but shall be precollected and remitted to the department by the distributor for the purpose of convenience and facility only. The taxes that are precollected and paid to the department by the distributor shall be considered to be an advance payment and shall be added to the price of the cigarettes, cigars, smoking tobacco, plug tobacco, snuff and other forms of tobacco and shall be recovered from the consumer.

D. If the tax imposed by this section on cigarettes, cigars, smoking tobacco, plug tobacco, snuff and other forms of tobacco has not been precollected or remitted when due by the distributor, the distributor shall be subject to a civil penalty equal to the amount of taxes that should have been precollected or remitted but was not.

E. The tax levied by this section does not apply to cigarettes, cigars, smoking tobacco, plug tobacco, snuff and other forms of tobacco:

1. For which the taxes imposed by article 1.2 [FN1] of this chapter have been paid.
2. Sold by an Indian tribe, or by a federally licensed Indian trader, on an Indian reservation to Indians who are enrolled members of the Indian tribe for whose benefit the Indian reservation was established.

CREDIT(S)

1997 Electronic Pocket Part Update

Added by Initiative Measure approved election Nov. 8, 1994, eff. Nov. 28, 1994.

[FN1] Sections 42-1241, 42-1242.

<General Materials (GM) - References, Annotations, or Tables >

**REPEAL**

<This section is repealed by Laws 1997, Ch. 150, § 9, effective January 1, 1999.>

**HISTORICAL AND STATUTORY NOTES**

1997 Electronic Pocket Part Update

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Proposition 200, based on an initiative measure, proposing amendments to Arizona Revised Statutes by amendment of Title 42, Ch. 7 by adding Article 1.2, consisting of §§ 42-1241, 42-1242, and Article 1.3, consisting of §§ 42-1251 to 42-1257, relating to tobacco tax for health care purposes and Indian reservation tobacco tax, was approved by the electors at the November 8, 1994 general election as proclaimed by the governor on November 28, 1994.

Sections 1 and 4 of Proposition 200 of the 1994 General Election provided:

**"Section 1. Declaration of policy**

"A. The people of Arizona believe it is in the best interest of Arizona to establish state funds dedicated to provide health care programs and services, such as health care services for medically needy, medically indigent persons and low income children, education for the prevention and reduction of tobacco use and tobacco related disease and addiction research.

"B. It is the intention and desire of the people of Arizona in enacting this measure by initiative that the funds provided hereby are in addition to and separate from other funds that are now and shall be annually appropriated by the legislature. The funds provided hereby shall not be deemed or classed to be appropriations by the legislature."

**"Sec. 4. Severability clause**

"If any provision of this measure is declared invalid by a court of competent jurisdiction, such invalidity does not affect other provisions that can be given effect without the invalid provision and to this end the provisions of this measure are declared to be severable."

A. R. S. § 42-1252

AZ ST § 42-1252

END OF DOCUMENT



ARIZONA REVISED STATUTES ANNOTATED  
TITLE 42. TAXATION  
CHAPTER 7. LUXURY PRIVILEGE TAX  
ARTICLE 1.3. INDIAN RESERVATION TOBACCO TAX

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Current through End of the 1997, 1st Reg. Sess.

§ 42-1257. Indian reservation tobacco tax not to apply if similar tax is imposed by Indian tribe

If an Indian tribe imposes a luxury, sales, transaction privilege or similar tax on cigarettes, cigars, smoking tobacco, plug tobacco, snuff and other forms of tobacco, but at a rate less than that prescribed by § 42-1252, subsection A, the tax imposed by § 42-1252, subsection A shall be levied at a rate equal to the difference between the rate prescribed by § 42-1252, subsection A and the tax imposed by such Indian tribe. If the tax imposed by such Indian tribe is equal to or greater than the tax prescribed by § 42-1252, subsection A, then the rate prescribed by § 42-1252, subsection A shall be zero.

CREDIT(S)

1997 Electronic Pocket Part Update

Added by Initiative Measure approved election Nov. 8, 1994, eff. Nov. 28, 1994.

< General Materials (GM) - References, Annotations, or Tables >

REPEAL

< This section is repealed by Laws 1997, Ch. 150, § 9, effective January 1, 1999. >

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"B. It is the intention and desire of the people of Arizona in enacting this measure by initiative that the funds provided hereby are in addition to and separate from other funds that are now and shall be annually appropriated by the legislature. The funds provided hereby shall not be deemed or classed to be appropriations by the legislature."

"Sec. 4. Severability clause

AZ ST § 42-1257

Page 4

"If any provision of this measure is declared invalid by a court of competent jurisdiction, such invalidity does not affect other provisions that can be given effect without the invalid provision and to this end the provisions of this measure are declared to be severable."

A. R. S. § 42-1257

AZ ST § 42-1257

END OF DOCUMENT

**STARTED**  
***State-Tribal Approaches Regarding***  
***Taxation & Economic Development***

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## CHAPTER THREE

**B.1. "Identifying the dollar amount of all state taxes, fees, or other monies received from taxing business activities on Indian reservations or in Indian country, including the taxation of sales, income, or property of non-Indian owned businesses that occupy or traverse lands under contract with the Indian nations or tribes."**

—SB 1440

**B.2. "Identifying the amount of taxes, fees, or other monies paid to this state or counties by Indian people who reside on Indian reservations or in Indian country."— SB 1440**

**S**tate general fund revenue is generated from a number of sources: (1) state transaction privilege, use, and severance taxes imposed on businesses having the privilege of transacting business in the state; (2) corporate and personal income taxes; and (3) other miscellaneous taxes (*i.e.*, cigarette, luxury, property). In addition to state general fund monies, highway funding is generated from motor vehicle license taxes and fees, motor vehicle fuel taxes, and use fuel taxes.

Within each of the revenue-generating categories noted above, this chapter defines each tax type and identifies the amounts of taxes generated in FY 1993 from on-reservation businesses and residents.

### 1. STATE TAXES IMPOSED ON ARIZONA BUSINESSES

#### A. Transaction Privilege & Use Taxes

**Definitions**—The *transaction privilege* tax is imposed on certain classifications of businesses that enjoy the privilege of transacting business in the state. Tax rates range from 2 percent to 5.5 percent (depending on the type of transaction) on the gross proceeds of sales or the gross income derived from the transaction—with most rates at 5 percent.<sup>14</sup> The *use* tax is a tax on the use, storage or consumption of tangible personal property in Arizona based on the sale

price of goods. The tax rate is the same as that for transaction privilege tax.

#### On-Reservation Revenue

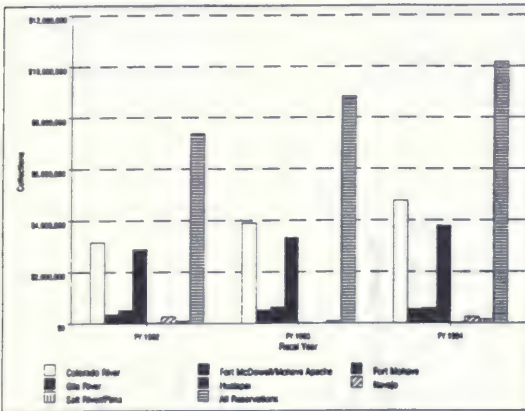
**Generated**—Combined *transaction privilege* and *use* tax collections for all Arizona reservation-based businesses totaled an estimated \$7,361,084 in FY 1992. This figure increased by almost 20 percent to \$8,829,296 in FY 1993, and increased again by over 15 percent to \$10,163,654 in FY 1994. (See Figures 3.1 & 3.2 illustrating the transaction privilege tax collection breakdown for reservations not limited by taxpayer confidentiality laws.)

**Methodology**—Arizona's tax collection records, as maintained by the state's Department of Revenue (DOR), do not include personal taxpayer information such as tribal membership or location of the taxed business transaction. Therefore, on-reservation *transaction privilege* and *use* tax collections were estimated based on the *mailing addresses* of all businesses filing a transaction privilege or use tax return.

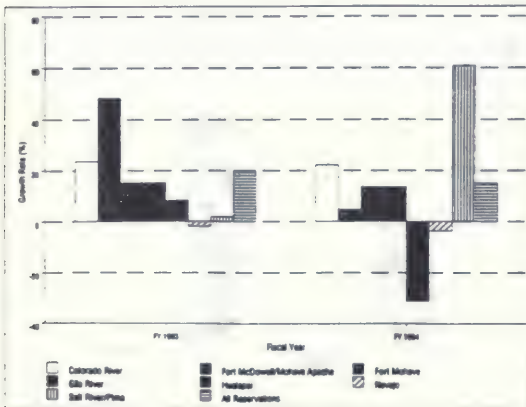
The estimated amount of *transaction privilege* and *use* taxes collected on reservations for FY 1993 was calculated by (1) determining the relevant 1993 United States postal zip codes for Arizona's 21 reservations, (2) identifying addresses of reservation-based businesses located in the DOR data base, (3) tabulating transaction



**Figure 3.1: State Transaction Privilege Tax Collections by Reservation from FY 1992-1994**



**Figure 3.2: State Transaction Privilege Tax Collection Growth Rates by Reservation from FY 1992-1994**



privilege tax collections for all reservation-based businesses in relevant zip codes, and (4) totaling all transaction privilege tax collections for each reservation.

[Note: Only zip codes that corresponded exclusively to reservation lands were used. In some instances, a zip code encompassed both reservation and non-reservation land; these were not included for the purpose of the analysis since they would have captured off-reservation tax collections also.] This methodology, however, most likely understates reservation-generated transaction privilege and use tax revenue for two reasons. First, it is possible that a business could report reservation gross receipts from a non-reservation address if the business headquarters (from where the TPT returns are mailed) is located off-reservation.

Although DOR's data base includes statewide tax collection information, transaction privilege tax data were not released for several of the reservations due to confidentiality requirements regarding taxpayer information.<sup>33</sup> DOR is authorized to disclose statistical information gathered from tax reports—but only if the release of this information is not likely to disclose information that could be attributed to any single taxpayer.<sup>34</sup> The number of businesses reporting transaction privilege tax collections was very low for the omitted reservations; and, to protect the private tax information of individual taxpayers, DOR was prevented from releasing this information. The confidentiality issue does not arise, however, when the transaction privilege tax figures for all Arizona reservation-based businesses are aggregated.

## B. Severance Tax

**Definition**—A severance tax is assessed in lieu of a transaction privilege tax on the businesses of mining metalliferous minerals (e.g., copper) and severing timber. The severance tax rate on mining is 2.5 percent and is assessed on the value of the materials mined. The severance tax rate on timbering is 1.5 percent of the value of the timber severed. [Note: Costs that may subsequently factor into the sale price of mined and severed materials, such as shipping and transportation costs, are indirectly exempted under the severance tax.]

### On-Reservation Revenue

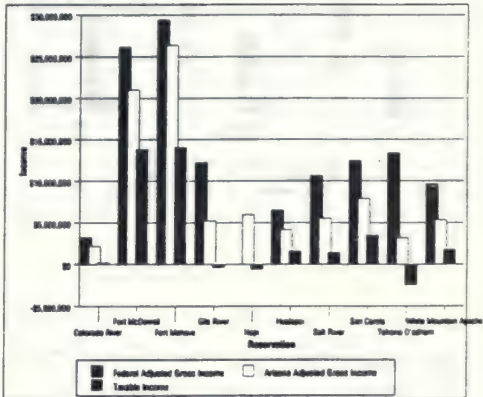
**Generated**—Due to the limited number of mining and timbering operations located on Arizona reservations, DOR was prevented by taxpayer confidentiality laws from providing figures on the total reservation severance tax collections.

income derived from sources in Arizona are subject to income tax on their net income. Tribally-enrolled Indians living on their native reservation are exempt from paying Arizona's personal income tax on income earned on their reservation.

### On-Reservation Revenue

**Generated**—Taxpayers who filed 1993 individual income returns from reservations within Arizona reported (a) total federal adjusted gross income of \$373,521,931; (b) total Arizona adjusted gross income of

Figure 3.3: State Income Tax Data of Select Arizona Reservations for Tax Year 1993



## 2. INCOME TAXES: CORPORATE & PERSONAL

### A. Corporate Income Tax

**Definition**—Arizona corporate income taxes are levied on the Arizona taxable income of every corporation unless a corporation is exempt by statute.

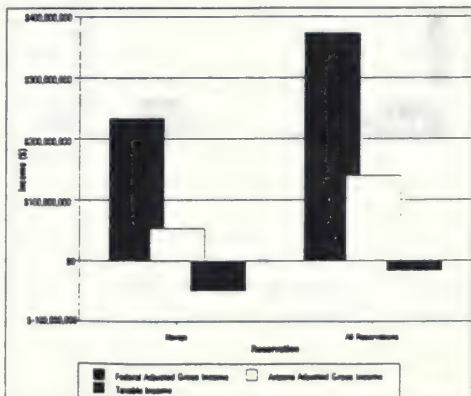
### On-Reservation Revenue

**Generated**—Due to the limited number of corporations that file income tax returns from Arizona reservations, DOR was prevented by taxpayer confidentiality laws from providing figures on total reservation corporate income tax collections.

### B. Personal Income Tax

**Definition**—All residents of this state and nonresidents who have

Figure 3.4: State Income Tax Data Comparing Navajo Nation with All Other Arizona Reservations for Tax Year 1993



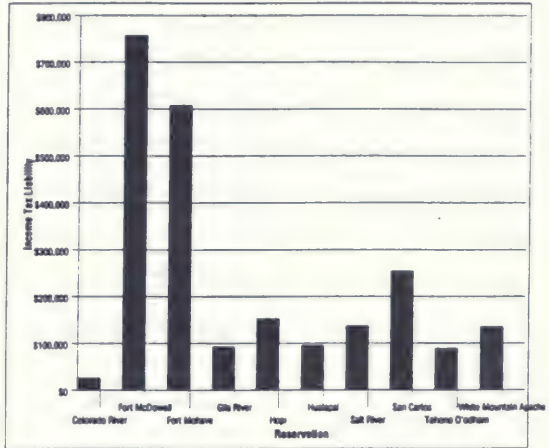
\$139,916,282; (c) total taxable income of [-]\$15,842,698; and (d) total state tax liability of \$5,909,372 (see Figures 3.3, 3.4 & 3.5). [Note: These figures overstate reservation-based income tax revenues from Indians because it includes income tax returns filed by non-Indian taxpayers who reside on reservations.]

**Methodology**—The amount of state income tax collected from all Indian and non-Indian reservation-based residents for tax year 1993 was calculated by (1) using relevant United States zip codes to identify returns filed from reservations, (2) tabulating individual income tax collections for those zip codes, and (3) totaling all individual state income tax collections for each reservation. It was not possible, however, to identify the amount of state income taxes paid *only* by tribal members because the reporting of tribal membership is not required on Arizona's individual income tax return form. Therefore, a

methodology similar to determining transaction privilege tax collections was used to *estimate* the amount of state income taxes paid by both individual *Indian* and *non-Indian*

income tax filers living on Arizona's reservations. [Note: See Table 3.1 for a specific breakdown of tax year 1993 state income tax data by reservation.]

**Figure 3.5: State Income Tax Liability of Select Arizona Reservations for Tax Year 1993**



**Table 3.1: Selected Arizona Indian Reservation Income Tax Data For Tax Year 1993**

Reservation	Federal Adjusted Gross Income	Arizona Adjusted Gross Income	Taxable Income	Tax Liability
Colorado River	\$3,254,978	\$2,194,206	\$261,621	\$25,938
Fort McDowell	\$26,155,667	\$21,035,128	\$13,830,043	\$756,706
Fort Mohave	\$29,391,435	\$26,366,663	\$14,060,139	\$608,059
Gila River	\$12,229,607	\$5,237,535	(\$338,138)	\$92,841
Hopi	\$16,503,353	\$5,957,918	(\$537,297)	\$152,550
Hualapai	\$6,517,627	\$4,175,689	\$1,621,696	\$95,108
Navajo	\$233,427,732	\$53,058,720	(\$49,115,514)	\$3,563,778
Salt River	\$10,626,116	\$5,506,642	\$1,460,594	\$136,618
San Carlos	\$12,468,025	\$7,867,641	\$3,534,815	\$254,054
Tohono O'odham	\$13,348,569	\$3,203,454	(\$2,421,195)	\$88,821
White Mountain Apache	\$9,598,822	\$5,312,686	\$1,800,538	\$134,899
All Arizona Reservations	\$373,521,931	\$139,916,282	(\$15,842,698)	\$5,909,372

### 3. MISCELLANEOUS TAXES

#### A. Luxury Tax

**Definition**—Arizona's main luxury taxes are on tobacco products and alcoholic beverages.<sup>27</sup> Wholesalers of liquor and distributors of tobacco are required to pay the tax and then pass the cost of the tax on to the consumer through the sale price of the product.

#### On-Reservation Revenue

**Generated**—State luxury taxes on on-reservation cigarette and tobacco distributors and liquor wholesalers are not enforced and, therefore, generate *no revenue* to the state general fund.

#### B. Cigarette Tax

**Definition**—In Fall, 1994, Arizona's voters approved Proposition 200—a 40 cent tax on cigarettes to be paid *by the consumer* (although the tax is collected from cigarette distributors). Because it is a tax on consumers, the only reservation-based cigarette sales that are exempt are those to tribally-enrolled members. Also, the Arizona tax is not imposed to the extent that the tribe also imposes a cigarette tax. Currently, a tobacco tax of at least 40 cents has been imposed by tribes on six reservations (Gila River, Fort Mohave, Salt River, Yavapai-Apache, Fort Apache and Kaibab-Paiute).

#### On-Reservation Revenue

**Generated**—The Proposition 200 cigarette tax became effective on November 28, 1994, and initial collection figures were not representative because there was no floor tax on existing inventory. Updated information will be provided to the SB 1440 committee when it becomes available.

#### C. Property (Ad Valorem) Tax

**Definition**—In Arizona, the property (ad valorem) tax is calculated based on the value of property (*i.e.*, ad valorem, meaning "according to value"). The tax is calculated from two different bases: (a) full cash value (or market value) and (b) limited value (*i.e.*, statutory-controlled value). The full cash value is used to calculate tax rates to pay for voter-initiated bonds, overrides, and special district levies. Taxes based on the limited (controlled) value generate funds to maintain the basic operations of state, county and city governments, schools, and other public entities.

#### On-Reservation Revenue

**Generated**—For tax years 1993 and 1994, DOR estimates that centrally-valued taxpayers (see Methodology) paid \$25.9 million and \$25.2 million respectively in property taxes on property (*e.g.*, buildings, mines) located on reservations (see Tables 3.2 and 3.3). Most of these property taxes are paid to counties, school districts, and any special taxing districts (*e.g.*, fire districts; hospitals; county libraries) located within Arizona's 21 reservations. The state's annual portion of these taxes, including the county equalization tax, is approximately \$1.1 million.

**Methodology**—The responsibility of valuing property in Arizona for tax purposes is shared between DOR and the 15 county assessors' offices. DOR values utilities, airlines, railroads, mines, and other geographically-dispersed properties—generally referred to as "centrally-valued properties." These values are relayed to the county boards of supervisors for entry on the county tax rolls for levy and collection of property taxes. County assessors, on the other hand (using standards and manuals

established by DOR), are responsible for assessing local classes of property (*e.g.*, residential, commercial, industrial, and agricultural properties). According to DOR, virtually all of the taxable property located on reservations is owned or leased by utilities, mines, and other centrally-valued taxpayers. The amount of taxes paid on other locally-assessed properties is projected to be minimal when compared with the amount paid by centrally-valued taxpayers and consists of revenues from property tax on personal property, including possessory interests.

### 4. HIGHWAY TAXES

#### A. Motor Vehicle License Tax

**Definition**—In lieu of a property tax on motor vehicles, a motor vehicle license tax is imposed on vehicles registered for operation on Arizona highways. Tribally-enrolled members living on their native reservation are not subject to this "in lieu" tax; however, tribal members are required to pay state vehicle registration fees of \$8 per motor vehicle and \$9 per motorcycle.

#### On-Reservation Revenue

**Generated**—The estimated amount of motor vehicle registration fees paid to the state general fund in FY 1993 by tribal members was \$396,954.

**Methodology**—The number of vehicles registered on reservations was determined by identifying registration forms mailed to reservation zip codes. The total registrations in FY 1993 were 486 motorcycles and 53,135 other vehicles. Tribal members comprised 92.43 percent (164,752 of 178,251) of Arizona's on-reservation population in calendar year 1993.



**Table 3.2: Property Taxes Paid in Tax Year 1993 by Centrally-Valued Taxpayers on Property Located On Reservations**

County	Full Cash Value	Assessed Value	Salt River Project (SRP)	SRP Assessed Value	Tax, Excluding SRP <sup>1</sup>	SRP Tax	Total Tax
Apache	\$63,594,476	\$19,568,134	\$266,317	\$79,895	\$1,714,940	\$6,467	\$1,721,407
Cochise	0	0	0	0	0	0	0
Coconino	490,844,644	145,367,260	109,636,783	32,951,035	12,754,706	2,858,786	15,613,492
Gila	1,836,806	504,871	0	0	36,783	0	36,783
Graham	1,662,368	462,243	0	0	25,270	0	25,270
Greenlee	0	0	0	0	0	0	0
La Paz	11,646,990	3,138,709	0	0	369,066	0	369,066
Maricopa	16,904,663	4,908,459	59,002,859	17,700,858	440,020	1,499,622	1,939,642
Mohave	6,581,455	1,810,200	0	0	201,669	0	201,669
Navajo	179,789,025	53,409,441	2,122,366	636,710	5,309,724	68,677	5,378,401
Pima	2,823,827	847,128	0	0	64,400	0	64,400
Pinal	13,745,061	3,917,410	8,292	2,488	480,307	348	480,655
Santa Cruz	0	0	0	0	0	0	0
Yavapai	935,516	273,598	0	0	35,653	0	35,653
Yuma	0	0	0	0	0	0	0
Totals	\$790,364,831	\$34,207,453	\$171,236,617	\$51,370,986	\$21,432,537	\$4,433,901	\$25,866,438

1. Tax (excludes Salt River Project, a publicly owned utility) includes state, county, community college, school district, and other taxes.

Therefore, of these vehicles, 450 motorcycles and 49,113 other vehicles were assumed to be owned by tribal members, creating total registration fee revenues of **\$396,954**  $[(450 \text{ motorcycles} \times \$9) + (49,113 \text{ vehicles} \times \$8)]$ .

#### **B. Motor Vehicle Fuel & Use Fuel Taxes**

**Definition**—The motor vehicle fuel tax is a tax on each gallon of fuel that is possessed, refined, manufactured, produced, blended, compounded, or imported in Arizona by a distributor. Motor vehicle fuel includes all varieties of gasoline and all flammable liquids that are composed of selected hydrocarbons manufactured or blended for use in internal combustion engines. The distributor pays the tax at the rate of 18 cents per gallon. A parallel tax to the motor vehicle fuel tax is the use

fuel tax. Use fuel includes all gases and liquids (such as diesel fuel) suitable for use to propel motor vehicles except motor vehicle fuel. The tax rate on use fuel is also 18 cents per gallon.

#### **On-Reservation Revenue**

**Generated**—The estimated total amount of motor vehicle fuel (i.e., gasoline) and use fuel (i.e., diesel fuel) taxes paid by tribal members in FY 1993 was **\$3,883,730**.

**Methodology**—In 1985, discussions between the Arizona Department of Transportation (ADOT) and several tribes prompted a study to be undertaken that estimated the motor vehicle fuel taxes collected from tribal members for on-reservation driving. At that time, the amount of motor vehicle fuel taxes being paid by tribal members for on-reservation driving was \$2.8 million.

ADOT updated its estimate for this study using the reservation population figures developed by LC researchers and the vehicle registration data described earlier in the discussion of vehicle registration fees. Indians comprised 92.4 percent of Arizona's on-reservation population in calendar year 1993. Therefore, of the 53,135 vehicles registered with reservation addresses, 49,113 (92.43 percent) were assumed to be owned by tribal members. Also, based on ADOT experience, it was assumed that the average on-reservation travel per vehicle was 8,000 miles annually. [Note: An average mile per gallon rating of 18.21 was derived from *Highway Statistics 1993* for passenger vehicles and single unit trucks. The Arizona mix of trucks and passenger vehicles was determined from *Vehicles in Operation in Arizona* by R.L. Polk.] Based on these figures, the annual

Table 3.3: Property Taxes Paid in Tax Year 1994 by Centrally-Valued Taxpayers on Property Located On Reservations

County	Full Cash Value	Assessed Value	Salt River Project (SRP)	SRP Assessed Value	Tax, Excluding SRP	SRP Tax	Total Tax
Apache	\$64,776,329	\$19,613,037	\$256,733	\$77,020	\$1,236,451	\$4,888	\$1,241,340
Cochise	0	0	0	0	0	0	0
Cocopino	477,197,126	141,359,010	108,885,224	32,665,567	12,532,715	2,984,549	15,517,264
Gila	2,312,089	637,260	0	0	49,256	0	49,256
Graham	1,858,021	519,564	0	0	28,602	0	28,602
Greenlee	0	0	0	0	0	0	0
La Paz	12,385,091	3,378,848	0	0	388,465	0	388,465
Maricopa	18,668,734	5,427,350	58,015,391	17,404,617	480,146	1,426,634	1,906,780
Mohave	6,334,734	1,760,497	0	0	180,812	0	180,812
Navajo	335,169,682	55,810,455	2,041,988	612,596	5,375,831	61,465	5,437,296
Pima	2,667,208	792,021	0	0	0	0	0
Pinal	13,200,831	3,313,725	7,985	2,396	393,283	331	393,613
Santa Cruz	0	0	0	0	0	0	0
Yavapai	1,126,964	330,175	0	0	41,588	0	41,588
Yuma	0	0	0	0	0	0	0
Totals	\$935,696,609	\$232,941,942	\$169,207,331	\$50,762,199	\$20,707,149	\$4,477,868	\$25,185,017

1. Tax (excludes Salt River Project, a publicly owned utility) includes state, county, community college, school district, and other taxes.

number of gallons of gasoline used for on-reservation travel by tribally-enrolled members is 21,576,277. At a tax rate of 18 cents per gallon, the revenue generated is \$3,883,730. [Note: In the 1985 study, it was determined that 15 percent of all tribal members' travel was off-reservation. If this ratio was applied to the updated figures, the amount of motor vehicle tax paid for all travel by tribal members would be approximately \$4.58 million.]

income tax (\$5,909,372); cigarette taxes (not yet collected); luxury taxes (not collected); motor vehicle fuel and use fuel taxes (\$3,883,730); motor vehicle license fees (\$396,954); and property taxes (\$1,100,000). Total identified contributions to the state due to on-reservation transactions was \$20,119,352.

## SUMMARY

For FY 1993, the following estimated state general fund revenue was generated by on-reservation based transactions: transaction privilege and use taxes (\$8,829,296); severance tax (unable to provide due to confidentiality laws); corporate income tax (unable to provide due to confidentiality laws); personal

**WEST'S COLORADO REVISED STATUTES ANNOTATED**  
**TITLE 24. GOVERNMENT-STATE**  
**INTERSTATE COMPACTS AND AGREEMENTS**  
**ARTICLE 61. TAXATION COMPACT BETWEEN THE SOUTHERN UTE INDIAN TRIBE, LA**  
**PLATA COUNTY, AND THE STATE OF COLORADO**  
**PART 1. APPROVAL AND TEXT OF COMPACT**

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Current through all 1997 First Regular Session laws

§ 24-61-102. Taxation compact between the Southern Ute Indian tribe, La Plata county, and the state of Colorado

The general assembly hereby approves the taxation compact between the Southern Ute Indian tribe, La Plata county, and the state of Colorado, referred to in this section as the "Taxation Compact", dated March 18, 1996, and signed by Roy Romer, governor of the state of Colorado; Leonard C. Burch, chairman of the Southern Ute Indian tribal council; Fred W. Klatt, III, chairman of the La Plata county board of county commissioners; Craig Larson, La Plata county assessor; and Ed Murray, La Plata county treasurer. Said compact is as follows:

**TAXATION COMPACT**  
**between**  
**THE SOUTHERN UTE INDIAN TRIBE, LA PLATA COUNTY and**  
**THE STATE OF COLORADO**

THIS AGREEMENT ("Taxation Compact") is entered into this 18th day of March, 1996, by, between and among the STATE OF COLORADO, on behalf of itself, its political subdivisions, offices, and officials ("the State"), the SOUTHERN UTE INDIAN TRIBE, by and through the Southern Ute Indian Tribal Council ("the Tribe"), and the COUNTY OF LA PLATA, by and through the Board of County Commissioners of La Plata county and the La Plata County Assessor and Treasurer ("County").

**Article One**

**Recitals.**

**1.01. Litigation.**

The parties to this Taxation Compact have been engaged in protracted litigation regarding the authority of the County and the State to tax the real or personal property owned or acquired by the Tribe within the exterior boundaries of the Southern Ute Indian Reservation ("Reservation"). That litigation ("the Litigation") has not provided the parties with definitive answers regarding the scope of such taxing authority or the scope of tribal immunity from such taxation ("the Dispute"). In the absence of agreement, the parties will be compelled to reinstitute litigation and to incur substantial litigation costs and commitments of time and energy to such disputes.

**1.02. Intergovernmental Agreement.**

Prior to refiling the Litigation, the parties to this taxation Compact entered into good faith negotiations in an effort to resolve the Dispute amicably in a manner consistent with the respective interests of the parties. In furtherance of the negotiation efforts, the parties entered into an Intergovernmental Agreement Concerning Taxation Negotiations which addressed procedures for maintaining the status quo and preserving the legal positions of the parties pending negotiation.

**1.03. Principal Individual Interests.**

During the negotiations, the Tribe has requested recognition of its claimed immunity from State and County taxation

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with respect to any interests in real or personal property it owns or may acquire within the boundaries of the Reservation, regardless of whether such property is held in trust for its benefit by the United States of America. The County has taken the position that interests in real or personal property owned or acquired by the Tribe within the boundaries of the Reservation are subject to ad valorem property taxes in circumstances where those real or personal property interests within the Reservation have been previously taxed to or are taxable in non-Tribal ownership. The county has reiterated its concern that recognition of taxing immunity to the Tribe with respect to any interest in real or personal property owned or acquired by the Tribe when that property has been taxed or taxable under non-Tribal ownership will have an adverse economic impact on those governmental institutions which rely upon general ad valorem property tax revenue to carry out governmental functions, particularly if Tribal acquisition efforts continue to escalate. The State's position is that real property acquired by the Tribe and not placed or held in trust by the federal government for the benefit of the Tribe is subject to taxation. The State has attempted to assist in the identification of governmental mechanisms that could be employed by the parties to settle their Dispute reasonably in a manner that will minimize adverse economic consequences resulting from possible recognition of the Tribe's claimed immunity. As used herein, the words "tax" and "taxes" includes ad valorem and severance taxes as well as the oil and gas conservation levy and the environmental response fund surcharge.

#### 1.04. Mutual Interests.

Each of the parties seeks to avoid further litigation in a manner consistent with the best interests of the respective constituents of each government. Further, in recognition of the fact that there are many substantive areas that require mutual cooperation of the parties, including social issues, economic development, land use and environmental protection, the parties seek to improve their government-to-government relationships for the present and the future.

#### 1.05. Educational Equalization.

The parties acknowledge that the State maintains as part of its system of public school financing a program which is intended to provide equalization in funding for students in the various public school districts throughout the State as reflected in, *inter alia*, "The Public School Finance Act of 1994" (article 54 of title 22, C.R.S.). The public school finance system also establishes a state public school fund which is available to provide relief to individual school districts in the event that unforeseen difficulties in maintaining assessment levels of property within any such district or in collecting property taxes is encountered. See section 22-54-117, C.R.S. Based on the status of public school financing, the parties acknowledge that the level of financing available for educating public school students within the boundaries of the Reservation will not be adversely affected in a material way so long as a system of State-wide equalization of student funding is maintained by the State.

#### 1.06. Settlement.

Based upon the foregoing, the parties have agreed to settle the Dispute, subject to the fulfillment of certain conditions hereinafter set forth, and each party finds that the settlement reflected in this Taxation Compact is in furtherance of the individual and mutual interests of the parties.

### Article Two

#### Conditions Precedent.

##### 2.01. Legislative Ratification.

As a condition precedent to implementation of this Taxation Compact, the parties agree that the Colorado General Assembly and the Governor of the State of Colorado must approve, and the Office of the Colorado Attorney General must review, this Taxation Compact and permit the County and the State to perform the covenants herein contained. If such authorization is not obtained prior to the close of the 1996 legislative session, this Taxation Compact shall become null and void, unless otherwise agreed by the parties.

##### 2.02. Statutory Amendment.



As an additional condition precedent, the parties agree that such amendments to existing State statutes needed to implement the terms of this Taxation Compact shall be enacted prior to the close of the 1996 legislative session. If such amendments are not so enacted, then this Taxation Compact shall become null and void.

### 2.03. Tribal Enactment.

As an additional condition precedent, the parties agree that the Tribe, prior to expiration of the 1996 legislative session of the Colorado General Assembly, through its Tribal Council, shall have enacted such resolutions or ordinances permitting the implementation of this Taxation Compact, including, but not limited to: Authorization for issuing annual tribal declarations of real property acquired by the Tribe, as provided in Article Five, *infra*; authorization for issuing annual payments, as provided in Article Six, *infra*; a mechanism for requiring non-Indians constructing facilities on tribal land to report to the County Assessor notice of completion of such facilities, as provided in Article Eight, *infra*; and a system for the recognition of County liens validly obtained under State law against the property of non-Indians, as well as, a system for foreclosure of such liens, as provided in Article Ten, *infra*.

### 2.04. Federal Approval.

To the extent that the Taxation Compact constitutes an agreement with an Indian Tribe related to land owned by an Indian Tribe, it is arguable that the validity of such Taxation Compact is dependent upon obtaining the approval of the Secretary of the Interior of the United States or his authorized representative pursuant to 25 U.S.C. sec. 81. Accordingly, as an additional condition precedent, prior to the close of the 1996 legislative session of the Colorado General Assembly, the parties must obtain the written approval of the Secretary of the Interior, or his authorized representative, of this Taxation Compact, or, alternatively, a written statement from such duly authorized official indicating that such written approval is not necessary or required under federal law.

### 2.05. Intergovernmental Agreement Operative.

Until such time that each of the conditions set forth above in Paragraphs 2.01, 2.02, 2.03, and 2.04 has been satisfied, the parties agree to honor and carry out the provisions of the Intergovernmental Agreement Concerning Taxation Negotiations referenced in Paragraph 1.02, above, and the parties hereby expressly extend the duration of said Intergovernmental Agreement Concerning Taxation Negotiations until the earlier of: (a) The close of the 1996 legislative session of the Colorado General Assembly; or (b) The satisfaction of the referenced conditions. In the event that each of the aforementioned conditions is not satisfied in the time provided, then, upon the close of the legislative session, the Intergovernmental Agreement Concerning Taxation Negotiations shall terminate, unless otherwise extended by the parties in writing.

## Article Three

### Tribal Immunity From Taxation.

#### 3.01. Trust Property.

The parties acknowledge that historically neither the State nor the County has attempted to tax real or personal property located within the Reservation when such property has been owned by the United States of America in trust for the benefit of the Tribe ("trust property"). Such exempt property has included: Surface estates; subsurface estates; tribal landowner royalty interests in mineral leases issued by the Tribe in accordance with federal laws and regulations; and any other interests acquired by the Tribe in trust property. The parties acknowledge that in the absence of express consent from the United States Congress, the Tribe, or as otherwise determined by the courts, trust property is exempt from State and local taxation. This Taxation Compact is not intended to and does not address whether there is express consent from the United States Congress and the Tribe for the taxation of trust property; however, the State and County agree to treat such trust property as exempt from State and County taxation for the duration of this Taxation Compact.

#### 3.02. Tribal Reacquisitions of Interests in Trust Property.

The parties acknowledge that a decline in the County's assessed value will occur when the Tribe reacquires interests in real or personal property on trust property under Article 3.01 in circumstances when those property interests have been previously held by and taxable to non-Tribal parties. While the County and State agree that interests so acquired by the Tribe will be treated as not subject to taxation under Article 3.01, the Tribe and State agree to assist the County in exploring future cooperative efforts to mitigate the negative revenue impacts that may result from these Tribal acquisitions on trust lands. Those cooperative efforts will include joint efforts at seeking federal or state assistance as required to mitigate those revenue impacts and other joint revenue raising efforts acceptable to the Tribe, the State and the County.

### 3.03. Non-Trust Tribal Property.

So long as this taxation compact remains in full force and effect, the State and County shall not seek to tax any property, real or personal, owned or acquired by the Tribe and held by the Tribe in non-federal-trust status; provided that said property is located within the exterior boundaries of the Reservation. Tribal property intended by this paragraph to be treated as non-taxable includes, but is not limited to the following:

- a. Real Property Surface Estates;
- b. Real Property Subsurface Estates;
- c. Mineral Lease Working Interests;
- d. Mineral Lease Royalty Interests;
- e. Mineral Lease Production Payments;
- f. Tribal Income;
- g. Vehicles and Mobile Homes;
- h. Buildings or Improvements;
- i. Equipment;
- j. Security Interests;
- k. Other Real or Personal Property.

### 3.04. Tribal Activities.

So long as this Taxation Compact remains in full force and effect, the State and the County shall not seek to impose on the Tribe, any activity undertaken by the Tribe, or tribal property, real or personal, located within the exterior boundaries of the Reservation the following taxes: an ad valorem tax (article 1 of title 39, C.R.S.); conservation levy or environmental response fund charge (section 34-60-122, C.R.S.); or severance tax (article 29 of title 39, C.R.S.).

### 3.05. Partial Interests.

So long as this Taxation Compact remains in full force and effect, the foregoing limitations on State and County taxation shall apply to partial or undivided interests owned by the Tribe, whether such interests arise from partnerships, joint ventures, or otherwise; provided that prior to such limitation becoming applicable, the Tribe shall file with the County and the State Department of Revenue, a declaration of the name of the partnership or joint venture, together with a statement listing the partners or venturers, the ownership interest of said partners or venturers, and a schedule of the on-Reservation property subject to any such partnership or joint venture.

### 3.06. Reports and Declarations by Third Parties.

So long as this Taxation Compact remains in full force and effect, any person or entity, other than the Tribe, required to submit reports or declarations related to the assessed value of property located within the Reservation owned by the Tribe, or any person or entity otherwise required to withhold and remit taxes or estimated taxes attributable to interests owned by the Tribe shall be permitted to report such tribal interests as exempt and shall not be required to withhold any taxes or estimated taxes with respect to such tribal ownership interests in such property or income.

### 3.07. State Legislative Amendments.

The Tribe maintains that the foregoing limitations on State and County taxation are mandated by federal statutes and case law and that the State and County are bound by such rules for decision under the United States Constitution, regardless of the provisions of State Law. The County has taken the position that interests in real or personal property owned or acquired by the Tribe within the boundaries of the Reservation are subject to ad valorem property taxes in circumstances where those real or personal property interests within the Reservation have been previously taxed to or are taxable in non-Tribal ownership. The State's position is that real property acquired by the Tribe and not placed or held in trust by the federal government for the benefit of the Tribe is subject to taxation. In order to carry out the terms of this Taxation Compact, the parties covenant jointly to seek legislative amendment to existing State statutory law confirming that throughout the duration of this Taxation Compact, the limitation on State and County taxation set forth above in this Article will be recognized by the State. Specifically, the parties shall seek legislative enactments necessary to implement this Taxation compact, including the following:

Add a new section to article 3 of title 39, C.R.S., (or some other appropriate designation) which provides essentially as follows:

#### **TAXATION COMPACT WITH THE SOUTHERN UTE INDIAN TRIBE.**

(1) The general assembly hereby finds and declares that the Taxation Compact dated March 18, 1996, entered into by and between the County of La Plata, the Southern Ute Indian Tribe, and the Governor, is in the best interests of the State of Colorado and settles in a satisfactory manner a taxation dispute which has been and would otherwise continue to be a matter of extensive litigation.

(2) The general assembly hereby ratifies said Taxation Compact subject to the conditions and covenants therein contained.

(3) Limited to the duration of said Taxation Compact, with respect to the taxes and the charges imposed by article 29 of title 39, C.R.S. (i.e., severance tax) and article 60 of title 34, C.R.S. (i.e., conservation levy and environmental response fund surcharge), and with respect to ad valorem taxes (article 1 of title 39, C.R.S.), the Southern Ute Indian Tribe and all property, real and personal, owned by the Tribe and located within the exterior boundaries of the Southern Ute Indian Reservation shall be deemed as exempt from taxation as more particularly set forth in said Taxation Compact.

(4) The State Property Tax Administrator, whose duties, powers, and authority are described in article 2 of title 39, C.R.S., shall have the authority to resolve disputes submitted to the administrator for resolution pursuant to and in the manner prescribed by the Taxation Compact dated March 18, 1996, between the County of La Plata, the Southern Ute Indian Tribe, and the State of Colorado.

(5) Any statutory change necessary concerning the school bonded indebtedness provisions of said Taxation Compact.

Should the General Assembly of the State fail to enact such statutory amendments deemed by the parties as necessary to carry out the terms of this Taxation Compact by the close of the 1996 legislative session, the Taxation Compact shall terminate for failure of satisfaction of conditions precedent, unless otherwise extended in writing by the parties.

### 3.08. Limitation on Scope.

Nothing in this Article Three shall be construed as affecting in any manner the tax liability of any entity other than the

Southern Ute Indian Tribe. Nothing in this Taxation Compact shall prevent the Oil and Gas Commission from charging its conservation levy and environmental response fee against any non-Indians operating within the exterior boundaries of the Southern Ute Indian Reservation.

#### Article Four

##### Real and Personal Property Interests Subject to Taxation on the Reservation.

The parties acknowledge that certain non-Indian real and personal property interests within the exterior boundaries of the Southern Ute Indian Reservation, including the interests of non-Indian partners or venturers with the Tribe, are generally subject to State and local taxation; however, the Tribe maintains that those taxes may be legally objectionable in circumstances where Congress has expressly granted an exemption from such taxation or imposition of the tax poses a serious and demonstrable threat to the economic or political security of the Tribe. The Tribe agrees not to interpose any objection for the duration of this Taxation Compact to State and local taxation of non-Indian real and personal property interests located within the Reservation boundaries under current circumstances (i.e., so long as present levels of State and local taxation of such interests do not change significantly). Specifically, those non-Indian real and personal property interests for which the Tribe does not assert exemption from State and local taxation under this Taxation Compact include:

- a. Real Property Surface Estates;
- b. Real Property Subsurface Estates;
- c. Mineral Lease Working Interests;
- d. Mineral Lease Royalty Interests;
- e. Mineral Lease Production Payments;
- f. Vehicles and Mobile Homes;
- g. Buildings or Improvements;
- h. Equipment;
- i. Security Interests;
- j. Other Real or Personal Property;
- k. Any Oil and Gas Production and Interest.

#### Article Five

##### Tribal Declaration of Real Property Acquisition.

###### 5.01. Tribal Declaration.

Following acquisition by the Tribe of any interest in real property located within the boundaries of the Reservation, in order to be entitled to the benefits of this Taxation Compact relative to such interest, the Tribe shall file a declaration of such acquisition with the County Assessor, which declaration shall contain: a legal description of the real property interest acquired, including a geographical description and a statement of the interest acquired; identification of the grantor of such interest; the date of closing of the acquisition transaction; and, with respect to interests acquired by the Tribe in non-trust real property, a statement of tribal intent of whether or not application is to be made by the Tribe to the United States of America to place ownership of such acquired interest into trust status. If the Tribe subsequently applies to have such interest placed into federal trust status, the Tribe shall so notify the County



Assessor in writing, and the Tribe shall further notify the County Assessor in writing if and when such trust status is conferred.

#### 5.02. Assessor's Annual Compilation.

No later than the thirty-first day of January of each year during which the Taxation Compact is in force, the County Assessor shall prepare a compilation of all tribally declared real property interests within the Reservation acquired during the preceding calendar year by the Tribe, which interests have not been identified by the Tribe as having been taken into trust status by the United States of America. For each such parcel or interest listed on said compilation, the county assessor shall prepare a schedule showing within which taxing districts such parcel or interest is located, together with a statement of the mill levy attributable to said interests by taxing district as reported on the last applicable tax or assessment notice, and a statement of the assessed or estimated assessed value of such parcel or interest based on the last applicable assessment notice. If tribally acquired interests have been shown on a previously issued annual compilation under this paragraph for the immediately preceding year, without subsequent notification by the Tribe of either a change in ownership or trust status of such interests, the County Assessor shall carry forward such interests on the then current annual compilation with such updated schedules of mill levy by taxing district for the particular carried-forward interest or parcel. For each such listed parcel or interest, the County Assessor shall also submit, with the assistance of the County Treasurer, a statement of the amount of ad valorem tax revenue that would have been collected during said applicable annual period, or part thereof during which the Tribe owned a listed interest, but for the Tribe's ownership. Upon completion of the annual compilation, the County Assessor shall promptly forward the same to the designated representative of the Tribe.

#### 5.03. Tribal Valuation Protest.

No later than forty-five days following its receipt of the County Assessor's Annual Compilation of tribally acquired interests, valuation, and statement of tax revenue, the Tribe may submit to the County Assessor a protest of the valuation estimate or statement of tax revenue for any parcel or interest which the Tribe believes is overstated in the Annual Compilation. Said protest shall be accompanied by written justification setting forth the basis for the protest. Such justification may include, for example, records of actual production and sales value of oil and gas or coalbed methane using valuation criteria similar to that employed by the State in valuing non-Indian oil and gas properties. Should the County Assessor and the Tribe not be able to reach agreement as to the proper valuation or statement of tax revenue to be assigned to any such parcel or interest, then said dispute shall be submitted to the State Property Tax Administrator for resolution. The State Property Tax Administrator shall employ such procedures he or she deems fair and reasonable for hearing the dispute, provided that in any event, both the Assessor and the Tribe shall have an effective opportunity to state their respective positions. The State Property Tax Administrator shall issue a ruling resolving said dispute no later than the first day of June of any such year, which ruling shall be binding and final. In no event shall the State Property Tax Administrator be permitted to reach a finding of valuation or a statement of tax revenue greater than that originally estimated by the County Assessor as set forth in the Annual compilation.

### Article Six

#### Annual Tribal Payment in Lieu of Taxation.

##### 6.01. Voluntary Payment.

In consideration for the covenants herein contained, the Tribe agrees during each year that this Taxation Compact is in full force and effect to make a voluntary payment to the County as more particularly described below.

##### 6.02. Non-Public School Share and Bonded Indebtedness.

The Tribe hereby agrees to remit to the County no later than the fifteenth day of June of each year a voluntary payment in lieu of taxes which shall be equal to the non-public school share of annual real property ad valorem taxes, plus the portion of annual real property ad valorem taxes that are attributable to public school bonded indebtedness, for non-trust real property owned or acquired by the Tribe within the Reservation that otherwise would have been

assessed and collected but for acquisition or ownership of such real property by the Tribe. The parties agree that the Colorado statutory definitions for the terms "real property" and "personal property" presently contained in article 1 of title 39, C.R.S., shall apply for purposes of this section of this Taxation Compact; provided however, the parties agree that regardless of how they are treated under Colorado law, mobile homes owned or acquired by the Tribe shall be considered personal property for purposes of this section of this Taxation Compact.

#### **6.03. How Determined and Reported.**

The amount of said voluntary payment will be computed based on the total sum of taxes that would have been collected for each parcel or interest listed on the County Assessor's Annual Compilation for all non-public school taxing districts. Together with the Tribe's voluntary payment, the Tribe shall submit a schedule setting forth the amount of voluntary payment being made for each parcel or interest contained on the County Assessor's Annual Compilation.

#### **6.04. Previously Acquired Non-Trust Real Property.**

The parties acknowledge that the County asserts a claim for seventy-seven thousand sixty-five dollars and eighty-four cents (\$77,065.84) in taxes due on non-trust real property acquired by the Tribe from and previously taxable to non-Tribal parties for the period of time prior to the 1996 tax year (i.e., prior to and including December 31, 1995). The Tribe agrees to pay the County seventy-seven thousand sixty-five dollars and eighty-four cents (\$77,065.84) in full satisfaction of any claims that the County may have against the Tribe relating to these claims. Additionally, prior to December 31, 1996, the Tribe agrees to provide to the County Assessor, in a format consistent with that described in Section 5.01, *supra*, a listing of real property interests owned by the Tribe, not held in trust, acquired by the tribe prior to the effective date of this Taxation Compact for which the Tribe is entitled to exemption from taxation under the provisions of Section 3.03, *supra*.

### **Article Seven**

#### **Tribal Oil and Gas Operations; Reporting and Remittance for Non-Indian Parties.**

##### **7.01. Red Willow Production Company.**

The parties acknowledge that the Tribe serves as the operator of oil, gas, and coalbed methane wells which produce minerals associated with both trust and non-trust mineral interests located within the Reservation. Such operations have been conducted by the Tribe under the name Red Willow Production Company, which is wholly owned by the Tribe. While in most instances such operations involve mineral leases issued by the Tribe pursuant to federal law, there are situations in which the underlying leases have been issued or could have been issued by non-Indian mineral interest holders. In either instance, however, non-operating interest holders typically include non-Indians who own working interests or overriding royalty interests in the applicable leases. The parties acknowledge that nothing in this Taxation Compact shall preclude the collection of lawful and applicable taxes and charges on property and interests owned by the Tribe and located outside the exterior boundaries of the Southern Ute Indian Reservation.

##### **7.02. State and County Reporting Requirements.**

Under existing State law, well operators are required to submit to State and county officials reports related to the conduct of well production activities and the disposition of produced substances. Such reports are utilized by the Colorado Oil and Gas Conservation Commission to monitor and regulate the development of oil, gas, and coalbed methane resources within the State. Additionally, such reports are available for use by the Colorado Department of Revenue and County officials to assess and collect taxes, including severance tax and ad valorem tax, from the actual holders of interests in minerals or from the beneficiaries of income derived from energy resource development. Based upon the reporting requirements imposed upon well operators, and based upon statutory provisions which require well operators to withhold and remit funds from production income to meet the tax liabilities of non-operating interest holders of such wells, compliance by well operators in submitting timely reports and remitting taxes withheld is integral to the effective operation of State tax laws with respect to non-operating interest holders.

**7.03. Red Willow Reporting Responsibilities.**

In order to assist the State and County in obtaining information needed for the effective monitoring and regulation of resource development, the accurate valuation of taxable interests of non-Indian interest holders on the Reservation, and the collection of taxes from parties lawfully subject to State and County taxes, the Tribe d/b/a Red Willow Production Company (or in whatever name the Tribe is doing business) agrees to remit reports and declarations involving energy production activities on the Reservation over which it serves as operator on the following basis:

a. **Operational Reports.** With respect to operational reports and filings, including, for example, applications for permits to drill and sundry notices, involving mineral operations conducted by red willow production company subject to federal supervision on lands within the Reservation, the Tribe hereby consents to provide or to cause the appropriate federal agencies to provide informational copies of documents filed by Red Willow with such federal agencies to the Colorado Oil and Gas Conservation Commission. This tribal consent is intended as a supplement to joint cooperative procedures already contained in the Memorandum of Understanding and Interagency Agreement between the Tribe and the Bureau of Land Management and the Bureau of Indian Affairs and the Bureau of Land Management, dated August 22, 1991, and in the Memorandum of Understanding between the Colorado Bureau of Land Management and the Colorado Oil and Gas Conservation Commission, dated August 22, 1991.

b. **Severance Tax Reports and Withholding.** The Tribe hereby agrees to submit to the executive director of the Colorado Department of Revenue an annual report related to energy impacts as otherwise required by section 39-29-110, C.R.S. With respect to wells operated by Red Willow located on the Reservation, the Tribe agrees to withhold from income it receives for the sale of production attributable to non-Indian interests such amounts otherwise required to be withheld on a quarterly basis pursuant to section 39-29-111, C.R.S., and to remit such withholding, together with forms for related reporting, to the Colorado Department of Revenue.

c. **Ad Valorem Declarations.** With respect to any leased lands that are producing or are capable of producing oil or gas on the assessment date of each year, which are operated by Red Willow on the Reservation, the Tribe shall file with the County Assessor in accordance with section 39-7-101, C.R.S., and section 39-5-107, C.R.S., a declaration of the oil, gas, or coalbed methane sold or transported from the premises, which declaration shall designate the Tribe's exempt share, if any, and such tax schedules normally filed by non-Indian operators designating such taxable personal property of non-operators or portions thereof over which Red Willow exercises control as operator. In preparing and filing any such declarations or schedules, the Tribe shall be entitled to list its own ownership share as exempt.

**7.04. Cooperation in Reporting.**

In order to assist the Tribe in complying with the reporting obligations of this Article Seven, officials from the State and the County shall make reasonable efforts to meet with tribal officials responsible for rendering such reports and to cooperate with said tribal officials to eliminate any unnecessary reporting obligations and to develop mutually acceptable means for facilitating the transmission of reported information. To the extent practicable and satisfactory, the parties may utilize and develop electronic reports and data retrieval systems.

**Article Eight**

**Statement of Completion of Improvements  
By Non-Indians on Tribal Lands.**

**8.01. Tribal Consent for Surface Disturbance.**

In accordance with federal law and regulations, including 25 U.S.C. sec. 476, and the Constitution of the Southern Ute Indian Tribe, tribal consent is required as a condition for third parties to obtain valid mineral leases, surface leases, commercial leases, rights-of-way or easements, or to conduct surface disturbing activities on tribal surface lands, whether held in trust or non-trust status. The Tribe maintains that it possesses the authority to condition its approval or consent to the issuance of such rights to third parties. The County has indicated that its efforts to determine the assessed valuation of improvements constructed by third parties on tribal lands pursuant to tribal



authorization have been hampered by a lack of knowledge of the completion or installation of such improvements, including pipelines and compressor stations.

#### **8.02. Disclosure of Completion of Improvements.**

Where the Tribe, in its sole discretion, determines that it has the legal right to do so, the Tribe covenants to establish a uniform procedure imposing, as a condition for the grant of its consent to the issuance of leases or rights-of-way on tribal lands involving the installation or construction of improvements, including pipelines or compressor stations, a requirement that the grantee or direct beneficiary of such rights shall notify the County Assessor in a timely manner of the completion of such improvements or facilities.

#### **8.03. Rights Withheld.**

In agreeing to require disclosure of completion of improvements by third parties on tribal land, the Tribe expressly reserves and retains all authority it possesses to control where and in what manner such improvements may be located or constructed. The disclosure requirement is solely intended as an aid to the County in conducting determinations of assessed valuation, and is not intended as conceding that the State or the County possesses the authority to tax such improvements.

### **Article Nine**

#### **Access to Tribal Land for Assessment.**

##### **9.01. Conditional Consent to Cross Tribal Lands.**

Subject to the conditions hereinafter set forth, the Tribe hereby consents to permit the County Assessor and his duly authorized representatives to cross tribal lands for the purpose of performing assessment and valuation activities with respect to improvements located within the Reservation, including, but not limited to: Oil, gas, and coalbed methane wells; compressor stations; pipelines; buildings; and surface facilities or equipment.

##### **9.02. Annual Permit.**

Upon the effective date of this Taxation Compact, and no later than the fifteenth day of January every year thereafter, the County Assessor shall contact the Director of the Division of Natural Resources of the Tribe to obtain a written permit evidencing his authority to cross tribal lands. The County Assessor shall provide to said Director a list of names of persons acting under his authority who he intends to have cross tribal lands for the purposes specified herein, together with a description of vehicles to be used by such persons and corresponding vehicle registration numbers. The list shall be updated from time to time to reflect changes in personnel within the office of the County Assessor. The County Assessor shall require any person within his supervision acting under authority of this Article Nine to carry such permit with him while performing assessment duties within the Reservation. Said permit shall be valid for one year, and shall bear the signature of the County Assessor and the Director.

##### **9.03. Possession of Alcohol and Firearms Prohibited.**

Any person, while carrying out his assessment duties within the Reservation pursuant to the aforementioned permit, shall be prohibited from carrying firearms or alcoholic beverages.

##### **9.04. Prior Notice for Tribal Lands.**

Prior to entering upon tribal lands for the purpose of inspecting or evaluating any facility or improvement so located, the County Assessor or his authorized delegatee shall notify the Director of his intentions and the approximate location of the inspection or evaluation. In the event that the facility to be inspected is related to oil, gas, or coalbed methane operations on tribal surface or mineral lands, the County Assessor shall also notify the Director of the Energy Resource Division of the Tribe.



**9.05. Permit Revocation.**

In the event that the County Assessor or his authorized delegates fail to comply with the conditions set forth in section 9.03 of this Article, the Tribal Council Chairman shall be authorized to revoke said permit, in whole or in part. In the event that the County Assessor or his authorized delegates fail to comply with the other conditions set forth in this Article, and such failure is wilful or material, the Tribal Council Chairman shall be authorized to revoke said permit, in whole or in part. Should such permit be revoked in whole, it shall not be eligible for reinstatement until the following year. Revocation of a crossing permit for cause shall not be grounds for termination of this Taxation Compact.

**Article Ten**

**Collection Procedures for Delinquent Taxes  
of Non-Indians on Tribal Lands.**

**10.01. Tribal Court Recognition Required.**

No lien created by operation of State law in any interest in Tribal real property, whether owned by the Tribe or by a non-Indian, or in personal property or improvements located on Tribal real property located within the boundaries of the Reservation, shall be recognized by the Tribe as having lawful effect unless recognized under principles of comity by the Southern Ute Tribal Court.

**10.02. How Recognition is Obtained.**

The Tribal Council hereby covenants to enact by appropriate resolution and ordinance a specially designated section of the Southern Ute Indian Tribal Code addressing recognition of State and County tax liens and the procedure by which such liens may be effectively foreclosed by said officials. Such enactment shall provide that recognition of State created liens, in interests in tribal real property or in personal property located on tribal real property, for non-payment of taxes may be obtained by the appropriate officer of the State or County by commencing an action for such recognition in the Tribal Court. Such action shall name as respondent the person or persons against whom the lien is claimed and shall set forth the basis supporting the lien. Any named respondent shall have the opportunity, in accordance with the Tribe's Civil Procedure Code, to contest the underlying jurisdictional basis of such lien, or the sufficiency of due process in its issuance. Should the named respondent fail to demonstrate an absence of jurisdiction or a lack of due process in the creation of the lien, the Tribal Court shall be required under the enactment to afford recognition to said lien effective as of the date of its creation under State law. Such recognition shall be evidenced by a judgment of recognition entered by the Tribal Court.

**10.03. Execution and Foreclosure.**

a. **PERSONAL PROPERTY.** The Tribal enactment contemplated in the foregoing section shall provide that recognized tax liens on personal property may be executed upon in accordance with the Enforcement of Secured Transactions Code, Title 15, Southern Ute Indian Tribal Code.

b. **REAL PROPERTY INTERESTS.** The Tribal enactment contemplated in the foregoing section shall also specifically address the foreclosure on real property interests in Tribal real property in a manner that comports with both Tribal and federal law, and to the extent applicable, state law. In that regard, the transfer of an interest in Tribal real property requires both Tribal and federal written consent. Both the Tribe and the United States must be provided an opportunity to ensure that purchasers of interests foreclosed upon meet the necessary qualifications to hold such interests under Tribal and federal law. Provision shall be made in said enactment for a process of qualification of bidders at a foreclosure sale in a manner that will not unduly restrict the ability for the State and the County to foreclose on liens on Tribal real property interests owned by non-Indians within the Reservation.

**Article Eleven****Duration of Taxation Compact.**

**11.01. Conditions Subsequent.**

This Taxation Compact is premised upon certain conditions that currently exist or that must exist prior to its effectiveness. Certain of such conditions, once in place, are beyond the ability of the parties to control fully; however, alteration of such conditions could dramatically change the nature of the amicable agreement reflected in this Taxation Compact. Accordingly, this Article is intended to identify those conditions subsequent, which, in the absence of amendment of this Taxation Compact will result in its termination. In order to provide the parties an opportunity to amend the Taxation Compact prior to its automatic termination, unless otherwise agreed by the parties in writing, there shall be a 120-day period between the creation of such conditions subsequent and the termination of the Taxation Compact. During the 120-day period, the parties shall meet and confer at least once in an attempt to resolve the issues created by that change in circumstance in a mutually acceptable manner. Any party that believes such a change in circumstance has occurred shall promptly notify the other parties of said occurrence in writing. The commencement of the 120-day period shall begin on the date of such written notice.

**11.02. Substantial Alteration or Repeal of Public School Financing and Equalization.**

This Taxation Compact is premised on the continuation of the equalization formula set forth under the Public School Finance Act of 1994, article 54 of title 22, C.R.S., which is intended to provide equalization payments to school districts throughout the State including the school districts in La Plata County in a manner that includes the consideration of the assessed value for real and personal property taxes. Accordingly, the parties understand that the level of funding available to school districts in La Plata County from the State of Colorado will be adjusted in accordance with the equalization formula of the Public School Finance Act in a manner that will address tax revenue losses, except for those associated with bonded indebtedness, to the school districts within La Plata County resulting from real and personal property acquisitions by the Tribe of properties that are subject to the provisions of Sections 3.01 and 3.03 of this Taxation Compact. This Taxation Compact shall terminate, in accordance with the provisions of Section 11.01, in the event that the Public School Finance Act does not in the future operate in such a manner to achieve the results set forth in this Section 11.02.

**11.03. Escalation of Non-Public School Taxation District Average Percentage of County Mill Levy above 33 1/3 Percent.**

This Taxation Compact is premised on the fact that the average portion of total real property tax levies assessed and collected by the County and its officials attributable to public school taxing districts for any taxed parcel or interest is approximately 70% of the total real property tax assessed and collected by the County and its officials for such parcel or interest. Accordingly, in estimating the voluntary payment that may be due in any annual period of this Taxation Compact for any parcel listed in the Assessor's Annual Compilation, the Tribe anticipates paying an amount that will not exceed approximately 30% of the total mill levy that would have been applicable, but for the Tribe's ownership. Should the aggregate average percentage of non-public school district taxes, as reflected in the Assessor's Annual Compilation, exceed 33 1/3% of the total taxes that would have been assessed with respect to the properties therein listed, the Tribe shall be required to remit as its annual voluntary payment in lieu of taxes an amount no greater than 33 1/3% of the aggregate total tax that would have been assessed, but for the Tribe's ownership. In said event, and upon receipt of the Tribe's annual voluntary payment and accompanying report, the County shall have the option to accept said payment in full satisfaction of the Tribe's contractual liabilities under this Taxation Compact for the immediately preceding tax year, or the County may notify the parties of the occurrence of a condition subsequent in accordance with Section 11.01 above. Should the parties be unable to make mutually satisfactory amendments to this Taxation Compact caused by the change in percentage of non-public school district taxation of total taxation, then this Taxation Compact shall terminate. In said event, the annual voluntary payment tendered by the Tribe shall be held in escrow in an account established by the State, to be distributed in accordance with the order of a court of competent jurisdiction or in accordance with the mutual written agreement of the parties.

**11.04. Escalation of Annual Tribal Payment in Lieu of Taxes Above One Million Dollars (\$1,000,000).**

Should the annual voluntary payment of the Tribe, computed in accordance with this Taxation Compact, ever exceed the amount of one million dollars (\$1,000,000), then the Tribe shall have the option in any such year to either make the payment or notify the parties of termination of the Taxation Compact in accordance with Section 11.01 above.

Should the parties be unable to make mutually satisfactory amendments to this Taxation Compact caused by the unanticipated amount of such annual voluntary payment, then this Taxation Compact shall terminate.

#### 11.05. Voluntary Termination by State, County, or Tribe.

Upon one year's notice in writing as set forth in this Taxation Compact, any of the parties may choose to voluntarily terminate this Compact. Upon the notice of such voluntary termination which shall include a statement of reasons and issues as to why the party is terminating this Compact, the matter shall be subjected to the alternative dispute resolution process set forth in Article 12 of this Taxation Compact. Upon any voluntary termination of this Taxation Compact by any of the parties to this Taxation Compact, other than pursuant to sections 11.01-11.04, the Tribe shall make payment to the County pursuant to Section 6.02 calculated up to the end of the tax year preceding the year in which the notice of such termination occurs and the County shall accept such payment in full satisfaction of any obligation the Tribe may have for payment of taxes to the County for the tax year preceding the year in which the notice of such voluntary termination occurs.

### Article Twelve

#### Dispute Resolution.

##### 12.01. Dispute Resolution Mechanism.

The parties shall attempt to promptly and in good faith resolve any dispute arising out of or relating to the matters addressed in the Taxation Compact. Any party may give the other parties written notice of any dispute not resolved in the normal course of business which notice shall include a statement of reasons and issues for the proposed termination as set forth in Article Ten. Upon the receipt of such notice, a meeting at a mutually acceptable place and time shall be scheduled within 15 days after delivery of such notice and will be attended by the Governor of the State of Colorado, the Chairman of the Southern Ute Indian Tribal Council, the Chairman of the La Plata County Board of County Commissioners or their respective designees, and said officials or their designees shall meet to exchange information relating to the dispute and to attempt to resolve the dispute. If the parties are unable to reach agreement to resolve the dispute within 60 days from the date of the notice invoking the provisions of this Article Twelve, the parties within 15 days after the passage of such 60-day period shall agree upon a single arbitrator to render a recommended decision to the parties concerning the resolution of the dispute. The arbitrator shall render his or her decision within 120 days of the date of notice invoking the provisions of this Article Twelve. The decision of the arbitrator shall then be implemented by the parties, provided however, that the State's obligation to implement the decision shall be subject to State constitutional limitations, unless affirmatively rejected by any of the parties in writing setting forth that party's conclusions and reasons for such rejection within 30 days of the arbitrator's recommended decision.

### Article Thirteen

#### Miscellaneous.

##### 13.01. Third Party Rights Unaffected.

Except as provided herein, this Taxation Compact is not intended by the parties to affect the individual rights of third parties or entities, including rights of individual members of the Tribe or the rights of persons subject to taxation by the State, County, or Tribe.

##### 13.02. Amendments.

The parties may amend this Taxation Compact from time to time in writing, provided that such amendment must bear the signature of an authorized representative of each party. This provision for amendment, however, is not intended to grant to any party individually or to the parties collectively any legislative authority to change State or Tribal law without the concurrence of the appropriate legislative body.



## 13.03. Annual Review.

On the anniversary date of this Taxation Compact or the first business day thereafter, or on some other mutually agreed upon date, but in no event less than annually, the parties to this Taxation Compact agree to meet and confer to discuss compliance, progress in implementation, whether amendments are necessary, and other issues related to this Taxation Compact.

## Article Fourteen

## Post-Compact Non-Waiver and Preservation.

## 14.01. Preservation of Rights, Claims, and Defenses.

Upon the termination of the Taxation Compact, the parties may wish to reinstitute litigation concerning any claims and defenses relating to taxation within the exterior boundaries of the Reservation, and if that occurs, the parties understand and agree that all issues relating to State and local taxation may be litigated de novo including any and all claims and defenses related to the taxation of all real and personal property interests within the Reservation as set forth in Articles Three and Four of the Taxation Compact. The parties acknowledge, understand and agree that this Taxation Compact, the prior litigation and the settlement negotiations leading up to this Taxation Compact shall not operate as a bar, waiver of any rights of the parties, or in any respect affect the ability of any party to this Taxation Compact to institute litigation and seek declaratory or injunctive relief or damages. The parties acknowledge, understand and agree that this Taxation Compact and the conduct of the parties pursuant to this Taxation Compact shall not be used in discovery or admissible into evidence, and all negotiations relating to this Taxation Compact and efforts to resolve any disputes relating to this Taxation Compact under Article Eleven shall be treated as compromise in settlement negotiations for purposes of the Federal Rules of Evidence, State Rules of Evidence, or Tribal Rules of Evidence. Notwithstanding the foregoing, however, for every annual period during which the Tribe makes and the County accepts, without contest, an annual voluntary payment in lieu of taxes, the Tribe shall be barred from asserting as a claim the sum of such payment, and the County and State shall be barred from seeking any taxes from the Tribe attributable to property, real or personal, owned by the Tribe within the Reservation.

IN WITNESS WHEREOF, the parties set forth their hands and seals on the date first above written.

Fred W. Klatt, III, chairman  
Board of county commissioners  
La Plata county, Colorado  
Leonard C. Burch, chairman  
Southern Ute Indian Tribal Council  
Southern Ute Indian Tribe

Craig Larson  
La Plata county assessor  
Ed Murray  
La Plata county treasurer

Roy Romer, Governor

State of Colorado

## CREDIT(S)

1997 Electronic Pocket Part Update

Added by Laws 1996, H.B.96-1367, § 1, eff. June 3, 1996.

C. R. S. A. § 24-61-102

CO ST § 24-61-102

END OF DOCUMENT



Requires that any state governmental unit entering into a settlement agreement with a government-supported official or employee to settle an employment dispute file a copy of the final settlement agreement with the department of personnel. Declares that such an agreement is a public record.

Provides that the president of the university of Colorado is an employee-at-will and is subject to the restrictions regarding payment of postemployment compensation.

Authorizes the enforcement of the statutory provisions regarding postemployment compensation through a civil suit filed in a court of competent jurisdiction.

APPROVED by Governor May 23, 1996

EFFECTIVE May 23, 1996

H.B. 96-1349 Youth crime prevention and intervention program - designation of funds - board members. Requires that no less than 20% of the appropriation for the youth crime prevention and intervention program be designated and used exclusively for programs designed for children under 9 years of age. Requires that one or more members of the youth crime prevention and intervention board have knowledge and awareness of early childhood care and education.

APPROVED by Governor April 16, 1996

EFFECTIVE April 16, 1996

H.B. 96-1350 State employees - clean air transit options. Permits any state agency to offer clean air transit options to state employees, including the use of available mass transit. Requires that the financing of those options be from existing appropriations to the state agency. Specifies that a transit option is a perquisite that is subject to the state controller's rules on perquisites.

APPROVED by Governor May 23, 1996

EFFECTIVE May 23, 1996

H.B. 96-1367 Tax compact with the Southern Ute Indian tribe - La Plata County - approval by general assembly - payments in lieu of taxes - resolution of valuation disputes. Declares the interest and authority of the general assembly to act to assist in the resolution of a dispute between the state, La Plata county, and the Southern Ute Indian tribe concerning the taxation of property held by the tribe. Approves the taxation compact between the Southern Ute Indian tribe, La Plata county, and the state of Colorado. Sets forth the provisions of the compact, including provisions requiring the tribe to make payments in lieu of taxes based on the value of property owned by the tribe. Provides that the compact shall be effective upon proper approval by all entities. Authorizes the property tax administrator to resolve valuation disputes as set forth in the compact.

APPROVED by Governor June 3, 1996

EFFECTIVE June 3, 1996

H.B. 96-1376 Legislative department - control of legislative spaces in the

# An Act

HOUSE BILL 96-1367

BY REPRESENTATIVES Dyer, Berry, Foster, Snyder, Acquafresca, Chlouber, DeGette, Entz, Friednash, George, Keller, Lamm, Lyle, Mace, Reeser, Schwarz, Taylor, and Tucker;  
also SENATORS Alexander, Norton, Wells, Feeley, Bishop, Schroeder, Tebedo, and Wham.

**COMMITTEE ON**  
**SENATE**

*Be it enacted by the General Assembly of the State of Colorado:*

SECTION 1. Title 24, Colorado Revised Statutes, 1988 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW ARTICLE to read:

**ARTICLE 61**  
**Taxation Compact Between the**  
**Southern Ute Indian Tribe, La Plata County,**  
**and the State of Colorado**

**PART 1**  
**APPROVAL AND TEXT**  
**OF COMPACT**

24-61-101. Compact as basis for payments - legislative declaration. (1) THE GENERAL ASSEMBLY HEREBY FINDS AND DECLARES THAT:

(a) IT IS IN THE INTEREST OF THE STATE OF COLORADO FOR THE GENERAL ASSEMBLY TO ACT TO ASSIST IN THE RESOLUTION OF A DISPUTE

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

OF MARCH, 1996, BY, BETWEEN AND AMONG THE STATE OF COLORADO, ON BEHALF OF ITSELF, ITS POLITICAL SUBDIVISIONS, OFFICES, AND OFFICIALS ("THE STATE"), THE SOUTHERN UTE INDIAN TRIBE, BY AND THROUGH THE SOUTHERN UTE INDIAN TRIBAL COUNCIL ("THE TRIBE"), AND THE COUNTY OF LA PLATA, BY AND THROUGH THE BOARD OF COUNTY COMMISSIONERS OF LA PLATA COUNTY AND THE LA PLATA COUNTY ASSESSOR AND TREASURER ("COUNTY").

**Article One**  
**Recitals.**

**1.01. Litigation.**

THE PARTIES TO THIS TAXATION COMPACT HAVE BEEN ENGAGED IN PROTRACTED LITIGATION REGARDING THE AUTHORITY OF THE COUNTY AND THE STATE TO TAX THE REAL OR PERSONAL PROPERTY OWNED OR ACQUIRED BY THE TRIBE WITHIN THE EXTERIOR BOUNDARIES OF THE SOUTHERN UTE INDIAN RESERVATION ("RESERVATION"). THAT LITIGATION ("THE LITIGATION") HAS NOT PROVIDED THE PARTIES WITH DEFINITIVE ANSWERS REGARDING THE SCOPE OF SUCH TAXING AUTHORITY OR THE SCOPE OF TRIBAL IMMUNITY FROM SUCH TAXATION ("THE DISPUTE"). IN THE ABSENCE OF AGREEMENT, THE PARTIES WILL BE COMPELLED TO REINSTITUTE LITIGATION AND TO INCUR SUBSTANTIAL LITIGATION COSTS AND COMMITMENTS OF TIME AND ENERGY TO SUCH DISPUTES.

**1.02. Intergovernmental Agreement.**

PRIOR TO REFILING THE LITIGATION, THE PARTIES TO THIS TAXATION COMPACT ENTERED INTO GOOD FAITH NEGOTIATIONS IN AN EFFORT TO RESOLVE THE DISPUTE AMICABLY IN A MANNER CONSISTENT WITH THE RESPECTIVE INTERESTS OF THE PARTIES. IN FURTHERANCE OF THE NEGOTIATION EFFORTS, THE PARTIES ENTERED INTO AN INTERGOVERNMENTAL AGREEMENT CONCERNING TAXATION NEGOTIATIONS WHICH ADDRESSED PROCEDURES FOR MAINTAINING THE STATUS QUO AND PRESERVING THE LEGAL POSITIONS OF THE PARTIES PENDING NEGOTIATION.

**1.03. Principal Individual Interests.**

DURING THE NEGOTIATIONS, THE TRIBE HAS REQUESTED RECOGNITION OF ITS CLAIMED IMMUNITY FROM STATE AND COUNTY TAXATION WITH RESPECT TO ANY INTERESTS IN REAL OR PERSONAL PROPERTY IT OWNS OR MAY ACQUIRE WITHIN THE BOUNDARIES OF THE RESERVATION, REGARDLESS OF WHETHER SUCH PROPERTY IS HELD IN TRUST FOR ITS BENEFIT BY THE UNITED STATES OF AMERICA. THE COUNTY HAS TAKEN THE POSITION THAT INTERESTS IN REAL OR PERSONAL PROPERTY OWNED OR ACQUIRED BY THE TRIBE WITHIN THE BOUNDARIES OF THE RESERVATION ARE SUBJECT TO AD VALOREM PROPERTY TAXES IN CIRCUMSTANCES WHERE THOSE REAL OR PERSONAL PROPERTY INTERESTS WITHIN THE RESERVATION HAVE BEEN PREVIOUSLY TAXED TO OR ARE TAXABLE IN NON-TRIBAL OWNERSHIP. THE COUNTY HAS REITERATED ITS CONCERN THAT RECOGNITION OF TAXING IMMUNITY TO THE TRIBE WITH RESPECT TO ANY INTEREST IN REAL OR PERSONAL PROPERTY OWNED OR ACQUIRED BY THE TRIBE WHEN THAT PROPERTY HAS BEEN TAXED OR TAXABLE UNDER NON-TRIBAL OWNERSHIP WILL HAVE AN ADVERSE ECONOMIC IMPACT ON THOSE GOVERNMENTAL INSTITUTIONS WHICH RELY UPON GENERAL AD VALOREM PROPERTY TAX REVENUE TO CARRY

AS A CONDITION PRECEDENT TO IMPLEMENTATION OF THIS TAXATION COMPACT, THE PARTIES AGREE THAT THE COLORADO GENERAL ASSEMBLY AND THE GOVERNOR OF THE STATE OF COLORADO MUST APPROVE, AND THE OFFICE OF THE COLORADO ATTORNEY GENERAL MUST REVIEW, THIS TAXATION COMPACT AND PERMIT THE COUNTY AND THE STATE TO PERFORM THE COVENANTS HEREIN CONTAINED. IF SUCH AUTHORIZATION IS NOT OBTAINED PRIOR TO THE CLOSE OF THE 1996 LEGISLATIVE SESSION, THIS TAXATION COMPACT SHALL BECOME NULL AND VOID, UNLESS OTHERWISE AGREED BY THE PARTIES.

**2.02. Statutory Amendment.**

AS AN ADDITIONAL CONDITION PRECEDENT, THE PARTIES AGREE THAT SUCH AMENDMENTS TO EXISTING STATE STATUTES NEEDED TO IMPLEMENT THE TERMS OF THIS TAXATION COMPACT SHALL BE ENACTED PRIOR TO THE CLOSE OF THE 1996 LEGISLATIVE SESSION. IF SUCH AMENDMENTS ARE NOT SO ENACTED, THEN THIS TAXATION COMPACT SHALL BECOME NULL AND VOID.

**2.03. Tribal Enactment.**

AS AN ADDITIONAL CONDITION PRECEDENT, THE PARTIES AGREE THAT THE TRIBE, PRIOR TO EXPIRATION OF THE 1996 LEGISLATIVE SESSION OF THE COLORADO GENERAL ASSEMBLY, THROUGH ITS TRIBAL COUNCIL, SHALL HAVE ENACTED SUCH RESOLUTIONS OR ORDINANCES PERMITTING THE IMPLEMENTATION OF THIS TAXATION COMPACT, INCLUDING, BUT NOT LIMITED TO: AUTHORIZATION FOR ISSUING ANNUAL TRIBAL DECLARATIONS OF REAL PROPERTY ACQUIRED BY THE TRIBE, AS PROVIDED IN ARTICLE FIVE, INFRA; AUTHORIZATION FOR ISSUING ANNUAL PAYMENTS, AS PROVIDED IN ARTICLE SIX, INFRA; A MECHANISM FOR REQUIRING NON-INDIANS CONSTRUCTING FACILITIES ON TRIBAL LAND TO REPORT TO THE COUNTY ASSESSOR NOTICE OF COMPLETION OF SUCH FACILITIES, AS PROVIDED IN ARTICLE EIGHT, INFRA; AND A SYSTEM FOR THE RECOGNITION OF COUNTY LIENS VALIDLY OBTAINED UNDER STATE LAW AGAINST THE PROPERTY OF NON-INDIANS, AS WELL AS, A SYSTEM FOR FORECLOSURE OF SUCH LIENS, AS PROVIDED IN ARTICLE TEN, INFRA.

**2.04. Federal Approval.**

TO THE EXTENT THAT THE TAXATION COMPACT CONSTITUTES AN AGREEMENT WITH AN INDIAN TRIBE RELATED TO LAND OWNED BY AN INDIAN TRIBE, IT IS ARGUABLE THAT THE VALIDITY OF SUCH TAXATION COMPACT IS DEPENDENT UPON OBTAINING THE APPROVAL OF THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OR HIS AUTHORIZED REPRESENTATIVE PURSUANT TO 25 U.S.C. SEC. 81. ACCORDINGLY, AS AN ADDITIONAL CONDITION PRECEDENT, PRIOR TO THE CLOSE OF THE 1996 LEGISLATIVE SESSION OF THE COLORADO GENERAL ASSEMBLY, THE PARTIES MUST OBTAIN THE WRITTEN APPROVAL OF THE SECRETARY OF THE INTERIOR, OR HIS AUTHORIZED REPRESENTATIVE, OF THIS TAXATION COMPACT, OR, ALTERNATIVELY, A WRITTEN STATEMENT FROM SUCH DULY AUTHORIZED OFFICIAL INDICATING THAT SUCH WRITTEN APPROVAL IS NOT NECESSARY OR REQUIRED UNDER FEDERAL LAW.

**2.05. Intergovernmental Agreement Operative.**

UNTIL SUCH TIME THAT EACH OF THE CONDITIONS SET FORTH ABOVE IN PARAGRAPHS 2.01, 2.02, 2.03, AND 2.04 HAS BEEN SATISFIED, THE



SO LONG AS THIS TAXATION COMPACT REMAINS IN FULL FORCE AND EFFECT, THE STATE AND COUNTY SHALL NOT SEEK TO TAX ANY PROPERTY, REAL OR PERSONAL, OWNED OR ACQUIRED BY THE TRIBE AND HELD BY THE TRIBE IN NON-FEDERAL-TRUST STATUS; PROVIDED THAT SAID PROPERTY IS LOCATED WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION. TRIBAL PROPERTY INTENDED BY THIS PARAGRAPH TO BE TREATED AS NON-TAXABLE INCLUDES, BUT IS NOT LIMITED TO THE FOLLOWING:

- a. REAL PROPERTY SURFACE ESTATES;
- b. REAL PROPERTY SUBSURFACE ESTATES;
- c. MINERAL LEASE WORKING INTERESTS;
- d. MINERAL LEASE ROYALTY INTERESTS;
- e. MINERAL LEASE PRODUCTION PAYMENTS;
- f. TRIBAL INCOME;
- g. VEHICLES AND MOBILE HOMES;
- h. BUILDINGS OR IMPROVEMENTS;
- i. EQUIPMENT;
- j. SECURITY INTERESTS;
- k. OTHER REAL OR PERSONAL PROPERTY.

#### 3.04. Tribal Activities.

SO LONG AS THIS TAXATION COMPACT REMAINS IN FULL FORCE AND EFFECT, THE STATE AND THE COUNTY SHALL NOT SEEK TO IMPOSE ON THE TRIBE, ANY ACTIVITY UNDERTAKEN BY THE TRIBE, OR TRIBAL PROPERTY, REAL OR PERSONAL, LOCATED WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION THE FOLLOWING TAXES: AN AD VALOREM TAX (ARTICLE 1 OF TITLE 39, C.R.S.); CONSERVATION LEVY OR ENVIRONMENTAL RESPONSE FUND CHARGE (SECTION 34-60-122, C.R.S.); OR SEVERANCE TAX (ARTICLE 29 OF TITLE 39, C.R.S.).

#### 3.05. Partial Interests.

SO LONG AS THIS TAXATION COMPACT REMAINS IN FULL FORCE AND EFFECT, THE FOREGOING LIMITATIONS ON STATE AND COUNTY TAXATION SHALL APPLY TO PARTIAL OR UNDIVIDED INTERESTS OWNED BY THE TRIBE, WHETHER SUCH INTERESTS ARISE FROM PARTNERSHIPS, JOINT VENTURES, OR OTHERWISE; PROVIDED THAT PRIOR TO SUCH LIMITATION BECOMING APPLICABLE, THE TRIBE SHALL FILE WITH THE COUNTY AND THE STATE DEPARTMENT OF REVENUE, A DECLARATION OF THE NAME OF THE PARTNERSHIP OR JOINT VENTURE, TOGETHER WITH A STATEMENT LISTING THE PARTNERS OR VENTURERS, THE OWNERSHIP INTEREST OF SAID PARTNERS OR VENTURERS, AND A SCHEDULE OF THE ON-RESERVATION PROPERTY SUBJECT TO ANY SUCH PARTNERSHIP OR JOINT VENTURE.

(3) LIMITED TO THE DURATION OF SAID TAXATION COMPACT, WITH RESPECT TO THE TAXES AND THE CHARGES IMPOSED BY ARTICLE 29 OF TITLE 39, C.R.S. (I.E., SEVERANCE TAX) AND ARTICLE 60 OF TITLE 34, C.R.S. (I.E., CONSERVATION LEVY AND ENVIRONMENTAL RESPONSE FUND SURCHARGE), AND WITH RESPECT TO AD VALOREM TAXES (ARTICLE 1 OF TITLE 39, C.R.S.), THE SOUTHERN UTE INDIAN TRIBE AND ALL PROPERTY, REAL AND PERSONAL, OWNED BY THE TRIBE AND LOCATED WITHIN THE EXTERIOR BOUNDARIES OF THE SOUTHERN UTE INDIAN RESERVATION SHALL BE DEEMED AS EXEMPT FROM TAXATION AS MORE PARTICULARLY SET FORTH IN SAID TAXATION COMPACT.

(4) THE STATE PROPERTY TAX ADMINISTRATOR, WHOSE DUTIES, POWERS, AND AUTHORITY ARE DESCRIBED IN ARTICLE 2 OF TITLE 39, C.R.S., SHALL HAVE THE AUTHORITY TO RESOLVE DISPUTES SUBMITTED TO THE ADMINISTRATOR FOR RESOLUTION PURSUANT TO AND IN THE MANNER PRESCRIBED BY THE TAXATION COMPACT DATED MARCH 18, 1996, BETWEEN THE COUNTY OF LA PLATA, THE SOUTHERN UTE INDIAN TRIBE, AND THE STATE OF COLORADO.

(5) ANY STATUTORY CHANGE NECESSARY CONCERNING THE SCHOOL BONDED INDEBTEDNESS PROVISIONS OF SAID TAXATION COMPACT.

SHOULD THE GENERAL ASSEMBLY OF THE STATE FAIL TO ENACT SUCH STATUTORY AMENDMENTS DEEMED BY THE PARTIES AS NECESSARY TO CARRY OUT THE TERMS OF THIS TAXATION COMPACT BY THE CLOSE OF THE 1996 LEGISLATIVE SESSION, THE TAXATION COMPACT SHALL TERMINATE FOR FAILURE OF SATISFACTION OF CONDITIONS PRECEDENT, UNLESS OTHERWISE EXTENDED IN WRITING BY THE PARTIES.

### **3.08. Limitation on Scope.**

NOTHING IN THIS ARTICLE THREE SHALL BE CONSTRUED AS AFFECTING IN ANY MANNER THE TAX LIABILITY OF ANY ENTITY OTHER THAN THE SOUTHERN UTE INDIAN TRIBE. NOTHING IN THIS TAXATION COMPACT SHALL PREVENT THE OIL AND GAS COMMISSION FROM CHARGING ITS CONSERVATION LEVY AND ENVIRONMENTAL RESPONSE FEE AGAINST ANY NON-INDIANS OPERATING WITHIN THE EXTERIOR BOUNDARIES OF THE SOUTHERN UTE INDIAN RESERVATION.

## **Article Four**

### **Real and Personal Property Interests Subject to Taxation on the Reservation.**

THE PARTIES ACKNOWLEDGE THAT CERTAIN NON-INDIAN REAL AND PERSONAL PROPERTY INTERESTS WITHIN THE EXTERIOR BOUNDARIES OF THE SOUTHERN UTE INDIAN RESERVATION, INCLUDING THE INTERESTS OF NON-INDIAN PARTNERS OR VENTURERS WITH THE TRIBE, ARE GENERALLY SUBJECT TO STATE AND LOCAL TAXATION; HOWEVER, THE TRIBE MAINTAINS THAT THOSE TAXES MAY BE LEGALLY OBJECTIONABLE IN CIRCUMSTANCES WHERE CONGRESS HAS EXPRESSLY GRANTED AN EXEMPTION FROM SUCH TAXATION OR IMPOSITION OF THE TAX POSES A SERIOUS AND DEMONSTRABLE THREAT TO THE ECONOMIC OR POLITICAL SECURITY OF THE TRIBE. THE TRIBE AGREES

CONFERRED.

**5.02. Assessor's Annual Compilation.**

NO LATER THAN THE THIRTY-FIRST DAY OF JANUARY OF EACH YEAR DURING WHICH THE TAXATION COMPACT IS IN FORCE, THE COUNTY ASSESSOR SHALL PREPARE A COMPILATION OF ALL TRIBALLY DECLARED REAL PROPERTY INTERESTS WITHIN THE RESERVATION ACQUIRED DURING THE PRECEDING CALENDAR YEAR BY THE TRIBE, WHICH INTERESTS HAVE NOT BEEN IDENTIFIED BY THE TRIBE AS HAVING BEEN TAKEN INTO TRUST STATUS BY THE UNITED STATES OF AMERICA. FOR EACH SUCH PARCEL OR INTEREST LISTED ON SAID COMPILATION, THE COUNTY ASSESSOR SHALL PREPARE A SCHEDULE SHOWING WITHIN WHICH TAXING DISTRICTS SUCH PARCEL OR INTEREST IS LOCATED, TOGETHER WITH A STATEMENT OF THE MILL LEVY ATTRIBUTABLE TO SAID INTERESTS BY TAXING DISTRICT AS REPORTED ON THE LAST APPLICABLE TAX OR ASSESSMENT NOTICE, AND A STATEMENT OF THE ASSESSED OR ESTIMATED ASSESSED VALUE OF SUCH PARCEL OR INTEREST BASED ON THE LAST APPLICABLE ASSESSMENT NOTICE. IF TRIBALLY ACQUIRED INTERESTS HAVE BEEN SHOWN ON A PREVIOUSLY ISSUED ANNUAL COMPILATION UNDER THIS PARAGRAPH FOR THE IMMEDIATELY PRECEDING YEAR, WITHOUT SUBSEQUENT NOTIFICATION BY THE TRIBE OF EITHER A CHANGE IN OWNERSHIP OR TRUST STATUS OF SUCH INTERESTS, THE COUNTY ASSESSOR SHALL CARRY FORWARD SUCH INTERESTS ON THE THEN CURRENT ANNUAL COMPILATION WITH SUCH UPDATED SCHEDULES OF MILL LEVY BY TAXING DISTRICT FOR THE PARTICULAR CARRIED-FORWARD INTEREST OR PARCEL. FOR EACH SUCH LISTED PARCEL OR INTEREST, THE COUNTY ASSESSOR SHALL ALSO SUBMIT, WITH THE ASSISTANCE OF THE COUNTY TREASURER, A STATEMENT OF THE AMOUNT OF AD VALOREM TAX REVENUE THAT WOULD HAVE BEEN COLLECTED DURING SAID APPLICABLE ANNUAL PERIOD, OR PART THEREOF DURING WHICH THE TRIBE OWNED A LISTED INTEREST, BUT FOR THE TRIBE'S OWNERSHIP. UPON COMPLETION OF THE ANNUAL COMPILATION, THE COUNTY ASSESSOR SHALL PROMPTLY FORWARD THE SAME TO THE DESIGNATED REPRESENTATIVE OF THE TRIBE.

**5.03. Tribal Valuation Protest.**

NO LATER THAN FORTY-FIVE DAYS FOLLOWING ITS RECEIPT OF THE COUNTY ASSESSOR'S ANNUAL COMPILATION OF TRIBALLY ACQUIRED INTERESTS, VALUATION, AND STATEMENT OF TAX REVENUE, THE TRIBE MAY SUBMIT TO THE COUNTY ASSESSOR A PROTEST OF THE VALUATION ESTIMATE OR STATEMENT OF TAX REVENUE FOR ANY PARCEL OR INTEREST WHICH THE TRIBE BELIEVES IS OVERSTATED IN THE ANNUAL COMPILATION. SAID PROTEST SHALL BE ACCOMPANIED BY WRITTEN JUSTIFICATION SETTING FORTH THE BASIS FOR THE PROTEST. SUCH JUSTIFICATION MAY INCLUDE, FOR EXAMPLE, RECORDS OF ACTUAL PRODUCTION AND SALES VALUE OF OIL AND GAS OR COALBED METHANE USING VALUATION CRITERIA SIMILAR TO THAT EMPLOYED BY THE STATE IN VALUING NON-INDIAN OIL AND GAS PROPERTIES. SHOULD THE COUNTY ASSESSOR AND THE TRIBE NOT BE ABLE TO REACH AGREEMENT AS TO THE PROPER VALUATION OR STATEMENT OF TAX REVENUE TO BE ASSIGNED TO ANY SUCH PARCEL OR INTEREST, THEN SAID DISPUTE SHALL BE SUBMITTED TO THE STATE PROPERTY TAX ADMINISTRATOR FOR RESOLUTION. THE STATE PROPERTY TAX ADMINISTRATOR SHALL EMPLOY SUCH PROCEDURES HE OR SHE DEEMS FAIR AND REASONABLE FOR HEARING THE DISPUTE, PROVIDED THAT IN ANY EVENT, BOTH THE ASSESSOR AND THE



SEVENTY-SEVEN THOUSAND SIXTY-FIVE DOLLARS AND EIGHTY-FOUR CENTS (\$77,065.84) IN FULL SATISFACTION OF ANY CLAIMS THAT THE COUNTY MAY HAVE AGAINST THE TRIBE RELATING TO THESE CLAIMS. ADDITIONALLY, PRIOR TO DECEMBER 31, 1996, THE TRIBE AGREES TO PROVIDE TO THE COUNTY ASSESSOR, IN A FORMAT CONSISTENT WITH THAT DESCRIBED IN SECTION 5.01, SUPRA, A LISTING OF REAL PROPERTY INTERESTS OWNED BY THE TRIBE, NOT HELD IN TRUST, ACQUIRED BY THE TRIBE PRIOR TO THE EFFECTIVE DATE OF THIS TAXATION COMPACT FOR WHICH THE TRIBE IS ENTITLED TO EXEMPTION FROM TAXATION UNDER THE PROVISIONS OF SECTION 3.03, SUPRA.

**Article Seven  
Tribal Oil and Gas Operations;  
Reporting and Remittance for Non-Indian Parties.**

**7.01. Red Willow Production Company.**

THE PARTIES ACKNOWLEDGE THAT THE TRIBE SERVES AS THE OPERATOR OF OIL, GAS, AND COALBED METHANE WELLS WHICH PRODUCE MINERALS ASSOCIATED WITH BOTH TRUST AND NON-TRUST MINERAL INTERESTS LOCATED WITHIN THE RESERVATION. SUCH OPERATIONS HAVE BEEN CONDUCTED BY THE TRIBE UNDER THE NAME RED WILLOW PRODUCTION COMPANY, WHICH IS WHOLLY OWNED BY THE TRIBE. WHILE IN MOST INSTANCES SUCH OPERATIONS INVOLVE MINERAL LEASES ISSUED BY THE TRIBE PURSUANT TO FEDERAL LAW, THERE ARE SITUATIONS IN WHICH THE UNDERLYING LEASES HAVE BEEN ISSUED OR COULD HAVE BEEN ISSUED BY NON-INDIAN MINERAL INTEREST HOLDERS. IN EITHER INSTANCE, HOWEVER, NON-OPERATING INTEREST HOLDERS TYPICALLY INCLUDE NON-INDIANS WHO OWN WORKING INTERESTS OR OVERRIDING ROYALTY INTERESTS IN THE APPLICABLE LEASES. THE PARTIES ACKNOWLEDGE THAT NOTHING IN THIS TAXATION COMPACT SHALL PRECLUDE THE COLLECTION OF LAWFUL AND APPLICABLE TAXES AND CHARGES ON PROPERTY AND INTERESTS OWNED BY THE TRIBE AND LOCATED OUTSIDE THE EXTERIOR BOUNDARIES OF THE SOUTHERN UTE INDIAN RESERVATION.

**7.02. State and County Reporting Requirements.**

UNDER EXISTING STATE LAW, WELL OPERATORS ARE REQUIRED TO SUBMIT TO STATE AND COUNTY OFFICIALS REPORTS RELATED TO THE CONDUCT OF WELL PRODUCTION ACTIVITIES AND THE DISPOSITION OF PRODUCED SUBSTANCES. SUCH REPORTS ARE UTILIZED BY THE COLORADO OIL AND GAS CONSERVATION COMMISSION TO MONITOR AND REGULATE THE DEVELOPMENT OF OIL, GAS, AND COALBED METHANE RESOURCES WITHIN THE STATE. ADDITIONALLY, SUCH REPORTS ARE AVAILABLE FOR USE BY THE COLORADO DEPARTMENT OF REVENUE AND COUNTY OFFICIALS TO ASSESS AND COLLECT TAXES, INCLUDING SEVERANCE TAX AND AD VALOREM TAX, FROM THE ACTUAL HOLDERS OF INTERESTS IN MINERALS OR FROM THE BENEFICIARIES OF INCOME DERIVED FROM ENERGY RESOURCE DEVELOPMENT. BASED UPON THE REPORTING REQUIREMENTS IMPOSED UPON WELL OPERATORS, AND BASED UPON STATUTORY PROVISIONS WHICH REQUIRE WELL OPERATORS TO WITHHOLD AND REMIT FUNDS FROM PRODUCTION INCOME TO MEET THE TAX LIABILITIES OF NON-OPERATING INTEREST HOLDERS OF SUCH WELLS, COMPLIANCE BY WELL OPERATORS IN SUBMITTING TIMELY REPORTS AND REMITTING TAXES WITHHELD IS INTEGRAL TO THE EFFECTIVE OPERATION OF STATE TAX LAWS



DECLARATION OF THE OIL, GAS, OR COALBED METHANE SOLD OR TRANSPORTED FROM THE PREMISES, WHICH DECLARATION SHALL DESIGNATE THE TRIBE'S EXEMPT SHARE, IF ANY, AND SUCH TAX SCHEDULES NORMALLY FILED BY NON-INDIAN OPERATORS DESIGNATING SUCH TAXABLE PERSONAL PROPERTY OF NON-OPERATORS OR PORTIONS THEREOF OVER WHICH RED WILLOW EXERCISES CONTROL AS OPERATOR. IN PREPARING AND FILING ANY SUCH DECLARATIONS OR SCHEDULES, THE TRIBE SHALL BE ENTITLED TO LIST ITS OWN OWNERSHIP SHARE AS EXEMPT.

#### **7.04. Cooperation in Reporting.**

IN ORDER TO ASSIST THE TRIBE IN COMPLYING WITH THE REPORTING OBLIGATIONS OF THIS ARTICLE SEVEN, OFFICIALS FROM THE STATE AND THE COUNTY SHALL MAKE REASONABLE EFFORTS TO MEET WITH TRIBAL OFFICIALS RESPONSIBLE FOR RENDERING SUCH REPORTS AND TO COOPERATE WITH SAID TRIBAL OFFICIALS TO ELIMINATE ANY UNNECESSARY REPORTING OBLIGATIONS AND TO DEVELOP MUTUALLY ACCEPTABLE MEANS FOR FACILITATING THE TRANSMISSION OF REPORTED INFORMATION. TO THE EXTENT PRACTICABLE AND SATISFACTORY, THE PARTIES MAY UTILIZE AND DEVELOP ELECTRONIC REPORTS AND DATA RETRIEVAL SYSTEMS.

### **Article Eight Statement of Completion of Improvements By Non-Indians on Tribal Lands.**

#### **8.01. Tribal Consent for Surface Disturbance.**

IN ACCORDANCE WITH FEDERAL LAW AND REGULATIONS, INCLUDING 25 U.S.C. SEC. 476, AND THE CONSTITUTION OF THE SOUTHERN UTE INDIAN TRIBE, TRIBAL CONSENT IS REQUIRED AS A CONDITION FOR THIRD PARTIES TO OBTAIN VALID MINERAL LEASES, SURFACE LEASES, COMMERCIAL LEASES, RIGHTS-OF-WAY OR EASEMENTS, OR TO CONDUCT SURFACE DISTURBING ACTIVITIES ON TRIBAL SURFACE LANDS, WHETHER HELD IN TRUST OR NON-TRUST STATUS. THE TRIBE MAINTAINS THAT IT POSSESSES THE AUTHORITY TO CONDITION ITS APPROVAL OR CONSENT TO THE ISSUANCE OF SUCH RIGHTS TO THIRD PARTIES. THE COUNTY HAS INDICATED THAT ITS EFFORTS TO DETERMINE THE ASSESSED VALUATION OF IMPROVEMENTS CONSTRUCTED BY THIRD PARTIES ON TRIBAL LANDS PURSUANT TO TRIBAL AUTHORIZATION HAVE BEEN HAMPERED BY A LACK OF KNOWLEDGE OF THE COMPLETION OR INSTALLATION OF SUCH IMPROVEMENTS, INCLUDING PIPELINES AND COMPRESSOR STATIONS.

#### **8.02. Disclosure of Completion of Improvements.**

WHERE THE TRIBE, IN ITS SOLE DISCRETION, DETERMINES THAT IT HAS THE LEGAL RIGHT TO DO SO, THE TRIBE COVENANTS TO ESTABLISH A UNIFORM PROCEDURE IMPOSING, AS A CONDITION FOR THE GRANT OF ITS CONSENT TO THE ISSUANCE OF LEASES OR RIGHTS-OF-WAY ON TRIBAL LANDS INVOLVING THE INSTALLATION OR CONSTRUCTION OF IMPROVEMENTS, INCLUDING PIPELINES OR COMPRESSOR STATIONS, A REQUIREMENT THAT THE GRANTEE OR DIRECT BENEFICIARY OF SUCH RIGHTS SHALL NOTIFY THE COUNTY ASSESSOR IN A TIMELY MANNER OF THE COMPLETION OF SUCH IMPROVEMENTS OR FACILITIES.

EVALUATION. IN THE EVENT THAT THE FACILITY TO BE INSPECTED IS RELATED TO OIL, GAS, OR COALBED METHANE OPERATIONS ON TRIBAL SURFACE OR MINERAL LANDS, THE COUNTY ASSESSOR SHALL ALSO NOTIFY THE DIRECTOR OF THE ENERGY RESOURCE DIVISION OF THE TRIBE.

#### 9.05. Permit Revocation.

IN THE EVENT THAT THE COUNTY ASSESSOR OR HIS AUTHORIZED DELEGATES FAIL TO COMPLY WITH THE CONDITIONS SET FORTH IN SECTION 9.03 OF THIS ARTICLE, THE TRIBAL COUNCIL CHAIRMAN SHALL BE AUTHORIZED TO REVOKE SAID PERMIT, IN WHOLE OR IN PART. IN THE EVENT THAT THE COUNTY ASSESSOR OR HIS AUTHORIZED DELEGATES FAIL TO COMPLY WITH THE OTHER CONDITIONS SET FORTH IN THIS ARTICLE, AND SUCH FAILURE IS WILFUL OR MATERIAL, THE TRIBAL COUNCIL CHAIRMAN SHALL BE AUTHORIZED TO REVOKE SAID PERMIT, IN WHOLE OR IN PART. SHOULD SUCH PERMIT BE REVOKED IN WHOLE, IT SHALL NOT BE ELIGIBLE FOR REINSTATEMENT UNTIL THE FOLLOWING YEAR. REVOCATION OF A CROSSING PERMIT FOR CAUSE SHALL NOT BE GROUNDS FOR TERMINATION OF THIS TAXATION COMPACT.

### Article Ten Collection Procedures for Delinquent Taxes of Non-Indians on Tribal Lands.

#### 10.01. Tribal Court Recognition Required.

NO LIEN CREATED BY OPERATION OF STATE LAW IN ANY INTEREST IN TRIBAL REAL PROPERTY, WHETHER OWNED BY THE TRIBE OR BY A NON-INDIAN, OR IN PERSONAL PROPERTY OR IMPROVEMENTS LOCATED ON TRIBAL REAL PROPERTY LOCATED WITHIN THE BOUNDARIES OF THE RESERVATION, SHALL BE RECOGNIZED BY THE TRIBE AS HAVING LAWFUL EFFECT UNLESS RECOGNIZED UNDER PRINCIPLES OF COMITY BY THE SOUTHERN UTE TRIBAL COURT.

#### 10.02. How Recognition is Obtained.

THE TRIBAL COUNCIL HEREBY COVENANTS TO ENACT BY APPROPRIATE RESOLUTION AND ORDINANCE A SPECIALLY DESIGNATED SECTION OF THE SOUTHERN UTE INDIAN TRIBAL CODE ADDRESSING RECOGNITION OF STATE AND COUNTY TAX LIENS AND THE PROCEDURE BY WHICH SUCH LIENS MAY BE EFFECTIVELY FORECLOSED BY SAID OFFICIALS. SUCH ENACTMENT SHALL PROVIDE THAT RECOGNITION OF STATE CREATED LIENS, IN INTERESTS IN TRIBAL REAL PROPERTY OR IN PERSONAL PROPERTY LOCATED ON TRIBAL REAL PROPERTY, FOR NON-PAYMENT OF TAXES MAY BE OBTAINED BY THE APPROPRIATE OFFICER OF THE STATE OR COUNTY BY COMMENCING AN ACTION FOR SUCH RECOGNITION IN THE TRIBAL COURT. SUCH ACTION SHALL NAME AS RESPONDENT THE PERSON OR PERSONS AGAINST WHOM THE LIEN IS CLAIMED AND SHALL SET FORTH THE BASIS SUPPORTING THE LIEN. ANY NAMED RESPONDENT SHALL HAVE THE OPPORTUNITY, IN ACCORDANCE WITH THE TRIBE'S CIVIL PROCEDURE CODE, TO CONTEST THE UNDERLYING JURISDICTIONAL BASIS OF SUCH LIEN, OR THE SUFFICIENCY OF DUE PROCESS IN ITS ISSUANCE. SHOULD THE NAMED RESPONDENT FAIL TO DEMONSTRATE AN ABSENCE OF JURISDICTION OR A LACK OF DUE PROCESS IN THE CREATION OF THE LIEN, THE TRIBAL COURT SHALL BE REQUIRED UNDER THE ENACTMENT TO AFFORD RECOGNITION TO SAID LIEN EFFECTIVE

#### 11.02. Substantial Alteration or Repeal of Public School Financing and Equalization.

THIS TAXATION COMPACT IS PREMISED ON THE CONTINUATION OF THE EQUALIZATION FORMULA SET FORTH UNDER THE PUBLIC SCHOOL FINANCE ACT OF 1994, ARTICLE 54 OF TITLE 22, C.R.S., WHICH IS INTENDED TO PROVIDE EQUALIZATION PAYMENTS TO SCHOOL DISTRICTS THROUGHOUT THE STATE INCLUDING THE SCHOOL DISTRICTS IN LA PLATA COUNTY IN A MANNER THAT INCLUDES THE CONSIDERATION OF THE ASSESSED VALUE FOR REAL AND PERSONAL PROPERTY TAXES. ACCORDINGLY, THE PARTIES UNDERSTAND THAT THE LEVEL OF FUNDING AVAILABLE TO SCHOOL DISTRICTS IN LA PLATA COUNTY FROM THE STATE OF COLORADO WILL BE ADJUSTED IN ACCORDANCE WITH THE EQUALIZATION FORMULA OF THE PUBLIC SCHOOL FINANCE ACT IN A MANNER THAT WILL ADDRESS TAX REVENUE LOSSES, EXCEPT FOR THOSE ASSOCIATED WITH BONDED INDEBTEDNESS, TO THE SCHOOL DISTRICTS WITHIN LA PLATA COUNTY RESULTING FROM REAL AND PERSONAL PROPERTY ACQUISITIONS BY THE TRIBE OF PROPERTIES THAT ARE SUBJECT TO THE PROVISIONS OF SECTIONS 3.01 AND 3.03 OF THIS TAXATION COMPACT. THIS TAXATION COMPACT SHALL TERMINATE, IN ACCORDANCE WITH THE PROVISIONS OF SECTION 11.01, IN THE EVENT THAT THE PUBLIC SCHOOL FINANCE ACT DOES NOT IN THE FUTURE OPERATE IN SUCH A MANNER TO ACHIEVE THE RESULTS SET FORTH IN THIS SECTION 11.02.

#### 11.03. Escalation of Non-Public School Taxation District Average Percentage of County Mill Levy above 33 1/3 Percent.

THIS TAXATION COMPACT IS PREMISED ON THE FACT THAT THE AVERAGE PORTION OF TOTAL REAL PROPERTY TAX LEVIES ASSESSED AND COLLECTED BY THE COUNTY AND ITS OFFICIALS ATTRIBUTABLE TO PUBLIC SCHOOL TAXING DISTRICTS FOR ANY TAXED PARCEL OR INTEREST IS APPROXIMATELY 70% OF THE TOTAL REAL PROPERTY TAX ASSESSED AND COLLECTED BY THE COUNTY AND ITS OFFICIALS FOR SUCH PARCEL OR INTEREST. ACCORDINGLY, IN ESTIMATING THE VOLUNTARY PAYMENT THAT MAY BE DUE IN ANY ANNUAL PERIOD OF THIS TAXATION COMPACT FOR ANY PARCEL LISTED IN THE ASSESSOR'S ANNUAL COMPILATION, THE TRIBE ANTICIPATES PAYING AN AMOUNT THAT WILL NOT EXCEED APPROXIMATELY 30% OF THE TOTAL MILL LEVY THAT WOULD HAVE BEEN APPLICABLE, BUT FOR THE TRIBE'S OWNERSHIP. SHOULD THE AGGREGATE AVERAGE PERCENTAGE OF NON-PUBLIC SCHOOL DISTRICT TAXES, AS REFLECTED IN THE ASSESSOR'S ANNUAL COMPILATION, EXCEED 33 1/3% OF THE TOTAL TAXES THAT WOULD HAVE BEEN ASSESSED WITH RESPECT TO THE PROPERTIES THEREIN LISTED, THE TRIBE SHALL BE REQUIRED TO REMIT AS ITS ANNUAL VOLUNTARY PAYMENT IN LIEU OF TAXES AN AMOUNT NO GREATER THAN 33 1/3% OF THE AGGREGATE TOTAL TAX THAT WOULD HAVE BEEN ASSESSED, BUT FOR THE TRIBE'S OWNERSHIP. IN SAID EVENT, AND UPON RECEIPT OF THE TRIBE'S ANNUAL VOLUNTARY PAYMENT AND ACCOMPANYING REPORT, THE COUNTY SHALL HAVE THE OPTION TO ACCEPT SAID PAYMENT IN FULL SATISFACTION OF THE TRIBE'S CONTRACTUAL LIABILITIES UNDER THIS TAXATION COMPACT FOR THE IMMEDIATELY PRECEDING TAX YEAR, OR THE COUNTY MAY NOTIFY THE PARTIES OF THE OCCURRENCE OF A CONDITION SUBSEQUENT IN ACCORDANCE WITH SECTION 11.01 ABOVE. SHOULD THE PARTIES BE UNABLE TO MAKE MUTUALLY SATISFACTORY AMENDMENTS TO THIS TAXATION COMPACT CAUSED BY THE CHANGE IN PERCENTAGE OF NON-PUBLIC SCHOOL DISTRICT TAXATION



COUNTY COMMISSIONERS OR THEIR RESPECTIVE DESIGNEES, AND SAID OFFICIALS OR THEIR DESIGNEES SHALL MEET TO EXCHANGE INFORMATION RELATING TO THE DISPUTE AND TO ATTEMPT TO RESOLVE THE DISPUTE. IF THE PARTIES ARE UNABLE TO REACH AGREEMENT TO RESOLVE THE DISPUTE WITHIN 60 DAYS FROM THE DATE OF THE NOTICE INVOKING THE PROVISIONS OF THIS ARTICLE TWELVE, THE PARTIES WITHIN 15 DAYS AFTER THE PASSAGE OF SUCH 60-DAY PERIOD SHALL AGREE UPON A SINGLE ARBITRATOR TO RENDER A RECOMMENDED DECISION TO THE PARTIES CONCERNING THE RESOLUTION OF THE DISPUTE. THE ARBITRATOR SHALL RENDER HIS OR HER DECISION WITHIN 120 DAYS OF THE DATE OF NOTICE INVOKING THE PROVISIONS OF THIS ARTICLE TWELVE. THE DECISION OF THE ARBITRATOR SHALL THEN BE IMPLEMENTED BY THE PARTIES, PROVIDED HOWEVER, THAT THE STATE'S OBLIGATION TO IMPLEMENT THE DECISION SHALL BE SUBJECT TO STATE CONSTITUTIONAL LIMITATIONS, UNLESS AFFIRMATIVELY REJECTED BY ANY OF THE PARTIES IN WRITING SETTING FORTH THAT PARTY'S CONCLUSIONS AND REASONS FOR SUCH REJECTION WITHIN 30 DAYS OF THE ARBITRATOR'S RECOMMENDED DECISION.

#### **Article Thirteen Miscellaneous.**

##### **13.01. Third Party Rights Unaffected.**

EXCEPT AS PROVIDED HEREIN, THIS TAXATION COMPACT IS NOT INTENDED BY THE PARTIES TO AFFECT THE INDIVIDUAL RIGHTS OF THIRD PARTIES OR ENTITIES, INCLUDING RIGHTS OF INDIVIDUAL MEMBERS OF THE TRIBE OR THE RIGHTS OF PERSONS SUBJECT TO TAXATION BY THE STATE, COUNTY, OR TRIBE.

##### **13.02. Amendments.**

THE PARTIES MAY AMEND THIS TAXATION COMPACT FROM TIME TO TIME IN WRITING, PROVIDED THAT SUCH AMENDMENT MUST BEAR THE SIGNATURE OF AN AUTHORIZED REPRESENTATIVE OF EACH PARTY. THIS PROVISION FOR AMENDMENT, HOWEVER, IS NOT INTENDED TO GRANT TO ANY PARTY INDIVIDUALLY OR TO THE PARTIES COLLECTIVELY ANY LEGISLATIVE AUTHORITY TO CHANGE STATE OR TRIBAL LAW WITHOUT THE CONCURRENCE OF THE APPROPRIATE LEGISLATIVE BODY.

##### **13.03. Annual Review.**

ON THE ANNIVERSARY DATE OF THIS TAXATION COMPACT OR THE FIRST BUSINESS DAY THEREAFTER, OR ON SOME OTHER MUTUALLY AGREED UPON DATE, BUT IN NO EVENT LESS THAN ANNUALLY, THE PARTIES TO THIS TAXATION COMPACT AGREE TO MEET AND CONFER TO DISCUSS COMPLIANCE, PROGRESS IN IMPLEMENTATION, WHETHER AMENDMENTS ARE NECESSARY, AND OTHER ISSUES RELATED TO THIS TAXATION COMPACT.

#### **Article Fourteen Post-Compact Non-Waiver and Preservation.**

##### **14.01. Preservation of Rights, Claims, and Defenses.**

UPON THE TERMINATION OF THE TAXATION COMPACT, THE PARTIES MAY WISH TO REINSTITUTE LITIGATION CONCERNING ANY CLAIMS AND DEFENSES RELATING TO TAXATION WITHIN THE EXTERIOR BOUNDARIES OF THE




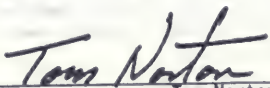
SECTION 2. 39-2-109 (1), Colorado Revised Statutes, 1994 Repl. Vol., is amended BY THE ADDITION OF A NEW PARAGRAPH to read:


39-2-109. Duties, powers, and authority. (1) It is the duty of the property tax administrator, and he shall have and exercise authority:

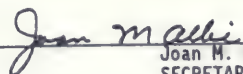
(1) TO RESOLVE VALUATION DISPUTES CONCERNING PROPERTY OR PROPERTY INTERESTS OWNED OR HELD BY THE SOUTHERN UTE INDIAN TRIBE AS PROVIDED IN THE TAXATION COMPACT SET FORTH IN SECTION 39-15-102.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

  
Charles E. Berry  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

  
Tom Norton  
PRESIDENT OF  
THE SENATE

  
Judith M. Rodrigue  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

  
Joan M. Albi  
SECRETARY OF  
THE SENATE

APPROVED June 3, 1996 at 4:20 P.M.

  
Roy Romer  
GOVERNOR OF THE STATE OF COLORADO

**WEST'S COLORADO REVISED STATUTES ANNOTATED**  
**TITLE 39. TAXATION**  
**SPECIFIC TAXES**  
**TOBACCO TAX**  
**ARTICLE 28. CIGARETTE TAX**

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Current through End of 1997 1st Ex. Sess.

**§ 39-28-111. Exempt sales**

The sales of cigarettes to the United States government or any of its agencies, sales in interstate commerce, or transactions the taxation of which is prohibited by the constitution of the United States are exempted from the provisions of this article. Such exempt sales shall be reported to the department with such information as the department shall require.

**CREDIT(S)**

1990 Main Volume

Laws 1964, H.B.1086, § 11.

**PRIOR COMPILATIONS**

1990 Main Volume

Prior Compilations: C.R.S.1963, § 138-8-11.

<General Materials (GM) - References, Annotations, or Tables>

**CROSS REFERENCES**

Sales and use tax, exemption of cigarettes, see §§ 39-26-114, 39-26-203.

**UNITED STATES SUPREME COURT**

Cigarette tax, wholesalers, resale on Indian reservations, see *Department of Taxation and Finance of New York v. Milhelm Attes & Bros., Inc.*, U.S.N.Y.1994, 114 S.Ct. 2028, 512 U.S. 61, 129 L.Ed.2d 52, on remand 642 N.E.2d 319, 618 N.Y.S.2d 1, 84 N.Y.2d 851.

Excise taxes, cigarettes sold to non-Indians, see *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, U.S.Cal.1985, 106 S.Ct. 289, 474 U.S. 9, 88 L.Ed.2d 9, rehearing denied 106 S.Ct. 839, 474 U.S. 1077, 88 L.Ed.2d 810, on remand 800 F.2d 1446.

Indian reservations, state jurisdiction, see *Washington v. Confederated Tribes of Colville Indian Reservation*, U.S.Wash.1980, 100 S.Ct. 2069, 447 U.S. 134, 65 L.Ed.2d 10, rehearing denied 101 S.Ct. 25, 448 U.S. 911, 65 L.Ed.2d 1172.

C. R. S. A. § 39-28-111

CO ST § 39-28-111

END OF DOCUMENT

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CONNECTICUT GENERAL STATUTES ANNOTATED  
TITLE 12. TAXATION  
CHAPTER 226C. ADMINISTRATION OF TRIBAL-STATE COMPACTS

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Current through End of 1997 January Regular and Sp. Sess.

§ 12-586f. Assessment of Mashantucket Pequot Tribe for expenses of administering Tribal-State Compact. Fingerprinting of applicants for casino gaming licenses

(a) For the purposes of this section, "tribe" means the Mashantucket Pequot Tribe and "compact" means the Tribal-State Compact between the tribe and the state of Connecticut, as incorporated and amended in the Final Mashantucket Pequot Gaming Procedures prescribed by the Secretary of the United States Department of the Interior pursuant to Section 2710(d)(7)(B)(vii) of Title 25 of the United States Code [FN1] and published in 56 Federal Register 24996 (May 31, 1991).

(b) The expenses of administering the provisions of the compact shall be financed as provided herein. Assessments for regulatory costs incurred by any state agency which are subject to reimbursement by the tribe in accordance with the provisions of the compact shall be made by the Commissioner of Revenue Services in accordance with the provisions of the compact, including provisions respecting adjustment of excess assessments. Any underassessment for a prior fiscal year may be included in a subsequent assessment but shall be specified as such. Payments made by the tribe in accordance with the provisions of the compact shall be deposited in the General Fund and shall be credited to the appropriation for the state agency incurring such costs.

(c) Assessments for law enforcement costs incurred by any state agency which are subject to reimbursement by the tribe in accordance with the provisions of the compact shall be made by the Commissioner of Public Safety in accordance with the provisions of the compact, including provisions respecting adjustment of excess assessments. Any underassessment for a prior fiscal year may be included in a subsequent assessment but shall be specified as such. Payments made by the tribe in accordance with the provisions of the compact shall be deposited in the General Fund and shall be credited to the appropriation for the state agency incurring such costs.

(d) If the tribe is aggrieved due to any assessment levied pursuant to such compact and this section or by any failure to adjust an excess assessment in accordance with the provisions of the compact and this section, it may, within one month from the time provided for the payment of such assessment, appeal therefrom in accordance with the terms of the compact, to the superior court for the judicial district of Hartford-New Britain, [FN2] which appeal shall be accompanied by a citation to the executive director of the Division of Special Revenue to appear before said court. Such citation shall be signed by the same authority, and such appeal shall be returnable at the same time and served and returned in the same manner as is required in case of a summons in a civil action. Proceedings in such matter shall be conducted in the same manner as provided for in section 38a-52.

(e) Each applicant for a casino gaming employee license, casino gaming service license or casino gaming equipment license shall be fingerprinted before such license is issued.

CREDIT(S)

1993 Main Volume

(1988, P.A. 88-230, § 1; 1990, P.A. 90-98, § 1; 1991, June Sp.Sess., P.A. 91-14, § 10, eff. Sept. 19, 1991; 1993, P.A. 93-142, § 4, eff. June 14, 1993.)

1998 Electronic Pocket Part Update

(1995, P.A. 95-220, § 4, eff. July 1, 1995; 1996, P.A. 96-142, § 2, eff. May 29, 1996.)

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[FN1] 25 U.S.C.A. § 2710.

[FN2] On and after Sept. 1, 1998, "judicial district of Hartford-New Britain" or "judicial district of Hartford-New Britain at Hartford" is changed to "judicial district of Hartford" pursuant to 1988, P.A. 88-230, § 1, as amended. See C.G.S.A. § 51-344a.

< General Materials (GM) - References, Annotations, or Tables >

## HISTORICAL AND STATUTORY NOTES

### 1998 Electronic Pocket Part Update

#### Codification

On and after Sept. 1, 1998, the terms "judicial district of Hartford-New Britain" or "judicial district of Hartford-New Britain at Hartford" wherever appearing, have been changed to "judicial district of Hartford" pursuant to 1988, P.A. 88-230, § 1, as amended by 1990, P.A. 90-98, § 1; 1993, P.A. 93-142, § 4; 1995, P.A. 95-220, § 4. See C.G.S.A. § 51-344a.

Gen.St., Rev. to 1997, changed the section heading from "Assessment of Mashantucket Pequot Tribe for expenses of administering Tribal-State Compact" to "Assessment of Mashantucket Pequot Tribe for expenses of administering Tribal-State Compact. Fingerprinting of applicants for casino gaming licenses".

#### Amendments

1996 Amendment. 1996, P.A. 96-142, § 2, added subsec. (e).

#### Effective Dates

1988 Act. 1988, P.A. 88-230, § 12, as amended by 1990, P.A. 90-98, § 2; 1993, P.A. 93-142, § 7, eff. June 14, 1993; 1995, P.A. 95-220, § 5, eff. July 1, 1995, provided:

"This act shall take effect September 1, 1998."

## CROSS REFERENCES

Indian Affairs Council, see C.G.S.A. § 47-59b.

Indians, citizenship, civil rights, land rights, see C.G.S.A. § 47-59a.

Payment of taxes via electronic funds transfer, see C.G.S.A. §§ 12-685 to 12-689.

## LIBRARY REFERENCES

### 1993 Main Volume

#### American Digest System

Gaming licensing procedures generally, see Gaming ¶4.

Levy and assessment of taxes generally, see Taxation ¶295 et seq.

#### Encyclopedias

Gaming licensing procedures generally, see C.J.S. Gaming §§ 50, 82.

Levy and assessment of taxes generally, see C.J.S. Taxation § 349 et seq.

C. G. S. A. § 12-586f



## NCSL LEGISBRIEF

June/July 1997

Vol. 5, No. 29

## STATE-TRIBAL REVENUE AGREEMENTS

By Judy Zelio

States may not tax the revenues that tribes receive from gambling enterprises.

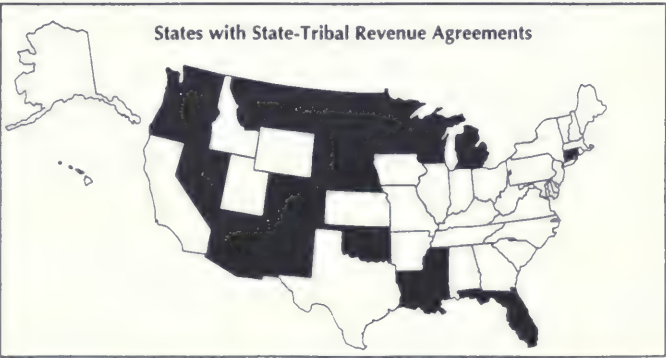
A requirement of the 1988 Indian Gaming Regulatory Act is that states may not tax the revenues that tribes receive from gambling enterprises. How does it happen, then, that two states—**CONNECTICUT** and **MICHIGAN**—receive a percentage of tribal casino revenues? In both cases, the tribes and states created formal agreements, separate from their gaming compacts, under which the tribes would share revenues in exchange for state restrictions on the spread of nontribal gambling.

In **CONNECTICUT**, the Mohegan and Mashantucket Pequot Tribes agreed to give the state either \$80 million or 25 percent of their casino revenues per year—whichever is greater—in exchange for the promise that no nontribal gaming machines will be permitted in the state. In FY 1997, revenues to the state from the Pequots' Foxwoods Casino are estimated to be \$208 million.

In **MICHIGAN**, agreements with seven tribal governments that operate 14 casinos provide for payments to the state of 8 percent of total revenues. Tribal payments to the Michigan Strategic Fund approached \$35 million in 1996. However, when state voters in November 1996 approved the establishment of nontribal casinos in Detroit, the tribes filed suit, saying that they are relieved of any further obligation to share revenues because they lost the exclusive right to conduct electronic gaming within state borders. Tribal payments will continue only until the first nontribal casino is licensed.

Currently, such gambling revenue-sharing agreements are uncommon. But at least 18 states have addressed other state-tribal revenue issues through legislation and agreements.

States with State-Tribal Revenue Agreements



Eighteen states have addressed state-tribal revenue issues through legislation and agreements.

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Executive Director William T. Pound

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Outside the boundaries of a reservation, Native American Indians are subject to the same state tax laws that apply to everyone else, unless a federal law or treaty confers a special immunity or a state grants exemptions. States have some powers to tax on reservations, but these are limited and particularly so when Indians' economic interests are affected.

Can states tax Native Americans? States may tax the income of tribal members who live and work off their reservation, but they may not tax the income of tribal members who live and work on their reservation. In addition, states may impose taxes on income and nontrust property of Indians who are not members of the tribe on whose reservation they work and reside. States also may tax nonIndians' income earned on a reservation.

States may tax the income of tribal members who live and work off their reservation

State and local governments have the power to levy taxes on most property owned by nonIndians within a reservation. Land owned by individual Indians may also be subject to property taxation. Most land owned by tribes and land held in trust by the federal government is not taxable.

Tribal members are liable for state sales taxes on transactions conducted off reservation lands, unless a state chooses to exempt them. States may not tax sales to and by tribal members when the transactions occur on tribal or trust lands. However, states may tax sales to and by nonIndians on tribal lands. NonIndians are liable for state taxes on purchases they make on Indian lands, and tribes are obligated to help collect state taxes on such sales.

Tribal members are liable for state sales taxes on transactions conducted off reservation lands.

Even when states have the right to impose taxes on Indian lands under certain circumstances, the collection of those taxes may be difficult. A state-tribal tax agreement is an arrangement between two governments that addresses specific jurisdictional issues in taxation. Each state must consider whether it is necessary to enact an enabling statute before creating such agreements. A separate state agreement with each tribal government is needed. If a tax conflict is to be resolved, both the tribe and the state must assent to the terms of an agreement. Agreements may not be possible with all tribes within a state's borders.

State-tribal agreements require discussion between tribal and state officials. Such discussions allow tribal and state leaders to talk directly and specifically about revenue needs, economic development objectives, and the practical, political and economic concerns that arise from jurisdictional conflicts. This approach—unlike litigation—enables the tribe and state, not a court, to decide whether results are satisfactory.

### Selected References

- Canby, William C., Jr. *American Indian Law in a Nutshell*. St. Paul, Minn.: West Publishing Co., 1988.
- Cohen, Felix S. *Handbook of Federal Indian Law*. Washington, D.C.: Government Printing Office, 1942. Reprinted, Albuquerque, N.M.: University of New Mexico Press, 1972.
- Getches, David H. and Charles F. Wilkinson. *Federal Indian Law: Cases and Materials*, 2nd Ed. St. Paul, Minn.: West Publishing Co., 1986.
- Reed, James B. and Judy A. Zelio. *States and Tribes: Building New Traditions*. Denver: National Conference of State Legislatures, 1995.

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**F.S. 210.05(5) (1997)****210.05 Preparation and sale of stamps; discount.--**

(1) The tax imposed by this part shall be paid by affixing stamps in the manner herein set forth or by affixing stamp insignia through the device of metering machines authorized in this part.

(2) The division shall prescribe, prepare, and furnish stamps of such denominations and quantities as may be necessary for the payment of the tax imposed by this part, and may from time to time and as often as it deems advisable provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design. The division shall make provisions for the sale of such stamps at such places and at such time as it may deem necessary.

(3)

(a) The division may appoint dealers in cigarettes, manufacturers of cigarettes, within or without the state as agent to buy or affix stamps to be used in paying the tax herein imposed, but an agent shall at all times have the right to appoint a person in his or her employ who is to affix the stamps to any cigarettes under the agent's control, provided, however, that any wholesale dealer in the state shall have the right to buy and affix such stamps. Whenever the division shall sell and deliver to any such agent or wholesaler any such stamps, such agent or wholesaler shall be entitled to receive as compensation for his or her services and expenses as such agent or wholesaler in affixing and accounting for the taxes represented by such stamps and to retain out of the moneys to be paid by the agent or wholesaler for such stamps a discount of 2 percent of the par value of any amount of stamps purchased during any fiscal year from July 1 through June 30 of the following year, provided the discount shall be computed on the basis of 24 cents per pack. No such discount shall be allowed to a dealer, vendor, or distributor who sells or deals in any form of candy which resembles drug paraphernalia. Stamping locations approved by the division shall be responsible for computing the discount they receive pursuant to this paragraph, and said computations shall be retained by the stamping location for a period of 5 years and shall be available to the division. All stamps purchased from the division under this part shall be paid for in cash on delivery, except as hereinafter provided

(b) Each agent appointed by the division to affix stamps shall be authorized to purchase stamps by furnishing an irrevocable letter of credit or unconditional guaranty contract or by executing bond with a solvent surety company qualified to do business in this state, in an amount of 110 percent of the agent's estimated tax liability for 30 days, but not less than \$2,000, conditioned upon said agent paying all taxes due the state arising hereunder. This form of payment in lieu of cash on delivery or its equivalent shall not preclude supplemental purchases for cash. Payment for each month's liability shall be due on or before the 10th day of the month following the month in which the stamps were sold. Default in the aforesaid bonding and payment provisions by any agent may result in the revocation of his or her privilege to purchase stamps except for cash on delivery for a period up to 12 months in the discretion of the division.

(4) The division may in its discretion revoke the authority of any agent failing to comply with the requirements of this part or the rules and regulations promulgated hereunder and such agent may in addition be punished in accordance with the provisions of this part

(5) Agents or wholesale dealers may sell stamped but untaxed cigarettes to the Seminole Indian Tribe, or to members thereof, for retail sale. Agents or wholesale dealers shall treat such cigarettes and the sale thereof in the same manner, with respect to reporting and stamping, as other sales under this part, but agents or wholesale dealers shall not collect from the purchaser the tax imposed by s. 210.02. The purchaser hereunder shall be responsible to the agent or wholesale dealer for the services and expenses incurred in affixing the stamps and accounting therefor.

**History.**—s. 3, ch. 21946, 1943; s. 3, ch. 22645, 1945; s. 1, ch. 26320, 1949; s. 1, ch. 57-255, s. 2, ch. 63-480, s. 2, ch. 68-30; ss. 16, 35, ch. 69-106; s. 1, ch. 69-221; s. 2, ch. 71-364; s. 12, ch. 72-360; s. 60, ch. 77-104; s. 8, ch. 77-421; s. 1, ch. 78-442, s. 4, ch. 79-11; ss. 2, 4, ch. 79-317; s. 2, ch. 86-123; s. 3, ch. 87-86; s. 21, ch. 90-132; s. 84, ch. 91-45; s. 1095, ch. 95-147.



Citation	Search Result	Rank 3 of 3	Database
61A-10.026			FL-ADC
61A-10.026, F.A.C.			
Fla. Admin. Code Ann. r. 61A-10.026			

## TEXT

FLORIDA ADMINISTRATIVE CODE ANNOTATED  
 TITLE 61. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
 SUBTITLE 61A. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO  
 CHAPTER 61A-10. CIGARETTE TAX DIVISION RULES  
 Current through January 1, 1998

61A-10.026 Sale of Stamped, Untaxed Cigarettes by Stamping Agents or Wholesale Dealers to Indians for Retail Sale, Reporting.

- (1) Stamping agents or wholesale dealers may sell stamped but untaxed cigarettes only to the Seminole Indian Tribe or to an enrolled member thereof exclusively for retail sale on Seminole Indian Reservation or trust lands when such cigarettes are stamped with a meter imprint and ink or water applied stamp indicia designated and approved by the Division.
- (2) Such cigarettes stamped but untaxed cigarettes may be sold only to a retail business exclusively owned and operated by the Seminole Indian Tribe or an enrolled member thereof for retail sale exclusively by such Tribe or member on Seminole Reservation or trust lands.
- (3) Each designated stamping agent or wholesaler selling any such stamped but untaxed cigarettes to the Seminole Indian Tribe or to an enrolled member thereof shall obtain and provide to the Division the following report and records:
  - (a) The invoice or sales slip substantiating any such tax-free sale which invoice or sales slip shall be attached to the monthly report. The invoice or sales slip must be signed by a person authorized to receive such stamped but untaxed cigarettes.
  - (b) The name of any person authorized to receive and sign for such tax-free cigarettes shall be submitted by the designated stamping agent or wholesaler to the District Auditor of the District of the Division of Alcoholic Beverages and Tobacco wherein the Seminole Indian Reservation or trust lands involved are located prior to any sale;
  - (c) A written statement which sets forth all persons or entities holding a direct or indirect interest in the retail business purchasing such cigarettes and all persons or entities entitled to share in any profits or income of the retail business purchasing such cigarettes. This statement shall be obtained prior to any sales of stamped but untaxed cigarettes to any retail business located on Seminole Reservation or trust lands and shall be amended by similar Indian interest or entitlement to share in profits or income. Such statements shall be kept on file for a period of three years and shall be available for inspection and review by the Division.
  - (4) All inventories of cigarettes bearing meter imprints which are to be sold to the Seminole Indian Tribe or an enrolled member thereof for sale on Seminole Indian Reservation or trust lands must be segregated in a separate and secure bonded area of the wholesaler's warehouse so as not to allow the commingling of stamped cigarettes bearing meter imprints with untaxed cigarettes bearing meter

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imprints. Also, a log of all receipts and withdrawals must be maintained for the secured area by the stamping agent.

(5) No stamping agent or wholesaler shall be authorized to receive from any retailer, wholesaler, Indian outlet, or manufacturer's representative any Indian cigarettes which have been spoiled, damaged, or become stale for any reason unless such wholesaler has originally applied the metering imprint to the Indian cigarettes.

(6) All stamping agents or wholesalers who apply meter imprints to taxable cigarettes and nontaxable Indian cigarettes must separate each of said classification of cigarettes prior to any witnessing by a Division of Alcoholic Beverages and Tobacco representative of such cigarettes for cancellation of cigarettes tax stamps, meter impressions or stamp indicia. Since there is no tax paid there can be no refund of tax for spoiled, damaged, or stale Indian cigarettes.

(7) Any stamping agent or wholesaler purchasing cigarettes for resale to the Seminole Indian Tribe or an enrolled member thereof on Seminole Indian Reservation or trust lands from other than a manufacturer of cigarettes licensed by the federal government must submit with their monthly cigarette report, a certified copy of the monthly report prepared by the shipper of such cigarettes into the State of Florida, which is required to be submitted to the taxing authority in the state in which the shipper is located.

(8) Any sales of stamped but untaxed cigarettes by a stamping agent or wholesaler not in strict conformity with the provisions of this rule shall be deemed a taxable sale and such stamping agent or wholesaler shall be liable for payment of such taxes.

CREDIT

Specific Authority 210.09, 210.10(1), 210.11 FS. Law Implemented 210.05(5), 210.09(2) FS. History--New 10-14-79, Formerly 7A-10.26, Amended 12-31-85, Formerly 7A-10.026.

ANNOTATIONS

## ANNOTATIONS

## Authority

Petitioners' contention that authority for rule is limited to F. S. A. §§ 210.05(5) and 210.09(2) was without merit. Contention that requirement that sales of untaxed but stamped cigarettes can be made only to retail business exclusively owned by tribe or to enrolled member thereof is beyond authority granted by F. S. A. § 210.05(5) is also without merit. Rule merely gives more specific definition to whom is included as Seminole Indian. Petitioners also contended that, by specifically limiting retail sales to retail establishments located on reservation or trust lands, rule adds to statutory criteria. However, rule is unchanged from predecessor and attack is not valid. Requiring wholesaler

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#### F TATIONS

to produce documentation of sale is in conformity with F. S. A. Ch. 210 and is valid requirement. Petitioners failed to show invalid exercise of delegated legislative authority. Seminole Tribe of Florida, Seminole Wholesale Distributors, Inc. v. State of Florida, Department of Business Regulation, Division of Alcoholic Beverages and Tobacco (DOAH 85- 1798R), 7 FALR 5460 (1985).

#### Validity

Provisions of rule are reasonable interpretations of statutory language and are consistent with legislative purpose. Seminole Tribe of Florida v. State Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, App., (1st) 496 So. 2d 193 (1986).

Paragraphs (8), (11) and (12) of proposed amendment to Rule 7A-10.26 (now Rule 61A-10.026) exceeded Divisions' legislative authority and were declared invalid, where Division had sought to tax sales of cigarettes by Indians to general public; hearing officer examined F. S. A. § 210.05(5) and found no legislative intent to tax such sales. Barone Sales Company v. Florida Department of Business Regulation, Division of Alcoholic Beverages and Tobacco (DOAH 80-1505R), 4 FALR 1 -A (1981).

61 FL ADC 61A-10.026  
END OF DOCUMENT

**WEST'S LOUISIANA STATUTES ANNOTATED**  
**LOUISIANA REVISED STATUTES**  
**TITLE 33. MUNICIPALITIES AND PARISHES**  
**CHAPTER 6. TAXATION AND FISCAL AFFAIRS**  
**PART V. APPROPRIATIONS FOR SPECIAL PURPOSES**

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Current through all 1997 Reg. Sess. Acts

**§ 3005. Avoyelles Parish Local Government Gaming Mitigation Fund; allocation and use of monies in the fund**

A. Beginning October 1, 1995, and each quarter thereafter, as received, the state treasurer shall credit to the Bond Security and Redemption Fund all financial contributions received by the state of Louisiana under the provisions of that compact between the state and the Tunica-Biloxi Indian Tribe of Louisiana entitled, "Tribal-State Compact for the Conduct of Class III Gaming Between the Tunica-Biloxi Indian Tribe of Louisiana and the State of Louisiana", as amended and hereinafter known as the "compact"; and after a sufficient amount is allocated from that fund to pay all the obligations secured by the full faith and credit of the state which become due and payable within any fiscal year, the treasurer shall pay the remainder of such funds into a special fund which is hereby created in the state treasury and designated as the "Avoyelles Parish Local Government Gaming Mitigation Fund", hereinafter referred to as the "fund".

B. The monies in the fund shall be subject to an annual appropriation by the legislature and shall be used solely to offset and defray the expenses of certain political subdivisions within Avoyelles Parish as provided in Subsection C of this Section which result from the conduct of Class III gaming. All unexpended and unencumbered monies in the fund at the end of each fiscal year shall remain in the fund; the treasurer shall invest all monies in the fund in the same manner as the monies in the state general fund and all interest earned shall remain to the credit of the fund.

C. Within ten days of the deposit of the monies into the fund each quarter, the state treasurer shall, in accordance with the provisions of Subsection B of this Section, remit all such monies to the Avoyelles Parish Police Jury. The Avoyelles Parish Police Jury shall, within ten days of the receipt of such monies, distribute all such funds to the governing authority of the political subdivisions of Avoyelles Parish as determined by the Gaming Revenue Distribution Committee created by the parish governing authority.

D. Notwithstanding Subsection C, the funds will be distributed as follows for the first year, beginning October 1, 1995:

- (1) Avoyelles Parish Police Jury—twenty-five percent.
- (2) Avoyelles Parish Law Enforcement District—thirty percent.
- (3) The district attorney for the Twelfth Judicial District—five percent.
- (4) Avoyelles Parish School Board—fifteen percent.
- (5) The municipalities in Avoyelles Parish—twenty-five percent, to be distributed to the individual municipalities in accordance with a formula developed by the Avoyelles Parish Mayors Association and approved by the police jury.

E. The Gaming Revenue Distribution Committee shall meet annually prior to October first each year to determine the proportion of funds to be distributed to each political subdivision of the parish. The Avoyelles Parish Mayors Association shall develop a formula for the distribution of the revenues allocated for the municipalities in the parish.

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## 1997 Electronic Pocket Part Update

Added by Acts 1995, No. 1060, § 1, eff. June 29, 1995.

&lt; General Materials (GM) - References, Annotations, or Tables &gt;

## HISTORICAL AND STATUTORY NOTES

## 1997 Electronic Pocket Part Update

Another R.S. 33:3005, enacted by Acts 1995, No. 1281, § 1, was redesignated as R.S. 33:3006, pursuant to the statutory revision authority of the Louisiana State Law Institute.

Pursuant to the statutory revision authority of the Louisiana State Law Institute, in this section as enacted in 1995, in subsec. A, "the Compact" was changed to "the 'compact' " following "known as the" and quotation marks were placed surrounding "fund" at the end of the subsection; and in subsec. B, in the first sentence, "Avoyelles Parish Local Government Gaming Mitigation Fund" was changed to "fund".

LSA-R.S. 33:3005

LA R.S. 33:3005

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LOUISIANA REVISED STATUTES  
TITLE 33. MUNICIPALITIES AND PARISHES  
CHAPTER 6. TAXATION AND FISCAL AFFAIRS  
PART V. APPROPRIATIONS FOR SPECIAL PURPOSES**

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Current through all 1997 Reg. Sess. Acts

§ 3006. Allen Parish Local Government Gaming Mitigation Fund; allocation and use of monies in the fund

A. Beginning April 1, 1996, and each quarter thereafter, as received, the state treasurer shall credit to the Bond Security and Redemption Fund all financial contributions received by the state of Louisiana under the provisions of the compact between the state and the Coushatta Indian Tribe of Louisiana entitled, "Tribal-State Compact for the Conduct of Class III Gaming Between the Coushatta Indian Tribe of Louisiana and the State of Louisiana", as amended and hereinafter known as the "compact"; and after a sufficient amount is allocated from that fund to pay all the obligations secured by the full faith and credit of the state which become due and payable within any fiscal year, the treasurer shall pay the remainder of such funds into a special fund which is hereby created in the state treasury and designated as the "Allen Parish Local Government Gaming Mitigation Fund", hereinafter referred to as the "fund".

B. The monies in the fund shall be used solely to offset and defray the expenses of certain political subdivisions within Allen Parish as provided in Subsection C of this Section which result from the conduct of Class III gaming. All unexpended and unencumbered monies in the fund at the end of each fiscal year shall remain in the fund; the treasurer shall invest all monies in the fund in the same manner as the monies in the state general fund and all interest earned shall remain to the credit of the fund.

C. Within ten days of the deposit of the monies into the fund each quarter and pursuant to appropriation by the legislature, the state treasurer shall, in accordance with the provisions of Subsection B of this Section, remit all such monies to the governing authority of Allen Parish.

D. The governing authority of Allen Parish shall within ten days of the receipt of such monies, distribute all such funds to the governing authorities of the political subdivisions of Allen Parish as determined by the Gaming Revenue Distribution Committee created by the governing authority of Allen Parish.

E. The Gaming Revenue Distribution Committee will meet annually prior to April first of each year to determine the proportion of funds to be distributed to each political subdivision of the parish. The mayors of the municipalities in Allen Parish shall jointly develop a formula for the distribution of revenues to each municipality in the parish.

**CREDIT(S)**

1997 Electronic Pocket Part Update

Added by Acts 1995, No. 1281, § 1.

< General Materials (GM) - References, Annotations, or Tables >

**HISTORICAL AND STATUTORY NOTES**

1997 Electronic Pocket Part Update

Pursuant to the statutory revision authority of the Louisiana State Law Institute, this section, enacted as R.S. 33:3005 by Acts 1995, No. 1281, § 1, was redesignated as R.S. 33:3006.

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## NOTES OF DECISIONS

## Distribution of funds 1

lump sum payment as a one-time salary supplement once the funds have been received. Op.Atty.Gen. No. 96-150, May 31, 1996.

## 1. Distribution of funds

Funds allocated to the Allen Parish School Board, having been generated from gaming revenues under a Compact between the State of Louisiana and the Coushatta Indian Tribe, which have been dedicated by the School Board for salary increases to classroom teachers and support personnel may be distributed in a

LSA-R.S. 33:3006

LA R.S. 33:3006

END OF DOCUMENT

**WEST'S LOUISIANA STATUTES ANNOTATED**  
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**PART V. APPROPRIATIONS FOR SPECIAL PURPOSES**

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§ 3007. St. Mary Parish Local Government Gaming Mitigation Fund; allocation and use of monies in the fund

A. Beginning July 1, 1997, and each quarter thereafter, as received, the state treasurer shall credit to the Bond Security and Redemption Fund all financial contributions received by the state of Louisiana under the provisions of that compact between the state and the Chitimacha Tribe of Louisiana entitled, "Tribal-State Compact for the Conduct of Class III Gaming Between the Chitimacha Tribe of Louisiana and the State of Louisiana", as amended and hereinafter known as the compact; and after a sufficient amount is allocated from that fund to pay all the obligations secured by the full faith and credit of the state which become due and payable within any fiscal year, the treasurer shall pay the remainder of such funds into a special fund which is hereby created in the state treasury and designated as the "St. Mary Parish Local Government Gaming Mitigation Fund", hereinafter referred to as the fund.

B. The monies in the St. Mary Parish Local Government Gaming Mitigation Fund shall be subject to an annual appropriation by the legislature and shall be used solely to offset and defray the expenses of certain political subdivisions within St. Mary Parish as provided in Subsections C and D of this Section which result from the conduct of Class III gaming. All unexpended and unencumbered monies in the fund at the end of each fiscal year shall remain in the fund. The treasurer shall invest all monies in the fund in the same manner as the monies in the state general fund, and all interest earned shall remain to the credit of the fund.

C. Within ten days of the deposit of the monies into the fund each quarter, the state treasurer shall, in accordance with the provisions of Subsection B of this Section, remit all such monies to the St. Mary Parish Council. The St. Mary Parish Council shall, within ten days of the receipt of such monies, distribute all such funds to the governing authority of the following political subdivisions in the proportions provided:

(1) First, two-thirds of the monies in the fund shall be distributed to the St. Mary Parish Council to be used solely for the purpose of constructing a parish road approximately two miles in length which will connect U.S. Highway 182, west of the town of Baldwin, to Martin Luther King Road at the intersection of Martin Luther King Road and Dinkins Road near Charenton. The monies shall be used to defray or finance the cost of such construction, not to exceed the principal sum of four million two hundred thousand dollars, plus interest on any obligations incurred therefor. Further, the governing authority of the parish is authorized to pledge the proceeds provided herein or credit enhancement to the payment of debt obligations issued by the parish to finance all or portions of such cost as the governing authority may determine.

(2) Next, the remaining monies in the fund shall be distributed in the following manner:

- (a) St. Mary Parish Council, 30%.
- (b) St. Mary Parish sheriff, 8%.
- (c) The city of Franklin, 27%.
- (d) The town of Baldwin, 20%.
- (e) The town of Patterson, 5%.



(f) The city of Morgan City, 5%.

(g) The town of Berwick, 5%.

D. (1) After a period not to exceed ten years or such time as the parish governing authority has received sufficient monies to fully retire the principal and interest of any indebtedness associated with the construction of the road specified in Paragraph C(1) of this Section, all monies in the fund shall be distributed to political subdivisions in the proportions provided in Paragraph C(2) of this Section.

(2) In the event that the St. Mary Parish Council determines not to construct the road as provided in Paragraph C(1) of this Section, all monies received by the governing authority shall be redistributed to the political subdivisions in the proportions provided in Paragraph C(2) of this Section.

CREDIT(S)

1997 Electronic Pocket Part Update

Added by Acts 1997, No. 741, § 1, eff. July 9, 1997.

<General Materials (GM) - References, Annotations, or Tables >

LSA-R.S. 33:3007

LA R.S. 33:3007

END OF DOCUMENT

- No state-tribal litigation in this area of taxation.

Officials from the *Seminole Tribe* reported the following:

- The Seminole Tribe has authority to impose and collect its own 10 percent tax on all cigarette sales. The tax is collected by an authorized wholesaler and is remitted to the Seminole Tribe on a weekly basis.

**Disadvantages of Existing Taxation Practices**—The only disadvantage reported by the *state* as a result of the exemption involves the following:

- An inability of the state to collect an estimated \$10 to \$21 million annually it might otherwise collect from sales to non-Indians. Despite this, the exemption overall has been well-received by the state.

**Recent Taxation Activity**—None reported.

### C. Louisiana

#### **Types of Taxes Addressed**—

Louisiana's Governor, Secretary of Revenue, and Secretary of Public Safety and Corrections entered into similar 10-year tax agreements with two of Louisiana's three tribes regarding (a) sales and use taxes on tribally-owned vehicles, (b) cigarette and tobacco excise taxes, and (c) motor fuel taxes.

**Existing Taxation Practices**—The taxation agreements are not governed by, or made in conjunction with, any statutes, but were negotiated and signed solely by tribal and state officials. Under the tax agreements, the state agrees to exempt certain goods and transactions on the reservation from state taxes when the tribe imposes a tribal tax at a rate equivalent to that of the state's.

[Note: While the agreements mandate the imposition of a tribal tax at the same rate as the state tax, no parish (i.e., county) taxes are applicable on the reservations, creating a competitive advantage for the tribe.] The following state taxes are exempted by the compacts:

(a) **Sales and Use Tax on Tribally-Owned Vehicles**—Each agreement provides that vehicles owned by the tribe and used for tribal governmental purposes are exempt from the state sales and use tax normally applicable to all vehicles. In return, the tribe agrees to register its vehicles pursuant to state law, pay the vehicle registration fees and attach state license plates, and comply with state motor vehicle safety inspections. [Note: The issue of exemptions for vehicles owned by individual tribal members was not addressed in the agreement but was left for the courts to decide. At the time of this writing, the federal appeals court has denied this exemption for individuals and it appears unlikely that this will be reversed.]

(b) **Cigarette and Tobacco Tax**—All tobacco sales on the reservation, whether to Indians or non-Indians, are exempt from the state's tobacco excise tax. In exchange, the tribe agrees to enact an equivalent tribal tax on all sales and to purchase stamped but tax-free cigarettes and tobacco products only from Louisiana wholesalers. Wholesalers may apply for a refund or credit from the state for any taxes that have been prepaid on exempt sales to Indians.

(c) **Motor Fuel Tax**—All gasoline sales on the reservation, whether to Indians or non-Indians, are exempt from the state's motor fuel tax. Under the terms of the agreement, the tribe imposes its own gasoline tax

equivalent to the state tax rate, and the revenues generated are used at the discretion of the tribe. State distributors pay the state tax without passing it on to the tribes, and they may apply to the state for a credit or refund on these tax-exempt sales of motor fuel.

**Advantages of Existing Taxation Practices**—Benefits of the taxation agreements include the following:

- Explicit recognition of tribal sovereignty;
- Avoidance of litigation between the state and tribes and better state-tribal relations; and
- Ability of tribes to collect revenue and maintain self-sufficiency, as evidenced by generation of \$80,000 to \$100,000 annually in revenue for the Chitimacha Tribe. This is used to support such improvements as the tribe's public works department, governmental facilities and grounds maintenance, and street lighting.

**Disadvantage of Existing Taxation Practices**—A disadvantage is associated with current taxation agreements.

- The state Department of Revenue and Taxation reports some loss of revenue in the tax being credited to the cigarette wholesalers, but overall there is a minimal economic impact.

**Recent Taxation Activity**—Increased gambling activity on the reservations has created considerable potential for a greater volume of retail sales to non-Indians to escape state taxation. The Louisiana Department of Revenue and the Office of the Governor have initiated efforts with tribal leaders to renegotiate the existing compacts. As

June/July 1997

Vol. 5, No. 29

## STATE-TRIBAL REVENUE AGREEMENTS

By Judy Zelio

States may not tax the revenues that tribes receive from gambling enterprises.

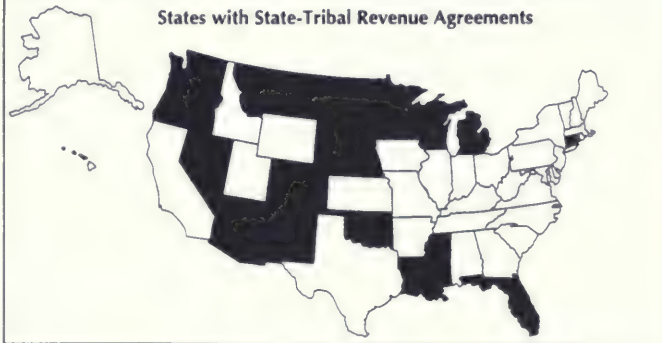
A requirement of the 1988 Indian Gaming Regulatory Act is that states may not tax the revenues that tribes receive from gambling enterprises. How does it happen, then, that two states—CONNECTICUT and MICHIGAN—receive a percentage of tribal casino revenues? In both cases, the tribes and states created formal agreements, separate from their gaming compacts, under which the tribes would share revenues in exchange for state restrictions on the spread of nontribal gambling.

In CONNECTICUT, the Mohegan and Mashantucket Pequot Tribes agreed to give the state either \$80 million or 25 percent of their casino revenues per year—whichever is greater—in exchange for the promise that no nontribal gaming machines will be permitted in the state. In FY 1997, revenues to the state from the Pequots' Foxwoods Casino are estimated to be \$208 million.

In MICHIGAN, agreements with seven tribal governments that operate 14 casinos provide for payments to the state of 8 percent of total revenues. Tribal payments to the Michigan Strategic Fund approached \$35 million in 1996. However, when state voters in November 1996 approved the establishment of nontribal casinos in Detroit, the tribes filed suit, saying that they are relieved of any further obligation to share revenues because they lost the exclusive right to conduct electronic gaming within state borders. Tribal payments will continue only until the first nontribal casino is licensed.

Currently, such gambling revenue-sharing agreements are uncommon. But at least 18 states have addressed other state-tribal revenue issues through legislation and agreements.

States with State-Tribal Revenue Agreements



Eighteen states have addressed state-tribal revenue issues through legislation and agreements.

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Outside the boundaries of a reservation, Native American Indians are subject to the same state tax laws that apply to everyone else, unless a federal law or treaty confers a special immunity or a state grants exemptions. States have some powers to tax on reservations, but these are limited and particularly so when Indians' economic interests are affected.

Can states tax Native Americans? States may tax the income of tribal members who live and work off their reservation, but they may not tax the income of tribal members who live and work on their reservation. In addition, states may impose taxes on income and nontrust property of Indians who are not members of the tribe on whose reservation they work and reside. States also may tax nonIndians' income earned on a reservation.

States may tax the income of tribal members who live and work off their reservation.

State and local governments have the power to levy taxes on most property owned by nonIndians within a reservation. Land owned by individual Indians may also be subject to property taxation. Most land owned by tribes and land held in trust by the federal government is not taxable.

Tribal members are liable for state sales taxes on transactions conducted off reservation lands, unless a state chooses to exempt them. States may not tax sales to and by tribal members when the transactions occur on tribal or trust lands. However, states may tax sales to and by nonIndians on tribal lands. NonIndians are liable for state taxes on purchases they make on Indian lands, and tribes are obligated to help collect state taxes on such sales.

Tribal members are liable for state sales taxes on transactions conducted off reservation lands.

Even when states have the right to impose taxes on Indian lands under certain circumstances, the collection of those taxes may be difficult. A state-tribal tax agreement is an arrangement between two governments that addresses specific jurisdictional issues in taxation. Each state must consider whether it is necessary to enact an enabling statute before creating such agreements. A separate state agreement with each tribal government is needed. If a tax conflict is to be resolved, both the tribe and the state must assent to the terms of an agreement. Agreements may not be possible with all tribes within a state's borders.

State-tribal agreements require discussion between tribal and state officials. Such discussions allow tribal and state leaders to talk directly and specifically about revenue needs, economic development objectives, and the practical, political and economic concerns that arise from jurisdictional conflicts. This approach—unlike litigation—enables the tribe and state, not a court, to decide whether results are satisfactory.

### Selected References

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- Cohen, Felix S. *Handbook of Federal Indian Law*. Washington, D.C.: Government Printing Office, 1942. Reprinted, Albuquerque, N.M.: University of New Mexico Press, 1972.
- Getches, David H. and Charles F. Wilkinson. *Federal Indian Law: Cases and Materials*, 2nd Ed. St. Paul, Minn.: West Publishing Co., 1986.
- Reed, James B. and Judy A. Zelio. *States and Tribes: Building New Traditions*. Denver: National Conference of State Legislatures, 1995.

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Citation  
M CONST Art. 9, s 17

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ANNOTATIONS (Notes of Decisions Index )

10. Gaming revenues

Gaming revenues specifically designated by Indian tribes for payment into fund established under Michigan Strategic Fund Act (MSFA) to promote economic development throughout state, under terms of consent judgment negotiated by governor to settle action brought under IGRA, were not "state funds" within meaning of appropriations clause of State Constitution but were gratuitous payments calculated to create local incentives to preserve tribes' exclusive gaming rights and, thus, legislative approval was not required for their disbursement to municipal development authority for construction of sports stadium where payments were not procured in exchange for state concessions, paid as tax or fee pursuant to legislative act, designated as gift or grant to state, or received as payment of debt or as penalty, and did not result from sale, relinquishment, waste, or damage of state assets. Tiger Stadium Fan Club, Inc. v. Governor (1996) 553 N.W.2d 7, 217 Mich.App. 439, appeal denied 552 N.W.2d 180.

M. C. L. A. Const. Art. 9, § 17  
MI CONST Art. 9, § 17



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 *This is a lengthy document*

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## Overview of Casino Gaming in Michigan

(Revised 3/19/98)

- [Campaign Reform](#)
- [Current Market](#)
- [Detroit](#)
- [History](#)
- [Indian Gaming](#)
- [Legislature](#)
- [Michigan Gaming Control Board](#)
- [Regulatory Guidelines](#)

### Related topics

- [Horse racing](#)
- [Lottery](#)

You may also find it helpful to consult the MGCB [Timeline](#) which is updated frequently.

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## History of Gaming in Michigan

The expansion of gaming in Michigan has paralleled national social trends in gaming acceptance. Parimutuel horse racing was legalized in 1933, followed by the legalization of a state lottery in 1972 and the explosion of gaming activity on Indian reservations in the 1980s. By the end of 1996, seven Indian tribes were operating 17 casinos in Michigan. Gaming has become a thriving industry in Michigan. The Michigan Lottery, which includes lottery ticket sales and charitable gaming, brought in \$1.65 billion in fiscal year 1996.

Efforts to initiate legalized casino gaming in Detroit have been occurring since the 1970s. These efforts failed until the Windsor Casino opened its doors across the Detroit River in Canada in 1994. The steady flow of Michigan residents and U.S. dollars into the Windsor Casino, along with the continued expansion of Indian casinos in Michigan, has had a dramatic impact upon voter attitudes toward casino gaming. This attitudinal shift culminated with the passage of Proposal E in the November 1996 general election. Proposal E enacted the Michigan Gaming Control & Revenue Act (the "Act") by public referendum. The Act permits the development and licensing of three privately owned casinos within the Detroit city limits. A study performed for Detroit Mayor Archer's Casino Advisory Committee by Deloitte & Touche LLP estimates that the three Detroit casinos will initially

have a \$1 billion market.

Recognizing that the Act provided only a skeleton framework for the development of privately owned casinos in Detroit, efforts immediately began to amend the Act after it was passed. The Michigan Senate created a new standing committee, the Gaming and Casino Oversight Committee. The Michigan House of Representatives designated the House Oversight and Ethics Committee as its gaming oversight committee. Both committees were assigned the responsibility of reviewing gaming legislation. After statewide public hearings, numerous bills were submitted in the Legislature. Governor John Engler signed into law Public Act 69 of 1997 in July 1997.

### Michigan Gaming Control Board

The Act established the Michigan Gaming Control Board as a Type I agency of the Michigan Department of Treasury. The Board consists of five unpaid members, not more than three of whom shall be members of the same political party. The Governor is responsible for appointing the Board members with the advice and consent of the Senate.

On November 22, 1996, Governor Engler appointed Michigan Horse Racing Commissioner Nelson Westrin to serve as interim executive director of the Board.

On December 20, 1996, the Governor announced his five appointees to the Board:

- **Mr. Thomas Denomme**, Chairman (term expires December 2000) - Mr. Denomme retired in December 1997 as vice-chairman and chief administrative officer of the Chrysler Corporation.
- **Ms. Paula Blanchard** (term expires December 1999) - Ms. Blanchard is the former Michigan First Lady. She has extensive experience in business, public relations and politics.
- **Mr. Rich Davis** (term expires December 1999) - Mr. Davis is a former director of the Michigan Department of State Police, and is currently project director for the Michigan Truck Safety Commission.
- **Mr. Taylor Segue III** (term expires December 2000) - Mr. Segue was an attorney in private practice in Detroit. *(Mr. Segue resigned from the Board in January 1997. He was replaced in February 1997 by Ms. Karen Batchelor Farmer. Ms. Farmer, also an attorney, was manager of civic and government affairs at Michigan Consolidated Gas Company. Ms. Farmer resigned from the Board in February 1998. Governor Engler is currently in the process of selecting a replacement for Ms. Farmer.)*
- **Hon. Michael Stacey** (term expires December 1998) - Judge Stacey is a former Wayne County Circuit Court Judge who retired in 1994. He has remained active by assisting with alternative dispute resolution and by serving as a visiting judge.

Since its appointment in December 1996, the Board has focused on the development of a comprehensive set of gaming rules (known as Administrative Rules) which detail licensing and regulatory oversight of the casino licensure process, casino licensees, casino employees and a wide range of casino suppliers. The Board also set about hiring appropriate staff to oversee Michigan's new privately owned casino industry. In August 1997, the draft Rules were approved by the Board, then went through the process for promulgated rulemaking required by Michigan's Administrative Procedures Act. They were adopted by the Board in March 1998.

On July 17, 1997, Mr. Westrin was appointed MGCB executive director.

On March 17, 1998, the Board completed the development of the Casino License application form and the Supplier License application form, and the accompanying Business and Personal Disclosure forms. The Board was awaiting the arrival of the three certified Development Agreements from the Detroit City Council (expected in April 1998) followed by applications from the three proposed casino operators and some of their designated suppliers. Upon receipt of such documents, the Board will commence its four- to 12-month background investigation process of the various license applicants.

The Board is expected to approve the Occupational (employment) License application form at its May 1998 public meeting.

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### City of Detroit

On November 18, 1996, Detroit Mayor Dennis Archer announced the formation of a 16-person Casino Advisory Committee. The Committee was charged with the task of making recommendations to the Mayor on the implementation of the Act. After conducting public hearings in Detroit and site visits in existing casino states, as well as numerous meetings with gaming regulators and gaming industry leaders, the Committee issued its Report on June 12, 1997. The Committee recommended that the City of Detroit (1) "cluster" all three casinos in a 100 acre area in Detroit's Central Business District, (2) procure project development sites (by eminent domain, if necessary), (3) reject the establishment of temporary casinos, (4) require that at least 30% of casino operations staffs be composed of Detroit residents and (5) establish Development Agreement requirements which assure that Detroit residents share in the profits of gaming in Detroit.

On June 23, 1997, Mayor Archer responded to the Committee's Report and issued a Phase One Request for Proposals/Qualifications. He rejected the Committee's "cluster" recommendation and established several areas (including Greektown) where the casinos could be located. *(Note: In February 1998, the Mayor announced all three casinos could be located near the east riverfront.)* The Mayor left open the issue of temporary casinos. He announced that he wanted at least 50% of casino operations staffs to be composed of Detroit residents. The deadline for submitting proposals was established as August 1, 1997. Eleven casino proposals were submitted, including proposals from several of the major Las Vegas and New Jersey casino companies.

On August 22, 1997, Mayor Archer announced seven semi-finalists in the application process and issued a Phase Two Request for Proposals/Qualifications. In announcing the seven semi-finalists, the Mayor also narrowed the areas where development of casinos could occur and, in addition, rejected the concept of land based temporary casinos, but did state that he would consider temporary river boat casino proposals. Phase Two applications by all seven semi-finalists were filed by the Phase Two filing deadline, October 11, 1997.

On November 20, 1997, the Mayor announced his choice of three proposed casino operators: Atwater/Circus Circus; Greektown/Sault Ste. Marie Band of Chippewa Indians; and MGM Grand.

Now that the three casino finalists have been selected by the Mayor, he will enter into Development Agreement negotiations with the three. These Development Agreements must be consistent with the Ordinances adopted by the City Council, as well as the Act. Once the Development Agreements have been finalized and approved by both the Mayor and the Detroit City Council, the three casino licensees



finalists will be able to apply to the MGCB for casino licenses. The Board makes the final decision on all casino license applications. The MGCB's license approval process is expected to take from four to twelve months, depending upon a variety of licensing and investigatory factors.

While the Mayor's Advisory Committee was performing its assigned task and the Mayor was implementing the Phase One and Phase Two Request for Proposals/Qualifications process, the Detroit City Council (which has ultimate local approval power of the three casino finalist Development Agreements) proceeded by forming a Casino Gaming Ordinance Subcommittee on November 27, 1996. After extensive work, the City Council adopted a Casino Competitive Development Selection Process Ordinance on June 18, 1997 and a Gaming Enterprise District Ordinance on June 23, 1997. The Mayor's Request for Proposals/Qualifications casino licensee selection process is consistent with these ordinances. In addition, the City Council is proceeding forward with the development of a comprehensive Casino Regulatory Ordinance.

### Overview of Current Market

Michigan's gaming industry is currently a \$3.2 billion dollar industry which consists of a State Lottery, 17 tribal casinos (operated by seven tribes), eight parimutuel horse betting tracks, bingo and charitable gaming. The Michigan Lottery, which includes lottery ticket sales, bingo and charitable gaming, brought in \$1.65 billion in fiscal 1996.

### State of Michigan and City of Detroit Regulatory Guidelines

#### Campaign Reform

Detroit Mayor Dennis Archer established a policy early in the casino licensing process that he would not accept political donations from groups that receive casino licenses. The Detroit City Council did not adopt a similar policy. However, the Legislature amended the Act to prohibit casino operators and their employees from making political donations to Michigan public officials. Section 7b(4) of the Act provides: *(4) A licensee or person who has an interest in a licensee or casino enterprise, or the spouse, parent, child or spouse of a child of a licensee or person who has an interest in a licensee or casino enterprise, shall not make a contribution to a candidate or a committee during the following periods:*

- (a) The time period during which a casino licensee or development agreement is being considered by a city or the board.*
- (b) The term during which the licensee holds a license.*
- (c) The 3 years following the final expiration or termination of the licensee's license.*
- (d) During either of the following, whichever is shorter:*
  - (i) The period beginning on or after the effective date of this amendatory act.*
  - (ii) The period beginning 1 year prior to applying for a license.*

#### "No Contact" Period

The City of Detroit adopted a "No Contact" policy during the Request for Proposal process. On June 18, 1997, the City Council adopted a "Casino Competitive Development Selection Process Ordinance." The Ordinance outlines the administration of the casino development competitive

selection process and establishes criteria for approval of development agreements with prospective developers. Section 18-13-2 of the Ordinance prohibits "Improper Contacts," defining that term as:

*A written or oral communication relating to the merits or outcome of a decision relating to a proposal or development agreement that is directed to the mayor, any mayoral appointee, any member of the City Council, or any city employee or City Council appointee or staff who has the ability to influence decisions relating to the proposal or development agreement. The term does not include a communication that is:*

- (1) An inquiry or request for information relating solely to the status of a decision on proposals or the status of a development agreement so long as the inquiry or request for information is directed to an individual authorized by either the Mayor or the City Council to respond to such inquiry or request and so long as the inquiry does not address the merits or outcome of a decision;*
- (2) Testimony or statements by a designated developer at a public hearing convened for the purpose of considering whether to approve a proposed development agreement; or*
- (3) Made through the public media, such as statements in news interviews and paid advertisements.*

The "No Contact" period began when Phase One, Request for Proposals/Qualifications applications were issued on June 23, 1997 and continues throughout the licensing and development agreement negotiation process.

### **The Michigan Legislature**

The State Legislature enacts the laws of Michigan; levies taxes and appropriates funds from money collected for the support of public institutions and the administration of the affairs of state government; proposes amendments to the state constitution, which must be approved by a majority vote of the electors; and considers legislation proposed by initiatory petitions. The Legislature also provides oversight of the executive branch of government through the administrative rules and audit processes, committees, and the budget process; advises and consents, through the Senate, on gubernatorial appointments; and considers proposed amendments to the Constitution of the United States. The majority of the Legislature's work, however, entails lawmaking.

During a typical two-year session, the Legislature will introduce about 4,400 bills: 600 to 800 of these will become law. Legislators and legislative committees spend many hours of work on each bill before the bill is sent to the floor of either house for consideration.

### **Michigan House Oversight & Ethics Committee**

The Michigan House of Representatives assigns a majority of the casino and gaming related bills, resolutions, and discussions to the House Oversight and Ethics Committee. This standing committee has created several subcommittees to handle specific gaming legislation.

### **The Michigan Senate Standing Gaming & Casino Oversight Committee**

The Senate created a standing Gaming and Casino Oversight Committee to review casino and gaming legislation in early 1997. The Committee traveled around the state in the beginning of 1997 to hear

Michigan residents' comments about casino gaming. The Committee also heard from industry leaders, state officials, gaming officials from states with legalized Class III gaming, and casino operators and suppliers. The Committee worked to amend Proposal E and obtain the necessary votes in both chambers.

### Indian Gaming in Michigan

Michigan has seven federally recognized Indian tribes operating 17 casinos. These tribes entered into gaming Compacts with Governor John Engler in 1993.

Tribal Community	Casino Name & Location
Bay Mills Indian Community	<ul style="list-style-type: none"> <li>• Bay Mills Resort &amp; Casino, Brimley (2 sites)</li> </ul>
Grand Traverse Band of Ottawa & Chippewa Indians	<ul style="list-style-type: none"> <li>• Eagle's Nest Casino, Suttons Bay</li> <li>• Leelanau Sands Casino &amp; Super Gaming Palace, Suttons Bay</li> <li>• Turtle Creek Casino, Williamsburg</li> </ul>
Hannahville Tribal Community	<ul style="list-style-type: none"> <li>• Chip-In Casino, Harris (2 sites)</li> </ul>
Keweenaw Bay Tribal Community	<ul style="list-style-type: none"> <li>• Ojibwa Casino, Baraga</li> <li>• Ojibwa II Casino, Marquette</li> </ul>
Lac Vieux Desert Band of Superior Chippewa Indians	<ul style="list-style-type: none"> <li>• Lac Vieux Desert Casino &amp; Resort, Watersmeet</li> </ul>
Saginaw Chippewa Tribal Community	<ul style="list-style-type: none"> <li>• Soaring Eagle Casino &amp; Resort, Mt. Pleasant (2 sites)</li> </ul>
Sault Ste. Marie Band of Chippewa Indians	<ul style="list-style-type: none"> <li>• Kewadin Shores Casino, St. Ignace</li> <li>• Kewadin Slots, Christmas</li> <li>• Kewadin Slots, Hessel</li> <li>• Kewadin Slots, Manistique</li> <li>• Kewadin Vegas Casino, Sault Ste. Marie</li> </ul>

Under a Consent Judgment, the tribes are required to pay 8% of their electronic video gaming and slot machine profits to the State, and 2% to local municipalities. The Consent Judgment established a provision that the tribes would continue to pay the state and local taxes so long as they possessed the "exclusive right" to conduct Class III gaming in the State. Thus, the voter-initiated law that permitted three casinos in Detroit allegedly violated the provision in the consent judgment. The seven tribes filed suit in January 1997 in U.S. District Court seeking clarification on the issue. The tribes argued that the passage of Proposal E put an end to their "exclusive right" to operate Class III gaming. U.S. District Court Judge Benjamin F. Gibson ruled that tribes lose their "exclusive right to operate when the Michigan Gaming Control Board issues a license to operate a casino to a person or entity other



than the Tribes." It is generally believed that the tribes will cease paying the 8% State fee once the MGCB issues a Detroit casino license. As of the end of 1997, nearly \$110 million had been paid to the Michigan Strategic Fund by the tribes since they began making payments in 1994.

There are four other federally recognized tribes who do not operate casinos in Michigan (they were included in the 1997 Indian Gaming Compact with Governor, but their Compacts have not been approved by the Legislature):

- Little River Band of Ottawa Indians, Manistee
- Little Traverse Bay Band of Odawa Indians, Mackinaw City
- Nottawaseppi Huron Band of Potawatomi Indians, Athens (near Battle Creek)
- Pokagon Band of Potawatomi Indians, New Buffalo

On January 30, 1997, the Governor re-negotiated Class III gaming Compacts with three of these tribes that had initially signed Compacts in September 1995. The three tribes that negotiated gaming Compacts in 1995 were:

- Little River Band of Ottawa Indians
- Little Traverse Bay Bands of Odawa Indians
- Pokagon Band of Potawatomi Indians

The Huron Band of the Potawatomi Indian Tribe signed onto the 1997 gaming Compact, but was not included in the 1995 gaming Compact. These Compacts have not been approved by the Michigan Legislature. Resolution 97-71 was introduced to the Senate floor in July 1997, but the Senate has not acted on the Resolution.

The gaming Compacts signed with the four tribes provide for payments by the tribes to the State equal to the payments made under the 1993 consent judgment, 8% to the State and 2% to the local municipality. However, unlike the first gaming Compacts, the newly reaffirmed tribes would be limited to just one gaming location per tribe. These Compacts also grant the tribes exclusivity of casinos beyond the three casinos that are expected to be built in Detroit. The Compacts still must be approved by the Michigan Legislature, then forwarded for final approval by the United States Interior Secretary. If the Michigan Legislature fails to adopt the Compacts, the four tribes could seek direct approval from the U.S. Department of Interior. The Little River Band of Ottawa Indians proposed building their casino in Manistee, the Little Traverse Bay Bands of Odawa Indians in Mackinaw City, and the Pokagon Band of Potawatomi Indians has chosen a location in New Buffalo Township in Southwestern Michigan. The Huron Band of Potawatomi Indians has not publicly announced where they would develop a casino.

The Federal Bureau of Indian Affairs has recently begun the final federal recognition approval process for the Gun Lake Band of Pottawatomi Indians. The Bureau announced a favorable recommendation for the group's recognition. The group is currently subject to a public comment period, which will conclude in January 1998. The group has plans to build a casino in connection with SunGold Gaming, a Canadian firm. The Tribe plans to develop a casino in Monroe County, south of Detroit.

#### Indian Tribes Currently Seeking Federal Recognition:

- Gun Lake Band of Potawatomi Indians, Bradley
- Burt Lake Band of Ottawa and Chippewa Indians, Brutus



## Tribal Communities with Casinos in Michigan:

- Bay Mills Indian Community (2 sites)  
P.O. Box 777  
Brimley, MI 49715  
phone: 906/248-3700
- Grand Traverse Band of Ottawa and Chippewa Indians (3 sites)  
2331 N. W. Bay Shore Drive  
Suttons Bay, MI 49682  
phone: 616/271-3538
- Hannahville Tribal Community (2 sites)  
N. 14911 Hannahville B-1 Road  
Wilson, MI 49896  
phone: 906/353-6623
- Keweenaw Bay Tribal Community (2 sites)  
107 Beartown Road  
Baraga, MI 49908  
phone: 906/353-6623
- Lac Vieux Desert Band of Superior Chippewa Indians (1 site)  
P.O. Box 249  
Watersmeet, MI 49969  
phone: 906/358-4577
- Saginaw Chippewa Tribal Community (2 sites)  
7070 East Broadway  
Mt. Pleasant, MI 48858  
phone: 517/772-8900
- Sault Ste. Marie Band of Chippewa Indians (5 sites)  
523 Ashmun  
Sault Ste. Marie, MI 49783  
phone: 906/635-6050

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MINNESOTA STATUTES ANNOTATED  
TAXATION, SUPERVISION, DATA PRACTICES  
CHAPTER 270. DEPARTMENT OF REVENUE  
STATE BOARD OF ASSESSORS

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Current through End of 1997 2nd Sp. Sess.

270.60. Tax refund agreements with Indians

**Subdivision 1. Taxes paid by Indians.** The commissioner of revenue is authorized to enter into a tax refund agreement with the governing body of any federally recognized Indian reservation in Minnesota. The agreement may provide for a mutually agreed upon amount as a refund to the governing body of any sales or excise tax paid by the total resident Indian population on or adjacent to a reservation into the state treasury, or for an amount which measures the economic value of an agreement by the tribal government to pay the equivalent of the state sales tax on items included in the sales tax base but exempt on the reservation, notwithstanding any other law which limits the refundment of taxes. The total resident Indian population on or adjacent to a reservation shall be defined according to the United States Department of the Interior, Bureau of Indian Affairs, as determined and stated in its Report on Service Population and Labor Force.

**Subd. 2. Sales, use, and excise taxes.** (a) The commissioner of revenue is authorized to enter into a tax agreement with the governing body of any federally recognized Indian reservation in Minnesota, that provides for the state and the tribal government to share sales, use, and excise tax revenues generated from on reservation activities of non-Indians and off reservation activities of members of the reservation. Every agreement entered into pursuant to this subdivision must require the commissioner of revenue to collect all state and tribal taxes covered by the agreement.

(b) The commissioner of revenue is authorized to collect any tribal taxes imposed pursuant to any agreement entered into pursuant to this subdivision and to make payments authorized by the agreement to the tribal government from the funds collected.

(c) The commissioner shall pay to the tribal government its share of the taxes collected pursuant to the agreement, as indicated in the agreement, and grant the taxpayer a credit for the taxpayer's share of the amount paid to the tribal government against the taxpayer's Minnesota tax.

**Subd. 3. Appropriation.** There is annually appropriated from the general fund to the commissioner of revenue the amounts necessary to make the refunds provided in this section.

**Subd. 4. Payments to counties.** (a) The commissioner shall pay to a qualified county in which an Indian gaming casino is located ten percent of the state share of all taxes generated from activities on reservations and collected under a tax agreement under this section with the tribal government for the reservation located in the county. If the tribe has casinos located in more than one county, the payment must be divided equally among the counties in which the casinos are located.

(b) A county qualifies for payments under this subdivision only if one of the following conditions is met:

(1) the county's per capita income is less than 80 percent of the state per capita personal income, based on the most recent estimates made by the United States Bureau of Economic Analysis; or

(2) 30 percent or more of the total market value of real property in the county is exempt from ad valorem taxation.

(c) The commissioner shall make the payments required under this subdivision by February 28 of the year following the year the taxes are collected.

(d) An amount sufficient to make the payments authorized by this subdivision, not to exceed \$1,100,000 in any fiscal year, is annually appropriated from the general fund to the commissioner. If the authorized payments exceed the amount of the appropriation, the commissioner shall proportionately reduce the rate so that the total amount equals the appropriation.

## CREDIT(S)

## 1989 Main Volume

Laws 1977, c. 203, § 9, eff. May 21, 1977. Amended by Laws 1983, c. 342, art. 6, § 1, eff. June 15, 1983.

## 1997 ELECTRONIC POCKET PART UPDATE

Amended by Laws 1989, c. 277, art. 1, § 7; Laws 1991, c. 291, art. 9, § 5; Laws 1994, c. 510, art. 3, §§ 1, 2, eff. July 1, 1994; Laws 1997, c. 231, art. 16, § 6; Laws 1997, 1st Sp., c. 5, § 37.

<General Materials (GM) - References, Annotations, or Tables >

## HISTORICAL AND STATUTORY NOTES

## 1997 ELECTRONIC POCKET PART UPDATE

## 1989 Legislation

The 1989 amendment added the paragraph authorizing tax refund agreements with governing bodies of federally recognized Minnesota Indian reservations for refunds of cigarette taxes.

Laws 1989, c. 277, art. 1, § 36 provides in part that § 7 (amending this section) is retroactively effective July 1, 1988.

## 1991 Legislation

The 1991 amendment designated subd. 1 as such and therein substituted "the total resident population on or adjacent to a reservation" for "the Indian residents of a reservation" and added the provision regarding how the total resident Indian population on or adjacent to a reservation shall be defined, and also designated subs. 2 and 3 as such.

## 1994 Legislation

The 1994 amendment in subd. 1, substituted "federally recognized Indian" for "Sioux or Chippewa", inserted "Indian" following "paid by the total resident", and substituted "tribal government" for "council"; and rewrote subd. 2, which previously read:

"The commissioner of revenue is also authorized to enter into a tax refund agreement with the governing body of any federally recognized Indian reservation in Minnesota, for refund of a mutually agreed upon amount of the cigarette taxes collected from sales on reservations or trust lands of an Indian tribe to the established governing body of the tribe having jurisdiction over the reservation or trust land on which the sale is made."

## 1997 Legislation

Laws 1997, c. 231, art. 16, § 6, added subd. 4, directing the commissioner to pay to a qualified county in which an Indian gaming casino is located a share of state taxes generated from activities on reservations and collected under a tax agreement under this section.

Laws 1997, 1st Sp., c. 5, § 37, amended subd. 4, as added by Laws 1997, c. 231, art. 16, § 6, by substituting at the beginning of par. (d) "An amount sufficient to make the payments authorized by this subdivision, not to exceed

\$1,100,000 in any fiscal year, is annually appropriated" for "To make the payments authorized by this subdivision, \$1,100,000 is annually appropriated".

Laws 1997, 1st Sp., c. 5, § 51, provided in part that unless provided otherwise, each section of that act takes effect at the time that the section of the law enacted in 1997 that it amends or cites takes effect.

#### 1989 Main Volume

The 1983 amendment revised the first paragraph which previously provided:

"The commissioner of revenue is authorized to enter into a tax refund agreement with the governing body of any Sioux or Chippewa reservation in Minnesota. The agreement may provide for a mutually agreed upon amount as a refund to the governing body of any sales or excise tax paid by the Indian residents of a reservation into the state treasury after June 14, 1976, notwithstanding any other law which limits the refundment of taxes."

#### LIBRARY REFERENCES

##### 1989 Main Volume

Taxation ¶535.

WESTLAW Topic No. 371.

C.J.S. Taxation §§ 631 et seq., 1077, 1087.

#### UNITED STATES SUPREME COURT

State jurisdiction over Indian tribe, individual members of tribe, see *Puyallup Tribe, Inc. v. Department of Game of State of Wash.*, U.S.Wash.1977, 97 S.Ct. 2616, 433 U.S. 165, 53 L.Ed.2d 667.

#### NOTES OF DECISIONS

##### Tribal sovereign immunity 1

##### 1. Tribal sovereign immunity

Tribal sovereign immunity, which attaches because of tribe's status as dependent domestic nation, did not prevent state of Minnesota from enforcing agreement with Leech Lake Band of Minnesota Chippewa Indians authorizing state to levy its sales taxes upon Band members, which specifically provides for state sales tax to be imposed on all sales made on reservation, collected and remitted by all vendors on reservation, subject to same penalties, interest, and revenue and government of Leech Lake Band of Minnesota Chippewa Indians, which permitted state of Minnesota to collect and enforce sales, use and motor vehicle taxes on all sales made on reservation and obligated state to refund per capita sum of money to Band; if acts alleged were proven, defendants clearly acted outside their authority as tribal officers in unlawfully depriving state of certain sales tax revenues to which state was entitled. *U.S. v. Finn*, D.Minn.1995, 919 F.Supp. 1305, adopted 911 F.Supp. 372, affirmed 121 F.3d 1157.

enforcement provisions as provided in state sales tax laws, and specifically contemplates method of refunding taxes collected on sales to Band members occurring on reservation. *U.S. v. Finn*, D.Minn.1995, 919 F.Supp. 1305, adopted 911 F.Supp. 372, affirmed 121 F.3d 1157.

Defendant tribal officers who allegedly conspired to cause false sales tax returns to be filed could not invoke protection of sovereign immunity as defense against enforcement of state sales tax laws, given refund agreement between state commissioner of revenue and government of Leech Lake Band of Minnesota Chippewa Indians, which permitted state of Minnesota to collect and enforce sales, use and motor vehicle taxes on all sales made on reservation and obligated state to refund per capita sum of money to Band; if acts alleged were proven, defendants clearly acted outside their authority as tribal officers in unlawfully depriving state of certain sales tax revenues to which state was entitled. *U.S. v. Finn*, D.Minn.1995, 919 F.Supp. 1305, adopted 911 F.Supp. 372, affirmed 121 F.3d 1157.

M. S. A. § 270.60

MN ST § 270.60

END OF DOCUMENT





## Lower Sioux Indian Community

P.O. Box 308 • RR#1 • Morton, MN 56270

### RESOLUTION NO. 32-95

BE IT RESOLVED that the Community Council of the Lower Sioux Indian Community hereby ratifies the attached agreement between the State of Minnesota and the Lower Sioux Indian Community; and authorizes its Acting Chairperson, Lana Hempel, to sign such agreement or one substantially identical to it on behalf of the Lower Sioux Indian Community. This agreement, while in effect, shall represent the law of the Lower Sioux Indian Community and shall be enforced according to its terms.

CERTIFICATION: We do hereby certify that the foregoing Resolution No. 32-95 was duly adopted by a vote of 3 for and 0 against at a meeting of the Lower Sioux Community Council held on March 24, 1995, with a quorum being present.

Dated: 3-24-95

Lana Hempel  
Lana Hempel, Vice-Chairperson  
Lower Sioux Community Council

Betty Lee  
Betty Lee, Secretary  
Lower Sioux Community Council

**TAX AGREEMENT BETWEEN THE MINNESOTA DEPARTMENT OF REVENUE  
AND THE LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA**

This Agreement is between the State of Minnesota ("State") and the Lower Sioux Indian Community in Minnesota Community Council ("Community Council") which is the federally recognized governing body of the Lower Sioux Indian Community in Minnesota ("Community"), with jurisdiction over lands owned in trust for the Community by the United States (hereinafter collectively referred to as "the Reservation"). The Commissioner of Revenue, exercising authority granted pursuant to Minnesota Statutes § 270.60, and the Community Council, pursuant to resolution which is attached to this Agreement, hereby agree to the following:

**Section 1. Statement of Intent**

A. The intent of this Agreement is to:

1. Provide for the mutual recognition and respect of the State and the Community of the sovereignty of one another.
2. Give recognition to the fact that there are many unsettled questions concerning taxation on Indian reservations and voluntarily resolve many of these uncertainties in a mutually satisfactory way that does not compromise either party's right to assert a position upon termination of the Agreement.
3. Share tax jurisdiction for taxes covered by this Agreement when the State and the Community have dual taxing authority, thereby assuring that similar taxes are imposed and collected on and off the Reservation.

4. Establish a mechanism for refunding to the Community tax payments made to the State by Indians subject to the jurisdiction of the Community (hereafter, "Community members") that are not subject to the State's taxing authority.
5. Establish a mechanism for collecting and sharing state taxes covered by this Agreement that are owed or paid by non-Community members resulting from Reservation activities.

## **Section 2. Taxes Included in the Agreement**

### **A. Revenue Sharing.**

The following taxes are subject to the revenue sharing provisions of this Agreement.

1. Sales and use tax of the type described in Minnesota Statutes, chapter 297A.
2. Cigarette and tobacco products taxes of the type described in Minnesota Statutes, chapter 297.
3. Liquor taxes of the type described in Minnesota Statutes, chapter 297C.
4. Motor fuel taxes of the type described in Minnesota Statutes, chapter 296.

### **B. Per Capita Refunds.**

The following taxes are subject to the per capita refund provisions of this Agreement:

1. Sales and use tax of the type described in Minnesota Statutes, chapter 297A.
2. Cigarette and tobacco products taxes of the type described in Minnesota Statutes, chapter 297.
3. Liquor taxes of the type described in Minnesota Statutes, chapter 297C.
4. Motor fuel taxes of the type described in Minnesota Statutes, chapter 296.

### **C. Tax on Gaming Proceeds.**

1. Nothing in this Agreement is intended to authorize the State to impose any tax on gaming proceeds from Community operated gaming on the Reservation.

D. Other Taxes.

1. Nothing in this Agreement is meant to preclude the Community from imposing other taxes within Community jurisdiction.
2. Nothing in this Agreement is meant to preclude the State from imposing other taxes within State jurisdiction.
3. The Community and persons or entities licensed by the Community to sell petroleum products shall pay the fees imposed upon distributors pursuant to Minnesota Statutes § 115C.08, subd. 3 and § 239.78 to the same extent and in the same manner as off Reservation purchasers of petroleum products.

**Section 3. Sharing Agreements**

A. Determining the Tax Base That Will Be Shared.

1. The sales and use tax base that will be shared ("sales tax base") is computed by:
  - a. adding the amount of sales and use tax collected from vendors on the Reservation.
  - b. subtracting the amount of the per capita sales tax refund computed pursuant to this Agreement, and
  - c. adding the tribal use tax imposed on sales occurring off the Reservation to Community members who live on or adjacent to the Reservation. The use tax included in the sales tax base is \$131.00 (one hundred thirty-one dollars and no cents) per Community member living on or adjacent to the Reservation.
2. The cigarette and tobacco products tax base and the liquor tax base that will be shared are computed by:



- a. adding the tax paid on cigarettes and tobacco products and liquor sold at retail on the Reservation, and
- b. subtracting the total amount of cigarette and tobacco product tax and the liquor per capita refunds computed pursuant to this Agreement.

3. The motor fuel tax base that will be shared ("motor fuels tax base") is computed by:

- a. adding the motor fuel taxes paid on fuel sold at retail by service stations on the Reservation, and
- b. subtracting the total amount of the motor fuel tax per capita refund computed pursuant to this Agreement, and
- c. subtracting the motor fuel tax refund paid on purchases made by the Community Council pursuant to this Agreement.

**B. Percent of Tax Base That Will Be Shared.**

- 1. The State will pay to the Community 50% of the sales and use tax base.
- 2. The State will pay to the Community 50% of the cigarette and tobacco products tax base.
- 3. The State will pay to the Community 50% of the liquor tax base.
- 4. The State will pay to the Community 50% of the motor fuel tax base.
- 5. The State share of each tax base is that portion of the tax base that is not paid to the Community.

**Section 4. Per Capita Refunds.**

- A. The State shall annually pay, in four quarterly payments, an estimate of taxes paid on the Reservation by Community members who live on or adjacent to the Reservation.

1. The annual refund for sales and use taxes shall be \$22.00 (twenty-two dollars and no cents) per Community member.
  2. The annual refund for cigarette and tobacco products taxes shall be \$35.50 (thirty-five dollars and fifty cents) per Community member.
  3. The annual refund for liquor taxes shall be \$9.75 (nine dollars and seventy-five cents) per Community member.
  4. The annual refund for motor fuel taxes shall be \$36.00 (thirty-six dollars and no cents) per Community member.
- B. The refunds specified in paragraphs 1 through 4 and the use tax component of the sales tax base will be recalculated by the State each September, and will be adjusted to reflect changes in the Consumer Price Index for the Minneapolis/St. Paul area for the previous state fiscal year. The changes in the Consumer Price Index will be measured using figures from the United States Bureau of Labor Statistics. The recalculated amounts will form the basis for refunds payable in October. If there is a material change in a state tax base or tax rate the State will adjust the per capita payment to reflect those changes.
- C. The quarterly refunds provided by this section shall be determined by:
1. multiplying the following two numbers:
    - a. the amount per Community Member as identified in paragraph A.1 - A.4.,  
and
    - b. the latest certified population of the Community members who live on or  
adjacent to the Reservation, and
  2. dividing the result by four.
- D. The Community shall certify to the State on or before July 1 of each year its population of Community members who live on or adjacent to the Reservation by providing a copy

of its latest Report on Service Population and Labor Force, as reported to the United States Department of the Interior, Bureau of Indian Affairs. The revised population number certified by each July 1 shall be used to calculate refunds beginning with the payments payable in October.

- E. The State will not pay any refunds or payments required by this Agreement if the Community has not submitted the population report; provided that if the Community submits the report within one year of the date it is due, the State shall pay all refunds and payments withheld by it up until the date of submission.
- F. The State will pay the quarterly refund amounts for sales and use, cigarettes and tobacco products, liquor, and motor fuel taxes by the last day of October, January, April, and July, unless otherwise specified in this Agreement. The State will pay refunds by warrant payable to the Community Council.

#### **Section 5. Exemptions from Tax**

- A. No sales or use tax shall be assessed on purchases made on or off the Reservation by the Community or a Community owned-entity for goods or services used by the Community or such entity solely for its own use and not intended for resale. To exercise this exemption, the Community or Community-owned entity shall present a State exemption certificate to the vendor at the time of purchase.
- B. No sales or use tax shall be assessed on purchases of supplies on or off the Reservation by Indian or non-Indian purchasers for use in construction projects on the Reservation when the Community or Community-owned entity is a party to the contract, and the contract is being undertaken for the purpose of the Community's welfare. To exercise

this exemption, the purchaser shall present a state exemption certificate to the vendor at the time of purchase.

- C. No motor vehicle excise taxes shall be assessed on vehicles purchased by the Community or Community-owned entity for its own use and not intended for resale. To exercise this exemption, the purchaser shall present a copy of an exemption certificate from the State.
- D. Motor fuel taxes paid on purchases made by the Community or Community-owned entity for fuel used by the Community or such entity in vehicles owned by them will be refunded to the Community on a quarterly basis. The Community will file a quarterly claim for refund by the 15th day of the month following the end of the calendar quarter on forms supplied by the State. The claim shall include supplier invoices evidencing the number of gallons purchased by the Community or Community-owned entity. The claim shall also contain a declaration that the fuel was used by the Community or Community-owned entity in the performance of official tribal business. The State will pay the refund by the 30th day of the first month after the end of the calendar quarter by a warrant made payable to the Community Council. No claim will be paid by the State under this section if it is filed more than one year late.

## Section 6. Administration of the Agreement

### A. Community Implementation.

- 1. The Community agrees, subject to the provisions of this Agreement, that the taxes provided for under this Agreement and imposed by Minnesota Statutes chapters 296, 297, 297A, and 297C, and all subsequent amendments thereto, or taxes identical to them, shall be imposed and collected in connection with all transactions occurring on the Reservation, and that such taxes shall be collected and remitted in the same manner as required under Minnesota statutes; except that



no tax shall be imposed or collected for sales and use taxes imposed by chapter 297A on telephone services, electricity, natural gas, heating oil, and LP gas delivered to Community members on the Reservation.

2. The Community will cause to be adopted and will enforce such Community laws as are necessary to implement the requirements of this Agreement, including the right of the State to audit and to assess and collect the taxes due under this Agreement.
3. All taxes covered by this Agreement will be remitted to the State for distribution according to this Agreement.
4. Upon request of the State, the Community will assist the State in the assessment and collection of any tax owed pursuant to this agreement.
5. All sellers of cigarettes, tobacco products, motor fuel, or liquor on the Reservation will purchase their stock from distributors licensed by the State of Minnesota, who will collect all applicable taxes as if the sale occurred off the Reservation to a non-Indian vendor. Any provision in any Minnesota tax law that allows reservation Indians to make purchases exempt from state tax subject to this Agreement may not be exercised while this Agreement remains in force.
6. The Community or Community-owned or Community-licensed entity shall not sell cigarettes or tobacco products to any retailer or licensed subjobber. All cigarettes sold on the Reservation shall contain an Indian Reservation cigarette stamp as described in Minnesota Statutes § 297.03. Such cigarettes may be sold only on the Reservation.
7. The Community shall provide a list to the State of all vendors who make taxable sales on the Reservation as well as a list of all vendors who sell cigarettes and

tobacco products, liquor and/or motor fuel. The list should include the legal business name, the address, and the Minnesota Business Identification Number of each vendor, and the type of tax involved for each vendor. The Community agrees to update these lists and the information contained in them as changes occur.

B. Sharing of the Tobacco Products, Liquor, and Motor Fuel Tax Bases.

1. The Community shall file a separate claim for payment for the sharing of the cigarette and tobacco tax base, the liquor tax base, and the motor fuel tax base pursuant to this Agreement. The claim must include copies of invoices or other proof of tax paid by the Reservation vendor.
2. The Community shall file one claim for tax sharing payments per quarter for each tax described in paragraph 1 above. The claim shall be filed by the 15th day of April, July, October, and January for taxes paid in the preceding quarter. The State shall make the payment within thirty days of the filing. If the Community fails to file its claims by the appropriate date, the State will not be obligated to make tax sharing payments for the affected quarter; provided that if the Community makes the filing within one year after its due date, the State shall make the payment within thirty days of the filing.
3. If a Reservation vendor makes a sale in any one day to a person of:
  - a. 10 or more cartons of cigarettes
  - b. 100 or more gallons of motor fuel
  - c. 4 or more cases of beer
  - d. 3 or more cases of wine, or

e. 3 or more cases of distilled spirits, then the vendor must prepare an invoice containing the following information:

- i. name and address of purchaser
- ii. quantity sold
- iii. date of sale
- iv. total sale price

The invoices must accompany the claim for payment.

C. Sharing of the Sales Tax Base.

1. The State shall calculate the Community's share of the sales tax base using sales tax collections reported to the State by the last day of the calendar quarter. The Community does not need to file a claim or report for its share of the sales tax base. The State shall make payment to the Community within thirty days after the end of the quarter.

D. Records.

1. Upon reasonable request of the Community, and subject to the confidentiality provisions of this Agreement, the State shall make available to the Community all records relating to tax filings that relate to the composition of the tax base, including the list of vendors and the amount of tax collected from each vendor during a period. Prior to receiving confidential information from the State, the person or persons who review the records for the Community must sign a written statement whereby the person agrees to be subject to the disclosure laws of the State.
2. The Community agrees to keep accurate records setting forth information in sufficient detail to allow for verification that the Community and Community-owned entities are collecting and remitting the correct amount of tax due pursuant

to this Agreement. Upon reasonable request of the State, and subject to the confidentiality provisions of this Agreement, the State may conduct a limited examination of the records of the Community and Community-owned entities for the sole purpose of verifying compliance with the requirements of this Agreement. Such examination shall be strictly limited to those enterprise activities of the Community or Community-owned entities which engage in sales subject to the taxes collected pursuant to this Agreement and may include examination of summary reports, exemption certificates, ledgers, cash register tapes and similar records. Nothing in this section authorizes any examination of the records of any part of the Community or Community-owned entity which does not engage in sales subject to the taxes collected pursuant to this Agreement, and nothing in this section authorizes any examination of any records that goes beyond what is needed to verify compliance with the requirements of this Agreement.

3. It is the intent of the State to perform no more than one examination under paragraph 2 during any calendar year. However, the State reserves the right to request additional examinations if the Commissioner of Revenue reasonably believes that the Community or Community-owned entity is materially underreporting taxes owed pursuant to this Agreement.

#### E. Remedies.

1. If the Community refuses to allow the State to inspect the records of the Community or Community-owned entities within 60 days following reasonable request of the State, the State may terminate this Agreement in accordance with Section 8 for failure to abide by the terms of the Agreement.



2. The State may apply any payment due pursuant to this Agreement to any delinquent tax finally determined pursuant to this section to be owed by the Community or a Community-owned entity.
3. Upon completion of an examination of records by the State pursuant to this Agreement, the State shall issue a report to the Community containing the results. If the report indicates a change in liability of the Community or a Community-owned entity, the Community may challenge that report by:
  - a. Requesting a redetermination from the State. The request must be made in writing within 60 days following issuance of the report. The redetermination will be made consistent with the appeal provisions contained in Minnesota Statutes § 289A.65, or
  - b. Requesting that the State enter into arbitration, pursuant to procedures established under the Uniform Arbitration Act. Such request must be made in writing within 60 days following issuance of the report. Only issues concerning the accuracy of the tax under applicable Minnesota law, as modified by this Agreement, may be decided by the arbitrator. Any issues concerning the jurisdiction of the State to impose a tax, are expressly excluded from the scope of arbitration.

If the Community does not challenge the findings of the State within 60 days after issuance of the report, then any additional tax assessed may be deducted from future payments made by the State to the Community pursuant to this Agreement until the assessment is paid in full.

If an examination reveals an overpayment of tax, the amount of the overpayment shall be paid to the Community within 30 days following the issuance of the report.

F. Assignment of Refunds and Payments.

1. Refunds and payments made pursuant to this Agreement may be pledged, assigned, or otherwise used as collateral or security by the Community through action of the Community Council for loans, promissory notes, or other financial transactions.
2. When refunds or payments are pledged, assigned, or otherwise used as security, a copy of the Resolution of the Community Council authorizing such action shall be mailed or delivered to the Commissioner. Following receipt of the required documents, the Commissioner shall issue future refunds and payments as directed by the documents until notified in writing by the secured party that the assignment has been terminated, or until notified in writing by the Chairperson and Secretary of the Community Council, accompanied by a resolution of the Community Council, that the assignment has been terminated, together with sufficient proof that such termination has occurred.

G. Confidentiality.

1. Tax information gathered by the State in the administration of this Agreement shall be protected and confidential to the same extent as the information is protected and confidential when gathered by the State in the administration of state tax laws pursuant to Minnesota Statutes chapter 270B and other Minnesota laws.

2. The Community agrees to protect the confidentiality of any information relating to this Agreement received from the State to the same extent as the information is protected from disclosure by the State pursuant to Minnesota Statutes chapter 270B and other Minnesota laws.
3. Breach of the confidentiality provisions of this Agreement constitutes grounds for termination under the provisions of this Agreement.

#### **Section 7. Sovereign Immunity**

- A. Nothing contained herein shall be construed in any fashion to be a waiver of the sovereign immunity of the Lower Sioux Indian Community in Minnesota, its Community Council, its officials, or its entities.

#### **Section 8. Termination of the Agreement**

- A. Either party may terminate this Agreement at the end of any calendar year, upon 90 days written notice. A notice of intent not to renew on behalf of the Community must be executed by the Chairperson and Secretary of the Community Council. A notice of an intent not to renew on behalf of the State must be executed by the Commissioner of Revenue of the State of Minnesota.
- B. Upon the failure of either party to abide by the terms of this Agreement, the other party may terminate the Agreement at any time upon 30 days written notice. The notice must specify the reason or reasons that the Agreement is being terminated. A notice of termination on behalf of the Community must be executed by the Chairperson and Secretary of the Community Council. A notice of termination on behalf of the State must be executed by the Commissioner of Revenue of the State of Minnesota.
- C. In the event of termination prior to the end of a calendar year, the State shall be obligated to remit the full quarterly remittance provided for according to the terms of this

Agreement with respect to the calendar quarter during which notice of termination is given, which obligation shall survive the termination of this Agreement. The Community agrees that until the end of the calendar quarter during which notice was given, all provisions relating to the collection and remittance of any tax under this Agreement remain in effect.

#### Section 9. Effective Date

- A. This Agreement shall be effective from April 1, 1995, for taxes incurred after March 31, 1995. All obligations created by prior agreements between the State and the Community remain in effect until the new agreements become effective.

IN WITNESS WHEREOF, the State and the Community have caused this Agreement to be executed and delivered by their duly authorized officers.

STATE OF MINNESOTA

LOWER SIOUX INDIAN COMMUNITY

DEPARTMENT OF REVENUE

COUNCIL

By: *William Swift*  
Commissioner of Minnesota  
Department of Revenue

By: *Lana Kempel*  
Acting Chairperson of Community  
Council

Date Signed: 4/11/95

Date Signed: 3/28/95



Adjustment of Refund Amounts Based on the Rate of Change of the  
Minneapolis/St. Paul CPI-U for Fiscal Period 1995-1996

FY 1995 CPI-U - 145.35  
FY 1996 CPI-U - 149.40  
Percent Change - 2.8%

	SALES TAX REFUND AMOUNTS		USE TAX REFUND AMOUNTS	
	Current Amount	Inflation-Adjusted Amount	Current Amount	Inflation-Adjusted Amount
Bole Forte	\$48.00	\$49.34	\$136.00	\$139.81
Fond du Lac	45.50	46.77	136.60	140.42
*Grand Portage	46.30	47.60	134.00	137.75
Leech Lake	83.50	85.84	83.50	85.84
Lower Sioux	22.00	22.62	131.00	134.67
Millie Lacs	42.70	43.90	128.11	131.70
*Prairie Island	28.80	29.61	483.00	475.96
Red Lake	zero	zero	160.00	164.48
*Shakopee	15.00	15.42	800.00	816.80
*Shakopee			900.00	925.20
Upper Sioux	28.00	28.78	150.00	154.20
White Earth	80.00	82.24	80.00	82.24

\* Proposed amounts; agreements not finalized

	FUEL TAX REFUND AMOUNTS	
	Current Amount	Inflation-Adjusted Amount
Bole Forte	\$51.45	\$52.89
Fond du Lac	51.45	52.89
*Grand Portage	37.00	38.04
Leech Lake	51.45	52.89
Lower Sioux	37.04	38.08
Millie Lacs	36.53	37.55
Prairie Island	zero	zero
Red Lake	zero	zero
*Shakopee	37.00	38.04
Upper Sioux	zero	zero
White Earth	51.45	52.89

\* Proposed amounts; agreements not finalized

	LIQUOR TAX REFUND AMOUNTS		CIGARETTE TAX REFUND AMOUNTS	
	Current Amount	Inflation-Adjusted Amount	Current Amount	Inflation-Adjusted Amount
Bole Forte	\$10.03	\$10.31	\$36.53	\$37.55
Fond du Lac	10.03	10.31	36.53	37.55
Grand Portage	10.03	10.31	36.53	37.55
Leech Lake	10.03	10.31	36.53	37.55
Lower Sioux	10.03	10.31	36.53	37.55
Millie Lacs	10.03	10.31	36.53	37.55
Prairie Island	10.03	10.31	36.53	37.55
Red Lake	5.02	5.18	36.53	37.55
Shakopee	10.03	10.31	36.53	37.55
Upper Sioux	10.03	10.31	36.53	37.55
White Earth	10.03	10.31	36.53	37.55

Source of CPI-U data: Semi-annual data came from the BLS Chicago Office (312)353-1980

Analyst: Narciso M. Miranda

Minnesota Department of Revenue

TAX RESEARCH DIVISION

Date prepared: 09/16/96

File: H:\users\mmiranda\csl\89d9696.xls

**AGREEMENT BETWEEN THE STATE OF MINNESOTA  
AND  
THE WHITE EARTH BAND OF CHIPPEWA INDIANS**

This Agreement is between the State of Minnesota ("State") and the White Earth Reservation Tribal Council ("Tribal Council") which is the federally recognized governing body of the White Earth Band of Chippewa Indians ("Band"), with jurisdiction over lands within the exterior borders of the White Earth Reservation as well as lands outside the exterior borders of the White Earth Reservation owned in trust for the Band by the United States (hereinafter collectively referred to as "the Reservation"). The Commissioner of Revenue, exercising authority granted pursuant to Minnesota Statutes § 270.60, and the Tribal Council, pursuant to resolution which is attached to this Agreement, hereby agree to the following:

**Section 1. Statement of Intent**

**A. The intent of this Agreement is to:**

1. Provide for the mutual recognition and respect of the State and the Band of the sovereignty of one another.
2. Give recognition to the fact that there are many unsettled questions concerning taxation on Indian reservations and voluntarily resolve many of these uncertainties in a mutually satisfactory way that does not compromise either party's right to assert a position upon termination of the Agreement.
3. Share tax jurisdiction for taxes covered by this Agreement when the State and the Band have dual taxing authority, thereby assuring that similar taxes are imposed and collected on and off the Reservation.

4. Establish a mechanism for refunding to the Band tax payments made to the State by Indians subject to the jurisdiction of the Band (hereafter, "Band members") that are not subject to the State's taxing authority.
5. Establish a mechanism for collecting and sharing state taxes covered by this Agreement that are owed or paid by non-tribal members resulting from Reservation activities.

## Section 2. Taxes Included in the Agreement

### A. Revenue Sharing.

The following taxes are subject to the revenue sharing provisions of this Agreement.

1. Sales and use tax of the type described in Minnesota Statutes ch. 297A.
2. Cigarette and tobacco products taxes of the type described in Minnesota Statutes ch. 297.
3. Liquor taxes of the type described in Minnesota Statutes ch. 297C.
4. Motor fuel taxes of the type described in Minnesota Statutes ch. 296.

### B. Per Capita Refunds.

The following taxes are subject to the per capita refund provisions of this Agreement:

1. Sales and use tax of the type described in Minnesota Statutes ch. 297A.
2. Cigarette and tobacco products taxes of the type described in Minnesota Statutes ch. 297.
3. Liquor taxes of the type described in Minnesota Statutes ch. 297C.
4. Motor fuel taxes of the type described in Minnesota Statutes ch. 296.

C. Tax on Gaming Proceeds.

1. Nothing in this Agreement is intended to authorize the State to impose any tax on gaming proceeds from Band operated gaming on the Reservation.

D. Other Taxes.

1. Nothing in this Agreement is meant to preclude the Band from imposing other taxes within Band jurisdiction.
2. Nothing in this Agreement is meant to preclude the State from imposing other taxes within State jurisdiction.
3. The Band and persons or entities licensed by the Band to sell petroleum products shall pay the fees imposed upon distributors pursuant to Minnesota Statutes § 115C.08, subd. 3, and § 239.78 to the same extent and in the same manner as off Reservation purchasers of petroleum products.

Section 3. Sharing Agreements

A. Determining the Tax Base That Will Be Shared.

1. The sales and use tax base that will be shared ("sales tax base") is computed by:
  - a. adding the amount of sales and use tax collected from vendors on the Reservation,
  - b. subtracting the amount of the per capita sales tax refund computed pursuant to this Agreement, and
  - c. adding the tribal use tax imposed on sales occurring off the Reservation to Band members who live on or adjacent to the Reservation. The use tax



included in the sales tax base is \$80.00 (eighty dollars) per Band member living on or adjacent to the Reservation.

2. The motor fuels tax base that will be shared ("motor fuels tax base") is computed by:
  - a. adding the motor fuels taxes paid on fuels sold at retail by service stations on the Reservation, and
  - b. subtracting the total amount of the motor fuels tax per capita refund computed pursuant to this Agreement, and
  - c. subtracting the motor fuels tax refund paid on purchases made by the Tribal Council pursuant to this Agreement.
3. The cigarette and tobacco products tax base and the liquor tax base that will be shared are computed by:
  - a. adding the tax paid on cigarettes and tobacco products and liquor sold at retail on the Reservation, and
  - b. subtracting the total amount of the cigarette and tobacco products and liquor tax per capita refunds computed pursuant to this Agreement.

**B. Percent of Tax Base That Will Be Shared.**

1. The State will pay to the Band 50% of the sales and use tax base.
2. The State will pay to the Band 50% of the cigarette and tobacco products tax base.
3. The State will pay to the Band 50% of the liquor tax base.
4. The State will pay to the Band 50% of the motor fuel tax base.

5. The State share of each tax base is that portion of the tax base that is not paid to the Band.

#### Section 4. Per Capita Refunds

- A. The State shall annually pay, in four quarterly payments, an estimate of taxes paid on the Reservation by Band members who live on or adjacent to the Reservation.
  1. The annual refund for sales and use taxes shall be \$80.00 (eighty dollars) per Band member.
  2. The annual refund for motor fuels taxes shall be \$50.00 (fifty dollars) per Band member.
  3. The annual refund for cigarette and tobacco products taxes shall be \$35.50 (thirty-five dollars and fifty cents) per Band member.
  4. The annual refund for liquor taxes shall be \$9.75 (nine dollars and seventy-five cents) per Band member.
- B. The refunds specified in paragraphs 1 through 4 and the use tax component of the sales tax base will be recalculated by the State each September, and will be adjusted to reflect changes in the Consumer Price Index for the Minneapolis/St. Paul area for the previous state fiscal year. The changes in the Consumer Price Index will be measured using figures from the United States Bureau of Labor Statistics. The recalculated amounts will form the basis for refunds payable in October. If there has been a material change in the state tax base or tax rate, the State will adjust the per capita payment to reflect the changes.

- C. The quarterly refunds provided by this section shall be determined by:
1. Multiplying the following two numbers:
    - a. the amount per Band Member as identified in paragraph A.1 - A.4., and
    - b. the latest certified population of the Band members who live on or adjacent to the Reservation; and
  2. Dividing the result by four.
- D. The Band shall certify to the State on or before July 1 of each year its population of Band members who live on or adjacent to the Reservation by providing a copy of its latest Report on Service Population and Labor Force, as reported to the United States Department of the Interior, Bureau of Indian Affairs. The revised population number certified by each July 1 shall be used to calculate refunds beginning with the payments payable in October.
- E. The State will not pay any refunds or payments required by this Agreement if the Band has not submitted the population report; provided that if the Band submits the report within one year of the date it is due, the State shall pay all refunds and payments withheld by it up until the date of submission.
- F. The State will pay the quarterly refund amounts by the last day of October, January, April, and July, unless otherwise specified in this Agreement. The State will pay refunds by warrant payable to the Tribal Council.

#### Section 5. Exemptions from Tax

- A. No sales or use tax shall be assessed on purchases made on or off the Reservation by the Band or a Band owned-entity for goods or services used by the Band or such entity solely

for its own use and not intended for resale. To exercise this exemption, the Band or Band-owned entity shall present a State exemption certificate to the vendor at the time of purchase.

- B. No sales or use tax shall be assessed on purchases of supplies on or off the Reservation by Indian or non-Indian purchasers for use in construction projects on the Reservation when the Band or Band-owned entity is a party to the contract, and the contract is being undertaken for the purpose of the Band's welfare. To exercise this exemption, the purchaser shall present a state exemption certificate to the vendor at the time of purchase.
- C. No motor vehicle excise taxes shall be assessed on vehicles purchased by the Band or Band-owned entity for its own use and not intended for resale. To exercise this exemption, the purchaser shall present a copy of an exemption certificate from the State.
- D. Motor fuels taxes paid on purchases made by the Band or Band-owned entity for fuel used by the Band or such entity in vehicles owned by them will be refunded to the Band on a quarterly basis. The Band will file a quarterly claim for refund by the 15th day of the month following the end of the calendar quarter on forms supplied by the State. The claim shall include supplier invoices evidencing the number of gallons purchased by the Band or Band-owned entity. The claim shall also contain a declaration that the fuel was used by the Band or Band-owned entity in the performance of official tribal business. The State will pay the refund by the 30th day of the first month after the end of the calendar quarter by a warrant made payable to the Tribal Council. No claim will be paid by the State under this section if it is filed more than one year late.



## Section 6. Administration of the Agreement

### A. Band Implementation.

1. The Band agrees, subject to the provisions of this Agreement, that the taxes provided for under this Agreement and imposed by Minnesota Statutes chs. 296, 297, 297A, and 297C, and all subsequent amendments thereto, or taxes identical to them, shall be imposed and collected in connection with all transactions occurring on the Reservation. Such taxes shall be collected and remitted in the same manner as required under Minnesota statutes.
2. The Band will cause to be adopted and will enforce such Band laws as are necessary to implement the requirements of this Agreement, including the right of the State to audit and to assess and collect the taxes due under this Agreement.
3. All taxes covered by this Agreement will be remitted to the State for distribution according to this Agreement.
4. Upon request of the State, the Band will assist the State in the assessment and collection of any tax owed pursuant to this agreement.
5. All sellers of cigarettes, tobacco products, motor fuels or liquor on the Reservation will purchase their stock from distributors licensed by the State of Minnesota, who will collect all applicable taxes as if the sale occurred off the Reservation to a non-Indian vendor. Any provision in any Minnesota tax law that allows Reservation Indians to make purchases exempt from any state tax subject to this Agreement may not be exercised while this Agreement remains in force.

6. The Band or Band-owned or Band-licensed entity shall not sell cigarettes or tobacco products to any retailer or licensed subjobber. All cigarettes sold on the Reservation shall contain an Indian Reservation cigarette stamp as described in Minnesota Statutes § 297.03. Such cigarettes may be sold only on the Reservation.
7. The Band shall provide a list to the State of all vendors who make taxable sales on the Reservation as well as a list of all vendors who sell cigarettes and tobacco products, liquor and/or motor fuels. The list should include the legal business name, the address, and the Minnesota Business Identification Number of each vendor, and the type of tax involved for each vendor. The Band agrees to update these lists and the information contained in them as changes occur.

**B. Tax Sharing Payments to the Band.**

1. The State shall calculate the Band's share of the cigarette and tobacco products and liquor tax bases using tax collections reported to the State by the last day of the calendar quarter. The State shall obtain the information from invoices and other records obtained from Reservation vendors and distributors who sell to Reservation vendors.
2. The State will calculate the motor fuels tax base using tax collections reported to the State during the calendar year. The State will obtain the information from invoices and other records of distributors, suppliers and service stations who do business on the Reservation. The State will pay to the Band its share of the motor fuels tax base quarterly. The first three quarterly payments in each

calendar year will each be equal to 12.5% of the motor fuels tax base for the previous calendar year. The fourth quarterly payment will be equal to the difference between the first three quarterly payments and 50% of the motor fuels tax base for the current year. The Band and the State understand that the 4th quarter payment may be significantly higher, or lower, than the three previous payments. For payments due for the second and third quarter of 1995, the payment will equal 12.5% of the motor fuels tax base for 1994. The payment due for the fourth quarter of 1995 will equal the difference between the first two payments and 37.5% of the motor fuels tax base for 1995.

3. The State shall calculate the Band's share of the sales tax base using sales tax collections reported to the State by the last day of the calendar quarter. The Band does not need to file a claim or report for its share of the sales tax base.
4. If a Reservation vendor makes a sale in any one day to a person of:
  - a. 10 or more cartons of cigarettes,
  - b. 100 or more gallons of motor fuel,
  - c. 4 or more cases of beer,
  - d. 3 or more cases of wine, or
  - e. 3 or more cases of distilled spirits then the vendor must prepare an invoice containing the following information:
    - (i) name and address of purchaser
    - (ii) quantity sold
    - (iii) date of sale

(iv) total sale price

the invoices must be submitted to the State in accordance with the provisions of this Agreement.

5. The Band shall file a separate report each quarter, on a form prescribed by the State, for cigarette and tobacco products, liquor, and motor fuels. The invoices required by paragraph 4 above must accompany the report. The report shall be filed by the 15th day of April, July, October, and January for taxes paid in the preceding quarter. If the Band fails to file its report by the appropriate date, the State will not be obligated to make tax sharing payments for the affected quarter; provided that if the Band makes the filing within one year after its due date, the State shall make the payment within thirty (30) days of the filing.
6. The State will make revenue sharing payments required by this Agreement quarterly. Payments will be made by the last day of April, July, October, and January. Payment shall be made by warrant made payable to the Tribal Council.

C. Records.

1. Upon reasonable request of the Band, and subject to the confidentiality provisions of this Agreement, the State shall make available to the Band all records relating to tax filings that relate to the composition of the tax base, including the list of vendors and the amount of sales tax collected from each vendor during a period. Prior to receiving confidential information from the State, the person or persons who review the records for the Band must sign a written statement whereby the person agrees to be subject to the disclosure laws of the State.



2. The Band agrees to keep accurate records setting forth information in sufficient detail to allow for verification that the Band and Band owned entities are collecting and remitting the correct amount of tax due pursuant to this Agreement. Upon reasonable request of the State, and subject to the confidentiality provisions of this Agreement, the State may conduct a limited examination of the records of the Band and Band-owned entities for the sole purpose of verifying compliance with the requirements of this Agreement. Such examination shall be strictly limited to those enterprise activities of the Band or Band-owned entities which engage in sales subject to the taxes collected pursuant to this Agreement and may include examination of summary reports, exemption certificates, ledgers, cash register tapes and similar records. Nothing in this section authorizes any examination of the records of any part of the Band or Band-owned entity which does not engage in sales subject to the taxes collected pursuant to this Agreement, and nothing in this section authorizes any examination of any records that goes beyond what is needed to verify compliance with the requirements of this Agreement.
3. It is the intent of the State to perform no more than one examination under paragraph 2 during any calendar year. However, the State reserves the right to request additional examinations if the Commissioner of Revenue reasonably believes that the Band or Band-owned entity is materially underreporting taxes owed pursuant to this Agreement.

## D. Remedies.

1. If the Band refuses to allow the State to inspect the records of the Band or Band-owned entities within sixty (60) days following reasonable request of the State, the State may terminate this Agreement in accordance with Section 8 for failure to abide by the terms of the Agreement.
2. The State may apply any payment due pursuant to this Agreement to any delinquent tax finally determined pursuant to this section to be owed by the Band or a Band-owned entity.
3. Upon completion of an examination of records by the State pursuant to this Agreement, the State shall issue a report to the Band containing the results. If the report indicates a change in liability of the Band or a Band-owned entity, the Band may challenge that report by:
  - a. requesting a redetermination from the State. The request must be made in writing within sixty (60) days following issuance of the report. The redetermination will be made consistent with the appeal provisions contained in Minnesota Statutes § 289A.65,
  - b. requesting that the State enter into arbitration, pursuant to procedures established under the Uniform Arbitration Act. Such request must be made in writing within sixty (60) days following issuance of the report. Only issues concerning the accuracy of the tax under applicable Minnesota law, as modified by this Agreement, may be decided by the arbitrator.

Any issues concerning the jurisdiction of the State to impose a tax, are expressly excluded from the scope of arbitration,

- c. if the Band does not challenge the findings of the State within sixty (60) days after issuance of the report, then any additional tax assessed may be deducted from future payments made by the State to the Band pursuant to this Agreement until the assessment is paid in full,
- d. if an examination reveals an overpayment of tax, the amount of the overpayment shall be paid to the Band within thirty (30) days following the issuance of the report.

**E. Assignment of Refunds and Payments.**

- 1. Refunds and payments made pursuant to this Agreement may be pledged, assigned, or otherwise used as collateral or security by the Band through action of the Tribal Council for loans, promissory notes, or other financial transactions.
- 2. When refunds or payments are pledged, assigned, or otherwise used as security, a copy of the Resolution of the Tribal Council authorizing such action shall be mailed or delivered to the Commissioner. Following receipt of the required documents, the Commissioner shall issue future refunds and payments as directed by the documents until notified in writing by the secured party that the assignment has been terminated, or until notified in writing by the Chairperson and Secretary/Treasurer of the Tribal Council, accompanied by a resolution of the Tribal Council, that the assignment has been terminated, together with sufficient proof that such termination has occurred.

**F. Confidentiality.**

1. Tax information gathered by the State in the administration of this Agreement shall be protected and confidential to the same extent as the information is protected and confidential when gathered by the State in the administration of state tax laws pursuant to Minnesota Statutes ch. 270B and other Minnesota laws.
2. The Band agrees to protect the confidentiality of any information relating to this Agreement received from the State to the same extent as the information is protected from disclosure by the State pursuant to Minnesota Statutes ch. 270B and other Minnesota laws.
3. Breach of the confidentiality provisions of this Agreement constitutes grounds for termination under the provisions of this Agreement.

**Section 7. Sovereign Immunity**

- A. Nothing contained herein shall be construed in any fashion to be a waiver of the sovereign immunity of the White Earth Band of Chippewa Indians, its Tribal Council, its officials, or its entities.

**Section 8. Termination of the Agreement**

- A. Either party may terminate this Agreement at the end of any calendar year, upon ninety (90) days written notice. A notice of intent to terminate on behalf of the Band must be executed by the Chairperson and Secretary/Treasurer of the Tribal Council. A notice of an intent to terminate on behalf of the State must be executed by the Commissioner of Revenue of the State of Minnesota.



- B. Upon the failure of either party to abide by the terms of this Agreement, the other party may terminate the Agreement at any time upon thirty (30) days written notice. The notice must specify the reason or reasons that the Agreement is being terminated. A notice of termination on behalf of the Band must be executed by the Chairperson and Secretary/Treasurer of the Tribal Council. A notice of termination on behalf of the State must be executed by the Commissioner of Revenue of the State of Minnesota.
- C. In the event of termination prior to the end of a calendar year, the State shall be obligated to remit the full quarterly remittance provided for according to the terms of this Agreement with respect to the calendar quarter during which notice of termination is given, which obligation shall survive the termination of this Agreement. The Band agrees that until the end of the calendar quarter during which notice was given, all provisions relating to the collection and remittance of any tax under this Agreement remain in effect.

#### **Section 9. Effective Date**

- A. This Agreement shall be effective from April 1, 1995, for taxes incurred after March 31, 1995. All obligations created by prior agreements between the State and the Tribal Council remain in effect until the new agreements become effective.

IN WITNESS WHEREOF, the State and the Band have caused this Agreement to be executed and delivered by their duly authorized officers.

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

By: Matthew S. Smith  
 Commissioner of Minnesota  
 Department of Revenue

Date Signed: 4/6/95

WHITE EARTH RESERVATION

TRIBAL COUNCIL

By: Paul Clark  
 Chairman of Tribal Council  
 Vice Chairman

Date Signed: 3-21-95

By: Paul W. Latham  
 Secretary/Treasurer of Tribal Council

Date Signed: 3-21-95

**MISSISSIPPI CODE 1972 ANNOTATED**  
**TITLE 27. TAXATION AND FINANCE**  
**CHAPTER 65. SALES TAX**  
**TRIBAL TAX BY MISSISSIPPI BAND OF CHOCTAW INDIANS**

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§ 27-65-211. Definitions.

As used in Sections 27-65-211 through 27-65-221, the following terms shall have the following meanings, unless the context clearly indicates a different meaning:

(a) "Reservation lands" mean those defined as Indian country under the provisions of 18 U.S.C. 1151(a) or (b).

(b) "Tribal tax" means any tax imposed by the Mississippi Band of Choctaw Indians on persons subject to the band's taxing powers.

SOURCES: Laws, 1986, ch. 322, § 1, eff from and after passage (approved March 13, 1986).

**FEDERAL ASPECTS—**

Provisions of 18 USC § 1151(a) or (b), see 18 USCS § 1151(a) or (b).

**RESEARCH AND PRACTICE REFERENCES—**

41 Am Jur 2d, Indians §§ 63 et seq.

42 CJS, Indians §§ 11, 12, 24-27.

Code 1972, § 27-65-211

MS ST § 27-65-211

END OF DOCUMENT

MS ST § 27-65-213  
Code 1972, § 27-65-213

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MISSISSIPPI CODE 1972 ANNOTATED  
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TRIBAL TAX BY MISSISSIPPI BAND OF CHOCTAW INDIANS

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§ 27-65-213. *Legislative findings.*

The Legislature finds that the public interest of both Indians and non-Indians is best served by close cooperation between the state government and the Mississippi Band of Choctaw Indians. The Legislature finds this cooperation to be especially important in the area of taxation. Accordingly, the Legislature hereby authorizes the State Tax Commission to enter into tax collection agreements with the Mississippi Band of Choctaw Indians.

SOURCES: Laws, 1986, ch. 322, § 2, *eff* from and after passage (approved March 13, 1986).

RESEARCH AND PRACTICE REFERENCES—

41 Am Jur 2d, *Indians* §§ 63 *et seq.*

42 CJS, *Indians* §§ 11, 12, 24-27.

Code 1972, § 27-65-213

MS ST § 27-65-213

END OF DOCUMENT



**MISSISSIPPI CODE 1972 ANNOTATED**  
**TITLE 27. TAXATION AND FINANCE**  
**CHAPTER 65. SALES TAX**  
**TRIBAL TAX BY MISSISSIPPI BAND OF CHOCTAW INDIANS**

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§ 27-65-215. Exemption from sales or gross receipts tax.

The State of Mississippi hereby relinquishes any jurisdiction it may have to levy and collect within reservation lands the sales or gross receipts tax imposed by Chapter 65 of Title 27, Mississippi Code of 1972, as it applies to sales by merchants on reservation lands of the Mississippi Band of Choctaw Indians when such merchants are authorized to do business on the reservation lands and are paying tribal sales taxes to the Mississippi Band of Choctaw Indians.

SOURCES: Laws, 1986, ch. 322, § 3, off from and after passage (approved March 13, 1986).

**RESEARCH AND PRACTICE REFERENCES—**

41 Am Jur 2d, Indians §§ 63 et seq.  
42 CJS, Indians §§ 11, 12, 24-27.

**ANNOTATIONS—**

United States District Court jurisdiction of action brought by Indian tribe under 28 USCS § 1362. 65 ALR Fed 649.

Code 1972, § 27-65-215

MS ST § 27-65-215

END OF DOCUMENT

MISSISSIPPI CODE 1972 ANNOTATED  
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§ 27-65-217. Entry into tax collection agreements.

The State Tax Commission may enter into tax collection agreements with the Mississippi Band of Choctaw Indians. These agreements may provide for the collection by the State Tax Commission for the Indian tribe of any tribal sales or gross receipts tax from reservation lands which are hereby authorized to be imposed subject to the provisions of Sections 27-65-211 through 27-65-221.

SOURCES: Laws, 1986, ch. 322, § 4, eff from and after passage (approved March 13, 1986).

RESEARCH AND PRACTICE REFERENCES—

41 Am Jur 2d, Indians §§ 63 et seq.

42 CJS, Indians §§ 11, 12, 24-27.

14 Am Jur Pl & Pr Forms (Rev), Indians, Form 4.1 (complaint, petition, or declaration-by motor fuel dealer-to recover motor fuel taxes wrongfully assessed by state agency against sales on Indian reservation).

22 Am Jur Pl & Pr Forms (Rev), Sales and Use Taxes, Form 5.1 (complaint, petition or declaration-for declaratory relief from sales tax levy-taxes assessed on nontaxable transactions-motor fuel taxes wrongfully assessed by state agency against sales on Indian reservations).

22 Am Jur Pl & Pr Forms (Rev), State and Local Taxation, Form 402.1.1 (complaint, petition, or declaration-for declaratory relief from sales tax levy-motor fuel taxes wrongfully assessed by state agency against sales on Indian reservations).

Code 1972, § 27-65-217

MS ST § 27-65-217

END OF DOCUMENT

MS ST § 27-65-219  
Code 1972, § 27-65-219

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§ 27-65-219. Approval of tax collection agreements.

Any tax collection agreement entered into pursuant to Sections 27-65-211 through 27-65-221 shall be binding and effective only upon approval of the Tribal Chief of the Mississippi Band of Choctaw Indians, the Governor and the Attorney General of the State of Mississippi.

SOURCES: Laws, 1986, ch. 322, § 5, eff from and after passage (approved March 13, 1986).

**RESEARCH AND PRACTICE REFERENCES-**

41 Am Jur 2d, Indians §§ 63 et seq.

42 CJS, Indians §§ 11, 12, 24-27.

Code 1972, § 27-65-219

MS ST § 27-65-219

END OF DOCUMENT

MS ST s 27-65-221  
Code 1972, § 27-65-221

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§ 27-65-221. Duration and renewal of tax collection agreements.

Any tax collection agreements between the State Tax Commission and the Mississippi Band of Choctaw Indians shall be for a term not to exceed ten (10) years; however, such agreements shall be renewable upon expiration by the mutual consent of the parties.

SOURCES: Laws, 1986, ch. 322, § 6, eff from and after passage (approved March 13, 1986).

**RESEARCH AND PRACTICE REFERENCES—**

41 Am Jur 2d, Indians §§ 63 et seq.

42 CJS, Indians §§ 11, 12, 24-27.

Code 1972, § 27-65-221

MS ST § 27-65-221

END OF DOCUMENT



- 18-11-105. Submission of agreement to attorney general.  
 18-11-106. Repealed.  
 18-11-107. Filing of agreement.  
 18-11-108. Revocation of agreement.  
 18-11-109. Authorization to appropriate funds for purpose of agreement.  
 18-11-110. Specific limitations on agreements.  
 18-11-111. Validity of existing agreements.

MT

#### Chapter Cross-References

Jurisdiction on Indian lands. Title 2, ch. 1,  
 part 3.

### Part 1

#### General Provisions

18-11-101. Short title. This chapter shall be known and may be cited as the "State-Tribal Cooperative Agreements Act".

History: En. Sec. 1, Ch. 309, L. 1981.

18-11-102. Definitions. As used in this chapter, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Public agency" means any political subdivision, including municipalities, counties, school districts, and any agency or department of the state of Montana.

(2) "Tribal government" means the officially recognized government of any Indian tribe, nation, or other organized group or community located in Montana exercising self-government powers and recognized as eligible for services provided by the United States to Indians because of their status as Indians.

History: En. Sec. 2, Ch. 309, L. 1981.

18-11-103. Authorization to enter agreement — general contents.

(1) Any one or more public agencies may enter into an agreement with any one or more tribal governments to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments entering into the contract is authorized by law to perform. The agreement shall be authorized and approved by the governing body of each party to the agreement.

(2) The agreement shall set forth fully the powers, rights, obligations, and responsibilities of the parties to the agreement.

History: En. Sec. 3, Ch. 309, L. 1981.

18-11-104. Detailed contents of agreement. The agreement authorized by 18-11-103 shall specify the following:

- (1) its duration;
- (2) the precise organization, composition, and nature of any separate legal entity created thereby;
- (3) the purpose of the agreement;
- (4) the manner of financing the agreement and establishing and maintaining a budget therefor;

(5) the method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination;

(6) provision for administering the agreement, which may include creation of a joint board responsible for such administration;

(7) the manner of acquiring, holding, and disposing of real and personal property used in the agreement;

(8) when an agreement involves law enforcement:

(a) the minimum training standards and qualifications of law enforcement personnel;

(b) the respective liability of each public agency and tribal government for the actions of law enforcement officers when acting under the provisions of an agreement;

(c) the minimum insurance required of both the public agency and the tribal government; and

(d) the exact chain of command to be followed by law enforcement officers acting under the provisions of an agreement; and

(9) any other necessary and proper matters.

History: En. Sec. 4, Ch. 309, L. 1981.

**18-11-105. Submission of agreement to attorney general.** (1) As a condition precedent to an agreement made under this chapter becoming effective, it must have the approval of the attorney general of Montana.

(2) The attorney general shall approve an agreement submitted to him under this chapter unless he finds it is not in proper form or does not meet the requirements set forth in this chapter or otherwise does not conform to the laws of Montana. If he disapproves an agreement, he shall provide a detailed, written statement to the governing bodies of the public agency and tribal government concerned, specifying the reasons for his disapproval.

(3) If the attorney general does not disapprove the agreement within 30 days after its submission to him, it shall be considered approved by him.

History: En. Sec. 5, Ch. 309, L. 1981.

**18-11-106. Repealed. Sec. 2, Ch. 38, L. 1985.**

History: En. Sec. 6, Ch. 309, L. 1981.

**18-11-107. Filing of agreement.** (1) Within 10 days after approval by the attorney general and signature of the parties, an agreement made pursuant to this chapter must be filed with:

(a) the area office of the bureau of Indian affairs of the United States department of the interior having trust responsibility for the tribe that is party to the agreement or its successor agency;

(b) each county clerk and recorder of each county where the principal office of one of the parties to the agreement is located, except as provided in (2) of this section;

(c) the secretary of state; and

(d) the affected tribal government.

(2) If a party to the agreement is a state agency, the agreement need not be filed with the county clerk and recorder for Lewis and Clark County.

History: En. Sec. 7, Ch. 309, L. 1981; and. Sec. 1, Ch. 38, L. 1985.

18-11-108. **Revocation of agreement.** An agreement made pursuant to this chapter is subject to revocation by any party upon 6 months' notice to the other unless a different notice period of time is provided for within the agreement. No agreement may provide for a notice period for revocation in excess of 5 years.

History: En. Sec. 8, Ch. 309, L. 1981.

18-11-109. **Authorization to appropriate funds for purpose of agreement.** Any public agency entering into an agreement pursuant to this chapter may appropriate funds for and may sell, lease, or otherwise give or supply material to any entity created for the purpose of performance of the agreement and may provide such personnel or services therefor as is within its legal power to furnish.

History: En. Sec. 9, Ch. 309, L. 1981.

18-11-110. **Specific limitations on agreements.** Nothing in this chapter may be construed to authorize an agreement that:

(1) is not permitted by federal law. However, the parties are encouraged to deal with substantive matters and enforcement matters that can be mutually agreed upon, but no such agreement may be considered to affect the underlying jurisdictional authority of any party unless expressly authorized by congress.

(2) authorizes a public agency or tribal government, either separately or pursuant to agreement, to expand or diminish the jurisdiction presently exercised by the government of the United States to make criminal laws for or enforce criminal laws in Indian country; or

(3) authorizes a public agency or tribal government to enter into an agreement except as authorized by their own organizational documents or enabling laws.

History: En. Sec. 10, Ch. 309, L. 1981; and Sec. 1, Ch. 81, L. 1985.

18-11-111. **Validity of existing agreements.** (1) Except as provided in subsection (2), this chapter does not affect the validity of any agreement entered into between a tribe and a public agency prior to July 1, 1981.

(2) However, any such agreement must satisfy the requirements of this chapter no later than July 1, 1983.

History: En. Sec. 11, Ch. 309, L. 1981.

**MONTANA CODE ANNOTATED**  
**TITLE 18. PUBLIC CONTRACTS**  
**CHAPTER 11. STATE-TRIBAL COOPERATIVE AGREEMENTS**  
**PART 1. GENERAL PROVISIONS**

Current through End of 1997 Reg. Sess.

18-11-112. Revenue account -- administrative account -- distribution of revenue

(1) The revenue collected by the state, a public agency, or a tribal government under a state-tribal cooperative agreement and the administrative expenses, if any, deducted under subsection (2) from the total revenue collected must be deposited in separate special revenue accounts.

(2) Administrative expenses deducted by the state, a public agency, or a tribal government for collection of revenue may not exceed the actual cost of collecting the revenue on a reservation or 5%, whichever is less. Money from an administrative account may be expended only for the purpose of administering the tax or fee imposed under the state-tribal cooperative agreement or for paying the costs incurred in terminating the agreement.

(3) Except for administrative expenses, if any, deducted under subsection (2), revenue collected by a public agency under a state-tribal agreement must be deposited in separate special revenue accounts and must be disbursed as provided for in the agreement. If a public agency that is a party to an agreement is a local government, the agreement must provide for the disposition of revenue.

(4) Money deposited in a state administrative expenses account and in a state special revenue account is statutorily appropriated, as provided in 17-7-502, to the department or public agency that is a party to a state-tribal cooperative agreement under 18-11-103, for the purpose of paying administrative expenses or paying to a tribe its portion of the tax or fee.

(5) If a tax or license or permit fee is collected or refunded pursuant to a state-tribal cooperative agreement, each party must receive its share as provided in the agreement, notwithstanding any contrary state statutory, public agency ordinance, or tribal ordinance distribution formula. For distribution of the remainder, the state statutory, public agency, or tribal distribution formula must apply as if the amount remaining after each party to the agreement receives its share were the total revenue collected from the tax or license or permit fee.

History: En. Sec. 4, Ch. 625, L. 1993.

< General Materials (GM) - References, Annotations, or Tables >

**NOTES, REFERENCES, AND ANNOTATIONS**

**Compiler's Comments**

**Effective Date -- Applicability:** Section 8, Ch. 625, L. 1993, provided: "[This act] is effective July 1, 1993, and applies to agreements entered into on or after July 1, 1993."

MCA 18-11-112

MT ST 18-11-112

END OF DOCUMENT



FORT PECK - MONTANA AGREEMENT  
ON DISTRIBUTION OF UNTAXED CIGARETTES  
ON THE FORT PECK RESERVATION

THIS AGREEMENT is entered into this 30th day of March, 1992, by and between the State of Montana, Department of Revenue, hereinafter referred to as "State" and Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, hereinafter referred to as "Tribes."

The Tribal Executive Board is the governing body of the Tribes and is authorized to enter into this Agreement by Article VII, Section 1, of the Tribes' Constitution.

The State is authorized to enter into this Agreement pursuant to ch. 697, Laws of 1991 and the State-Tribal Cooperative Agreements Act, § 18-11-101, MCA et seq.

The State and the Tribes agree as follows:

1. General purposes of agreement. The purposes of this agreement are to:

(a) ensure that persons on the Fort Peck Reservation who are not legally obligated to pay the state cigarette sales tax continue to be able to purchase cigarettes on the Reservation without paying the state tax; and

(b) ensure that the state cigarette sales tax is collected on cigarettes sold on the Fort Peck Reservation to persons who are legally obligated to pay the state tax.

2. Reservation Quota. The parties agree to establish a maximum annual quota of cigarettes to be sold tax free ("quota cigarettes") on the Fort Peck Reservation as follows. The annual quota shall initially be 60,000 cartons of cigarettes per calendar year. For 1992, the quota shall be prorated by the number of days from the effective date of this agreement to the end of the calendar year. The parties agree that the amount of the quota may be renegotiated at any time if either party gives notice to the other that it does not believe the quota accurately reflects the actual consumption of cigarettes by persons entitled to purchase cigarettes without paying state taxes. The parties shall have access to each other's records and the records of the retailers when renegotiating the amount of the quota. In order to be

effective for the next calendar year, a new quota must be renegotiated prior to November 30.

3. Shipment of cigarettes.

(a) The Tribes shall license each retailer on the reservation who it determines is entitled to receive quota cigarettes. It shall provide the State with the names of each retailer and the amount of quota cigarettes each retailer is authorized to receive for each calendar year. The information shall be provided at least 10 days before a new calendar year begins. The allocation for each retailer shall be the same as the previous calendar year unless changed by the Tribes. The State shall allow quota cigarettes to be shipped to each licensed cigarette retailer on the Fort Peck Reservation, in the amount designated by the Tribes for that retailer, from the distributor or distributors selected by each retailer. The distributors shall not collect the state tax on these quota cigarettes from the Tribally licensed retailer, but shall stamp the quota cigarettes and receive a refund of all prepaid taxes from the State. The quota cigarettes may be shipped at anytime during the year as designated by the retailers.

(b) The Tribes agree that by making available the agreed upon amount of quota cigarettes for sale on the Fort Peck Reservation, the State of Montana has fulfilled its legal obligation to make untaxed cigarettes available for purchase and consumption by persons on the Reservation entitled to purchase tax free cigarettes. It is agreed that no additional untaxed cigarettes need to be provided to the Reservation once the total quota amount has been shipped to the designated retailers on the Reservation for any calendar year.

4. Tribal law. The Tribes shall adopt and keep in force an ordinance enforcing the Reservation quota by prohibiting the sale of unstamped cigarettes and by prohibiting the sale of untaxed cigarettes to persons on the Reservation who are not entitled to purchase cigarettes without paying the state tax. In addition, the Tribes shall require licensed retailers to sell at or above the minimum prices that are set in state law, and require the Indian retailers to keep records of all sales of quota cigarettes. The

records shall include the names of all the persons who purchase tax exempt cigarettes, and the date and the amounts of all such purchases.

5. Effective date and term.

(a) This Agreement shall be effective the first day of the month following receipt by the parties of written notification that the State has adopted administrative rules and the Tribes have adopted an ordinance which specifically implements this Agreement.

(b) This Agreement shall remain in effect until January 1, 2002, and shall be automatically renewed for additional successive ten year terms if no action is taken by either party. However, this Agreement may be terminated at the end of any calendar year by either party by delivering written notice of termination to the other party on or before November 30. If the State or Tribes terminate any other agreement on taxes, either party may cancel this Agreement at any time after 30 days' written notice.

6. Amendments, renegotiation and renewal. This Agreement may be amended only by written instrument signed by both parties.

7. Reservation of rights and negative declaration. The State and Tribes have entered into this Agreement in part to resolve a legal dispute and avoid litigation. The parties agree that by entering into this Agreement, neither the State nor the Tribes shall deem to have waived any rights, arguments or defenses available in litigation on any subject. This Agreement is specifically not intended to reflect or be viewed as reflecting in this or any context either party's position with respect to the jurisdictional authority of the other. Nothing in this Agreement or in any conduct undertaken pursuant thereto shall be deemed as enlarging or diminishing the jurisdictional authority of either party except to the extent necessary to implement and effectuate the Agreement's terms. This Agreement, conduct pursuant thereto or conduct in the negotiations or renegotiations of this Agreement shall not be offered as evidence, otherwise referred to in any present or future litigation, or used in any way to further either party's equitable or legal position in any litigation. By entering into this Agreement, neither the State nor the Tribes are

forfeiting any legal rights to apply their respective taxes otherwise except as specifically set forth in this Agreement. This Agreement does not apply to any state tax collected other than the tax on cigarettes as provided in MCA, 1991. It does not apply to any other taxes or fees of any nature collected by the State. This Agreement does not apply to any other tax collected by any other agency or subdivision of the State of Montana.

8. Notices. All notices and other communications required to be given under this Agreement by the Tribes and the State shall be deemed to have been duly given when delivered in person or posted by United States certified mail, return receipt requested, with postage prepaid, addressed as follows:

(a) If to the Tribes:

Chairman  
Fort Peck Tribal Executive Board  
Post Office Box 1027  
Poplar, Montana 59255

(b) If to the State:

Director of Revenue  
Montana Department of Revenue  
Room 455, Mitchell Building  
Helena, Montana 59620

Notice shall be considered given on the date of mailing.

DATED this 30 day of March, 1992.

MONTANA DEPARTMENT OF REVENUE

Denis Adams  
DENIS ADAMS, Director

DATED this 19th day of MARCH, 1992.

ASSINIBOINE AND SIOUX TRIBES

Caleb Shields  
CALEB SHIELDS  
Chairman, Tribal Council  
Reservation



FORT PECK - MONTANA  
ALCOHOLIC BEVERAGES TAX  
AGREEMENT

THIS AGREEMENT is entered into this 30<sup>th</sup> day of March, 1992, by and between the State of Montana, Department of Revenue, hereinafter referred to as "State" and Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, hereinafter referred to as "Tribes."

The Tribal Executive Board is the governing body of the Tribes and is authorized to enter into this Agreement by Article VII, Section 1, of the Tribes' Constitution.

It is understood that this agreement is not effective until specifically authorized by the 1993 Montana Legislature.

The State and the Tribes agree as follows:

1. General purposes of agreement. The purposes of this agreement are to avoid legal controversy and possible litigation over the taxation on the sale of alcoholic beverages within the exterior boundaries of the Fort Peck Indian Reservation (hereinafter referred to as "Reservation"), to avoid dual taxation of such sales of alcoholic beverages by both the Tribes and the State, and to ensure that the same level of taxation is imposed on the sale of alcoholic beverages both within and outside the boundaries of the Reservation.

2. State law. The State imposes taxes on sales of alcoholic beverages by all persons within the State's jurisdiction under Part 4, Chapter 1, Title 16, Montana Code Annotated, including the liquor excise tax, §§ 16-1-401 through 405, MCA, and the beer and wine taxes, §§ 16-1-406 through 411, MCA. The State shall notify the Tribes in writing of any changes or amendments to these provisions which the State believes necessitate an amendment to tribal law under this agreement.

3. Tribal law. The Tribes shall adopt and keep in force an ordinance imposing taxes equal to the Montana liquor excise tax and beer and wine taxes, which taxes shall apply to liquor, beer and wine sold to all persons within the Tribes' jurisdiction on the Reservation in a manner similar to the Montana taxes. The Tribes shall supply the State with a current copy of this ordinance as it may be amended from time to time to substantially conform to state law.

4. Collection and administration of taxes. The State and the Tribes agree that alcoholic beverages sold on the Reservation shall not be subject to both the state tax and tribal tax, but shall be subject to one tax. The State agrees to collect both taxes on the Reservation and to remit to the Tribes the tribal liquor and beer and wine tax collected on liquor and beer and wine sold on the Reservation as determined by the formulas described below.

(a) The total amount of remittance distributed to the Tribes shall be:

(i) Liquor: The Tribes will receive forty percent (40%) of the total taxes collected on the sale of liquor on the Reservation determined by sales of liquor from retail liquor distributors on the Reservation for each calendar quarter; and

(ii) Beer and Wine: The Tribes will receive forty percent (40%) of the total taxes collected on beer and wine consumed on the Reservation. The amount so consumed will be determined by multiplying the total population of the Reservation as determined by the 1990 census by the tax on the per capita consumption per quarter of beer and wine in Montana as determined by the State for the preceding calendar year, and then multiplying the resulting sum by .40.

(b) The State shall distribute the moneys due to the Tribes under this Agreement no later than thirty days from the end of each calendar quarter. The State will include with each distribution a statement showing how the distribution was determined for that quarter.

(c) Distributions will start within thirty days from the end of the first whole calendar quarter after the effective date of this Agreement and continue until the expiration or the termination of this Agreement as provided Paragraph 5 or required by law. For the purposes of this Agreement a calendar quarter begins on January 1, April 1, July 1 or October 1 of each year.

(d) The amount payable to the Tribes shall be in the form of a warrant issued by the State of Montana payable to the Tribes and sent to the Chairman of the Tribes.

5. Term. This Agreement shall be for a term of nine years from the effective date, subject to the renewal provision of paragraph 8 unless terminated in writing by either party upon written notice to the other. This Agreement shall automatically remain in effect for each successive calendar quarter beyond its term if neither party terminates the Agreement as provided above or if the parties fail to renew the Agreement as provided in paragraph 8 of this Agreement. Remittance of funds by the State to the Tribes in the event of termination of the Agreement shall be as follows:

(a) If written notice of termination is given by the State or the Tribes more than thirty days prior to the end of the calendar quarter, the State shall be obligated to remit the full amount payable to the Tribes for the calendar quarter in which the notice of termination is given.

(b) If written notice of termination is given by the Tribes less than thirty days prior to the end of the calendar quarter, the State shall be obligated to remit the full amount payable to the Tribes for the calendar quarter in which the notice of termination is given.

(c) If the written notice of termination is given by the State less than thirty days prior to the end of the calendar quarter, the State shall be obligated to remit the full amount payable to the Tribes for the next calendar quarter following notice.

The obligations stated in subparagraphs (a) through (c) shall survive any termination of this Agreement.

6. Audits. Either party may examine or audit the records of the other party to determine the accuracy of the statements or representations called for in this Agreement. The right of examination or audit shall exist during the term of the Agreement and for a period one year after the date of any termination or expiration of this Agreement.

7. Effective date. If approved by the Montana Legislature, this Agreement shall be effective on the 1st day of July, 1993, or the first day of the whole calendar quarter following the initial effective date of the tribal ordinance required under Paragraph 3, whichever shall last occur.

8. Amendments, renegotiation and renewal.

(a) This Agreement may be amended only by written instrument signed by both parties.

(b) Six months prior to expiration of the initial nine year term provided in paragraph 5 of this Agreement, the parties shall meet to negotiate in good faith a renewal of the Agreement.

9. Reservation of rights and negative declaration. The State and Tribes have entered into this Agreement in part to resolve a legal dispute and avoid litigation. The parties agree that by entering into this Agreement, neither the State nor the Tribes shall be deemed to have waived any rights, arguments or defenses available in litigation on any subject. This Agreement is specifically not intended to reflect or be viewed as reflecting in this or any context either party's position with respect to the jurisdictional authority of the other. Nothing in this Agreement or in any conduct undertaken pursuant thereto shall be deemed as enlarging or diminishing the jurisdictional authority of either party except to the extent necessary to implement and effectuate the Agreement's terms. This Agreement, conduct pursuant thereto or conduct in the negotiations or renegotiations of this Agreement shall not be offered as evidence, otherwise referred to in any present or future litigation, or used in any way to further either party's equitable or legal position in any litigation. By entering into this Agreement, neither the State nor the Tribes are forfeiting any legal rights to apply their respective taxes except as specifically set forth in this Agreement. This Agreement does not apply to any state tax collected other than the tax on liquor and beer and wine as provided in §§ 16-1-401 through 411, MCA, 1991. It does not apply to any other taxes or fees of any nature collected by the State. This Agreement does not apply to any other tax collected by any other agency or subdivision of the State of Montana.

10. Notices. All notices and other communications required to be given under this Agreement by the Tribes and the State shall be deemed to have been duly given when delivered in person or posted by United States certified mail, return receipt requested, with postage prepaid, addressed as follows:

FORT PECK TRIBES - ALCOHOL TAX AGREEMENT 3 OF 4

(a) If to the Tribes:

Chairman  
Fort Peck Tribal Executive Board  
Post Office Box 1027  
Poplar, Montana 59255

(b) If to the State:

Director of Revenue  
Department of Revenue  
Room 455, Mitchell Building  
Helena, Montana 59620

Notice shall be considered given on the date of mailing.

DATED this 30 day of March, 1992.

MONTANA DEPARTMENT OF REVENUE

*Denis Adams*  
DENIS ADAMS, Director

DATED this 19th day of MARCH, 1992.

ASSINIBOINE AND SIOUX TRIBES

*Caleb Shields*  
CALEB SHIELDS  
Chairman, Tribal Council  
Reservation



FORT PECK-MONTANA  
GASOLINE TAX  
AGREEMENT

THIS AGREEMENT is entered into this 26<sup>th</sup> day of March, 1992, by and between the State of Montana, Department of Transportation, hereinafter referred to as "State" and Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, hereinafter referred to as "Tribes".

The Tribal Executive Board is the governing body of the Tribes and is authorized to enter into this Agreement by Article VII, Section 1, of the Tribes' Constitution.

The State is authorized pursuant to ch. 772, Laws of 1991 and the State-Tribal Cooperative Agreements Act, § 13-11-101, MCA et seq. to enter into an agreement in writing with any one or more tribal governments with respect to taxes on gasoline motor fuels.

The State and the Tribes agree as follows:

1. General purposes of agreement. The purposes of this agreement are to avoid legal controversy and possible litigation over the taxation of gasoline within the exterior boundaries of the Fort Peck Indian Reservation (hereinafter referred to as "Reservation"), to avoid dual taxation of gasoline by both the Tribes and the State, and to ensure that the same level of taxation is imposed on distribution of gasoline both within and outside the boundaries of the Reservation.

2. State law. The State imposes a tax on gasoline distributed within the State's jurisdiction under Part 2, Chapter

70, Title 15, Montana Code Annotated. The State shall notify the Tribes in writing of any changes or amendments to these statutes which the State believes necessitate an amendment to tribal law under this agreement.

3. Tribal law. The Tribes shall adopt and keep in force an ordinance imposing taxes equal to the Montana gasoline license tax, which tax shall apply to gasoline sold to all persons within the Tribes' jurisdiction on the Reservation in a manner similar to the Montana taxes. The Tribes shall supply the State with a current copy of this ordinance as it may be amended from time to time to substantially conform to state law.

4. Collection and administration of taxes. The State and the Tribes agree that gasoline sold on the Reservation shall not be subject to both the state tax and the tribal tax, but shall be subject to one tax. The State agrees to collect all gasoline taxes on the Reservation and to remit to the Tribes the tribal gasoline tax collected on gasoline sold on the Reservation as determined by the formulas described below.

(a) The total amount of remittance distributed to the Tribes in each calendar quarter shall be as follows:

(i) Until the Montana Legislature and Tribal Executive Board shall both enact legislation requiring all service stations on the Reservation to report all sales of gasoline to the Department of Transportation, the Tribes shall receive the following amount:

79 percent of the average per capita gasoline license taxes paid after the average per

capita agricultural refunds, both as last calculated by the Montana Department of Transportation on an annual basis, multiplied by the number of enrolled tribal members residing on the Fort Peck Reservation as last certified by the Billings Area Office of the Bureau of Indian Affairs.

(ii) The Tribes shall enact, and the Tribes and the State shall support enactment by the Montana legislature of, legislation to require all service stations on the Reservation to report all sales of gasoline to the Department of Transportation. Beginning with the first full calendar quarter after the effective date of that legislation, the Tribes shall receive forty percent (40%) of the gasoline taxes actually collected on the Reservation.

(b) The State shall distribute the moneys due to the Tribes under this Agreement no later than thirty days from the end of each calendar quarter. The State will include with each distribution a statement showing how the distribution was determined for that quarter.

(c) Distributions will start within thirty days from the end of the first whole or partial calendar quarter after the effective date of this Agreement and continue until the expiration or the termination of this Agreement as provided in Paragraph 5 or required by law. For the purposes of this Agreement a calendar quarter begins on January 1, April 1, July 1 or October 1 of each year.

(d) The remittance amount payable to the Tribes shall be in the form of a warrant issued by the State of Montana payable to the Tribes and mailed to the Chairman of the Tribes.

5. Term. This Agreement shall be for a term of nine years, subject to the renewal provision of paragraph 3, unless terminated in writing by either party upon not less than thirty days' written notice to the other. In the event of termination by the State prior to the end of the term, the State shall be obligated to remit the full amount payable to the Tribes provided for in this Agreement for that period of time up to and including the effective date of termination. This obligation of the State shall survive any termination of this Agreement.

6. Audits. Either party may examine or audit the records of the other party to determine the accuracy of the statements or representations called for it in this Agreement. The right of examination or audit shall exist during the term of the Agreement and for a period of one year after the date of any termination or expiration of this Agreement.

7. Effective date. Subject to approval by the Revenue Oversight Committee and the Attorney General this Agreement shall be effective on the 1st day of March, 1992, so long as the tribal ordinance described in Paragraph 3 is adopted by the Tribal Executive Board during March 1992. Otherwise, the Agreement shall become effective on the 1st day of April 1992.

8. Amendments, renegotiation and renewal.

(a) This Agreement may be amended only by written instrument signed by both parties.



(b) Six months prior to expiration of the initial nine year term of this Agreement, the parties shall meet to negotiate in good faith a renewal of the Agreement for an additional ten year term, and thereafter shall meet to negotiate successive ten year renewals of the Agreement. The parties in each negotiation of a renewal term shall seek to agree on a percentage for distributing tax revenues on substantially the same basis as the one provided in Paragraph 4(a)(ii), in light of the circumstances existing at that time, including: (i) the total population and Indian population of the Reservation as determined by the latest decennial census, (ii) the population of Indians residing on the Reservation who are enrolled in the Assiniboine and Sioux Tribes, (iii) the portion of state tax revenues distributed to local governments, and (iv) the administrative costs to the State of collecting both taxes and distributing the Tribes' share to the Tribes.

9. Reservation of rights and negative declaration. The State and Tribes have entered into this Agreement in part to resolve a legal dispute and avoid litigation. The parties agree that by entering into this Agreement, neither the State nor the Tribes shall be deemed to have waived any rights, arguments or defenses available in litigation on any subject. This Agreement is specifically not intended to reflect or be viewed as reflecting in this or any context either party's position with respect to the jurisdictional authority of the other. Nothing in this Agreement or in any conduct undertaken pursuant thereto shall be deemed as enlarging or diminishing the jurisdictional authority of either party except to the extent necessary to implement and effectuate the Agreement's terms. This Agreement,

conduct pursuant thereto or conduct in the negotiations or renegotiations of this Agreement shall not be offered as evidence, otherwise referred to in any present or future litigation, or used in any way to further either party's equitable or legal position in any litigation. By entering into this Agreement, neither the State nor the Tribes are forfeiting any legal rights to apply their respective taxes except as specifically set forth in this Agreement. This Agreement does not apply to any state tax collected other than the gasoline license tax as provided in Sections 15-70-201 through 216, MCA, 1991. It does not apply to any other taxes or fees of any nature collected by the State. This Agreement does not apply to any other tax collected by any other agency or subdivision of the State of Montana.

10. Notices. All notices and other communications required to be given under this Agreement by the Tribes and the State shall be deemed to have been duly given when delivered in person or posted by United States certified mail, return receipt requested, with postage prepaid, addressed as follows:

(i) If to the Tribes:

Chairman  
Fort Peck Tribal Executive Board  
Post Office Box 1027  
Poplar, Montana 59255

(ii) If to the State:

Director of Transportation  
2701 Prospect Avenue  
Helena, MT 59620

Attorney General of the State of Montana  
215 North Sanders  
Helena, MT 59601-1401

Notice shall be considered given on the date of mailing.

APPROVED PURSUANT to § 13-11-105, MCA (1991).

DATED this 26<sup>th</sup> day of March, 1992.

STATE OF MONTANA

Marc Racicot  
Marc Racicot, Attorney General

John Rothwell  
John Rothwell  
Director of Transportation

ASSINIBOINE AND SIOUX TRIBES

Caleb Shields  
Caleb Shields, Chairman  
Tribal Executive Board

RESOLUTION #606-92-3

TRIBAL GOVERNMENT

WHEREAS, the Fort Peck Tribal Executive Board is the duly elected body representing the Assiniboine and Sioux Tribes of the Fort Peck Reservation and is empowered to act on behalf of the Tribes. All actions shall be adherent to provisions set forth in the 1960 Constitution and By-Laws, and

WHEREAS, the Tribes have negotiated a Gasoline Tax Agreement with the State of Montana, Now

THEREFORE, BE IT RESOLVED that the Tribes hereby approve and adopt the Fort Peck Montana Gasoline Tax Agreement, and

BE IT FURTHER RESOLVED that the Tribal Chairman is hereby authorized to execute the Agreement on behalf of the Tribes.

### C E R T I F I C A T I O N

I, the undersigned Secretary Accountant of the Tribal Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, hereby certify that the Tribal Executive Board is composed of 12 voting members of whom 12 constituting a quorum were present at a Special meeting duly called and convened this 2th day of March, 1992, that the foregoing resolution was duly adopted at such meeting by the affirmative vote of 8 for 4 opposed.

*Paula Brien*

Paula Brien, Secretary/Acct.

APPROVED:

*David H. H. H. H.*  
Chairman/Vice Chairman  
Tribal Executive Board

Wyman Babby, Superintendent  
Fort Peck Agency



RESOLUTION #609-92-3

TRIBAL GOVERNMENT

WHEREAS, the Fort Peck Tribal Executive Board is the duly elected body representing the Assiniboiné and Sioux Tribes of the Fort Peck Reservation and is empowered to act on behalf of the Tribes. All actions shall be adherent to provisions set forth in the 1960 Constitution and By-Laws, and

WHEREAS, the Tribes have negotiated a Gasoline Tax Agreement with the State of Montana, and

WHEREAS, the Tribes have approved and adopted the Fort Peck Montana Gasoline Tax Agreement, Now

THEREFORE, BE IT RESOLVED that the Tribes hereby approve and adopt the following Chapter 4, Basic Gasoline License tax, which shall be added to and amend the Comprehensive Code of Justice of the Assiniboiné and Sioux Tribes of the Fort Peck Reservation Title XVII Taxation.

### C E R T I F I C A T I O N

I, the undersigned Secretary Accountant of the Tribal Executive Board of the Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation, hereby certify that the Tribal Executive Board is composed of 12 voting members of whom 12 constituting a quorum were present at a Special meeting duly called and convened this 9th day of March, 1992, that the foregoing resolution was duly adopted at such meeting by the affirmative vote of 8 for 4 opposed.

*Paula Brien*

Paula Brien, Secretary/Acct.

APPROVED:

*Barth Thiel*

Chairman/Vice Chairman  
Tribal Executive Board

Wyman Babby, Superintendent  
Fort Peck Agency

The following chapter shall be added to and amend the Comprehensive Code of Justice of the Assiniboine and Sioux Tribes of the Fort Peck Reservation Title XVII - Taxation.

Chapter 4. Basic Gasoline License Tax

- Sec. 401 Definitions
- Sec. 402 Tax Imposed
- Sec. 403 Distributor's statement and payment
- Sec. 404 Recordkeeping requirements
- Sec. 405 Invoice of distributors
- Sec. 406 Examination of records
- Sec. 407 Tax penalty for delinquency

## BASIC GASOLINE LICENSE TAX

Sec. 401. Definitions. As used in this chapter, unless otherwise noted, the following definitions apply:

(1) "State" means the State of Montana, Department of Transportation.

(2) "Agreement" means the Fort Peck-Montana Gasoline Tax Agreement.

(3) "Distributor" means any person who maintains a valid distributor license with the State; and

(i) who engages in the business within the Reservation of producing, refining, manufacturing, or compounding gasoline for sale, use, or distribution; or,

(ii) who imports gasoline for sale, use or distribution; or,

(iii) who engages in the wholesale distribution of gasoline within the Reservation.

(4) "Gasoline" includes all products commonly or commercially known or sold as gasolines, including casinghead gasoline, natural gasoline, and all flammable liquids composed of a mixture of selected hydro-carbons expressly manufactured and blended for the purpose of effectively operating internal combustion engines.

(5) "Import" means to receive into any person's possession or custody first after its arrival and coming to rest at destination within the Reservation of any gasoline shipped or

transported into this Reservation from a point of origin outside this Reservation other than in the fuel supply tank of a motor vehicle.

(6) "Person" means any person, firm, association, joint-stock company, syndicate, or corporation.

(7) "Use" includes and means the operation of motor vehicles upon the public roads or highways of the Reservation

Sec. 402. Tax Imposed. Every distributor shall pay a Tribal license tax for the privilege of engaging in and carrying on business on the Reservation in an amount equal to 20 cents for each gallon of all gasoline distributed by him within the Reservation, and upon which the gasoline tax has not been paid by any other distributor. Pursuant to the Agreement, this tax shall be collected by the State.

Sec. 403. Distributor's statement and payment. Each distributor shall, not later than the 25th day of each calendar month, render a true statement, duly signed, to the State of all gasoline distributed and received by him within the Reservation during the preceding calendar month and containing any other information the Tribes or the State may reasonably require in order to administer this tribal gasoline license tax law. Where the distributor has not separately paid the state gasoline license tax with respect to such gasoline, the statement must be accompanied by a payment in an amount equal to the tax imposed by Sec. 402, less any per



capita agricultural refund credit issued pursuant to the Agreement and less 1% of the total tax that may be deducted by the distributor as an allowance for evaporation and other loss of gasoline distributed by the distributor.

**Sec. 404. Recordkeeping requirements.**

(a) Each distributor, retail service station owner, or any other person dealing in, transporting, receiving, or storing gasoline shall keep for a period not to exceed three years such records, receipts, invoices, and statements (required under Sec. 403) and any other pertinent papers and information as the Tribes or State may require.

(b) Retail service station owners within the Reservation are hereby required to maintain a record of total purchases and sales of gasoline and total taxes paid to all distributors of gasoline on a quarterly basis, and to report the same to the State within 25 days after the close of each calendar quarter.

**Sec. 405. Invoice of distributors.** Each distributor operating on the Reservation, shall at the time of delivery, except where authorized by the Tribes, issue to the purchaser an invoice in which shall be stated the number of gallons of gasoline covered by such invoice.

**Sec. 406. Examination of records.** The Tribes, or its authorized representative is hereby empowered to examine all pertinent

books, papers, records, and equipment of any gasoline distributor or retail service station owner operating on the Reservation.

Sec. 407. Tax penalty for delinquency.

(1) Any license tax not paid within the time provided shall be delinquent, and a penalty of 10% shall be added to the tax, and in addition the tax shall bear interest at the rate of 1% per month from the date of delinquency until paid. Upon a showing of good cause by the distributor, the Tribes may waive the penalty.

(2) If any distributor or other person subject to the payment of such license tax shall willfully fail, neglect, or refuse to make any statement required by this Chapter or shall willfully fail to make payment of such license tax within the time provided, the Tribes shall be authorized to revoke any license to engage in and carry on business on the Reservation.

(3) In addition, the Tribes shall inform itself regarding the matters required to be in any such statement and determine the amount of the license tax due the Tribes from such distributor and shall add thereto a penalty of \$25.00 or 10% thereof, whichever is greater, together with interest at the rate of 1% per month from the date such statements should have been made and said license tax paid.

(4) The Tribes shall proceed to collect such license tax, with penalties and interest. The Tribes may commence and prosecute to final determination in any court of competent jurisdiction an action to collect such license tax.

## CHAPTER 370

### TOBACCO: LICENSES AND TAXES

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#### GENERAL PROVISIONS

**370.010 Definitions.** As used in this chapter, unless the context otherwise requires:

1. "Commission" means the Nevada tax commission.
2. "Department" means the department of taxation.

(Supplied in codification)

### **CIGARETTES**

#### **370.020 Application for subsidiary place of business.**

1. A cigarette wholesaler may maintain a warehouse for keeping merchandise on hand at another place than the established principal place of business, by listing the subsidiary place of business with the department.
2. Application must be made to the department for each subsidiary location and the application must specify the location by street and number.

[Tax Comm'n, Cigarette Tax Reg. part No. 2, eff. 6-7-68; A by Dep't of Taxation, 10-22-75]

#### **370.030 Conditions for use of stamping machine by dealer.**

1. The privilege of using a stamping machine to apply cigarette revenue stamps will be granted to licensed wholesale cigarette dealers upon written request to the department subject to compliance with the following terms:
  - (a) Cigarette revenue stamps applied by machines must be approved by the department with the security codes provided by the manufacturer.
  - (b) Only cigarettes bearing clear and legible cigarette revenue stamps may be distributed by wholesale dealers.
  - (c) Cigarette revenue stamps may only be applied by machines owned or leased by the licensed wholesale dealer for which a security code has been provided to the department.
  - (d) All cigarette revenue stamps applied upon packages must be of a special type devised and specified for the machines by the manufacturer. All cigarette revenue stamps must be applied on the bottom of the original package.
  - (e) The design of the cigarette revenue stamp must be that particular design approved by the department.
  - (f) All wholesale dealers permitted to use stamping machines must take every reasonable precaution to prevent the theft of, unauthorized use of or tampering with the machines.
  - (g) All repairs to the machine must be made by an authorized representative of the manufacturer.



(h) All equipment must be serviced and cleaned according to the instructions issued by the manufacturer of the machine.

(i) All cigarette revenue stamps must be purchased from an authorized agent or representative of the department.

2. Upon the failure of any licensed wholesale dealer to fully comply with subsection 1, the permission to use the machines will be summarily withdrawn and the dealer will be required to affix water decal stamps until such time as he satisfies the department that the provisions of subsection 1 have been met and will be fully complied with in the future.

[Tax Comm'n, Cigarette Tax Reg. part No. 4, eff. 4-24-69; A by Dep't of Taxation, 1-1-76]—(NAC A by Tax Comm'n, 7-18-88)

### **370.100 Placement of cigarettes in vending machines; inspection of machines by department.**

1. All packages or packets of cigarettes in each vending machine which has an opening or transparent panel through which a sampling of all of the brands of cigarettes are visible must be placed in the machine so that the cigarette revenue stamp is visible from the front of the machine.

2. On demand, an operator of cigarette vending machines shall allow any authorized representative of the department to accompany any employee of the operator on his route, during business hours and on working days, and the employee or operator shall open vending machines in control of the operator for inspection by the representative of the department.

[Tax Comm'n, Cigarette Tax Reg. part No. 3, eff. 1-18-69; A by Dep't of Taxation, 10-22-75]—(NAC A by Tax Comm'n, 7-18-88)

### **370.110 Security for payment of tax.**

1. The department will accept an undertaking or obligation vesting in the State of Nevada an interest in real property which is located within this state, constituting a lien on the real property pledged for the payment of the tax due pursuant to NRS 370.165 in the amount prescribed by the department as security for the tax.

2. Upon the discontinuance of the business for which the security was required and the payment of all amounts due including taxes, penalties and interest, the department will file a notice in the office of the county recorder removing the lien on the property.

3. If any amount due is not paid to the state, the department will request that judgment be entered against the person who pledged the property.

4. A taxpayer who has pledged property as security for the payment of the tax may furnish other security for the tax as prescribed by the department. If the taxpayer furnishes other security, the

department will file a notice in the office of the county recorder removing the lien on the property

[Tax Comm'n, Cigarette Tax Reg. No. 1, eff. 6-7-68, A by Dep't of Taxation, 10-22-75]—(NAC A 10-10-83)

### **370.120 Receipt of reports, returns and remittances sent by mail.**

1. Any report, return or remittance to cover a payment required by NRS 370.001 to 370.430, inclusive, which is transmitted through the United States mail, shall be deemed filed or received on the date shown by the postmark stamped upon the envelope containing it, as provided in NRS 238.100, or on the date it was mailed if other proof satisfactory to the commission establishes that it was timely deposited in the United States mail, postage prepaid and properly addressed to the commission

2. The date on a receipt for material sent by certified or registered mail, if different from the postmark, prevails if the date on the receipt is earlier than the date of the postmark.

3. A record authenticated by the post office that the postmark on certain batches of mail was erroneous is proof satisfactory to the commission that the mailing was made on a date other than the date of the postmark.

4. If it is known that the postal service was inoperative at a certain time because of a strike, riot, warfare or act of God or for some other reason, the commission will consider the circumstances, and if there is other evidence of timely mailing, will accept the evidence and deem the return or payment timely

5. A postmark affixed by a postage meter in the possession of the taxpayer or other person outside the post office will be disregarded as proof of the date mailed whenever it is contradicted by an official postmark stamped upon the envelope containing the payment. Unless corroborated, statements by a taxpayer or his employees are not sufficient to refute the postmark as the date of mailing.

[Tax Comm'n, Cigarette Tax Reg. part No. 6, eff. 7-24-70, A 10-9-71]—(NAC A by Dep't of Taxation, 10-10-83)

## **OTHER PRODUCTS MADE FROM TOBACCO**

**370.140 Wholesale dealer to notify department of intent to sell taxable product.** A wholesale dealer in products made from tobacco, other than cigarettes, shall notify the department of his intention to sell such products in this state before making any sales. The notification must be given on a form provided by the department.

(Added to NAC by Dep't of Taxation, eff. 10-10-83)

**370.150 Indicating tax on invoice; tax not to be charged to retail dealer as separate item.** A wholesale dealer in products made from tobacco, other than cigarettes, shall indicate on his invoices of sale the amount of the tax he is required to pay pursuant to NRS 370.450 as a part of the total price of those products. This amount must not be charged to the retail dealer as a separate item.

(Added to NAC by Dep't of Taxation, eff. 10-10-83)

**370.160 Payment of tax; monthly return.**

1 The tax imposed by NRS 370.450 must be paid to the department on or before the 20th day of each month for sales made during the preceding month.

2 Each wholesale dealer shall submit with his payment a return on a form provided by the department. If a wholesale dealer does not make a taxable sale during the preceding month, he shall file a return with the department indicating this fact.

(Added to NAC by Dep't of Taxation, eff. 10-10-83)

**SALES ON INDIAN RESERVATIONS AND COLONIES**

**370.210 Sales by tribe that imposes tax equal to or greater than state tax.**

1 A tribe that is located and sells and delivers cigarettes or other products made from tobacco on an Indian reservation or colony whose governing body has imposed and is enforcing an excise tax on the products being sold at a rate which is equal to or greater than the rate of the tax imposed by the state on the same products shall furnish the department a copy of the tribal ordinance which imposes the tribal tax.

2 The tribal tax must be applicable to at least all consumers who would otherwise be taxed under NRS 370.001 to 370.430, inclusive, and be actually collected whether or not the retail establishment from which the cigarettes or other products made from tobacco are sold is owned by the tribe.

3 The department will presume that the tax is being imposed and actually enforced by the tribe if the retail price of the cigarettes or other products made from tobacco exceeds the wholesale price charged to the tribe by an amount which is at least equal to the tax.

4 Except as otherwise provided in NRS 370.240 and 370.255, the tribe is not required to maintain any records of cigarettes received, sold or distributed by the tribe on that reservation or colony.

[Dep't of Taxation, Cigarette Tax Reg. No. 9, eff. 5-26-78]\_(NAC A 10-10-83, A by Tax Comm'n, 9-16-92)—(Substituted in revision for NAC 370.050)

**370.220 Purchase of tobacco by retail dealers; application for refund of precollected sales tax.**

1. Retail dealers who are located and sell and deliver cigarettes on an Indian reservation or colony shall purchase all of the cigarettes or other products made from tobacco that are to be sold and delivered on the reservation or colony from a licensed wholesale dealer who has precollected the state tax on the cigarettes and other products.

2. If a tribal tax has been imposed on the cigarettes and other products made from tobacco, the tribe may apply for a refund of the precollected tax pursuant to NRS 370.280 or 370.503 and NAC 370.230.

[Dep't of Taxation, Cigarette Tax Reg. part No. 8, eff. 5-26-78]—(NAC A by Tax Comm'n, 9-16-92)—(Substituted in revision for NAC 370.060)

**370.230 Refund of precollected state tax: Procedure; rate.**

1. As used in this section, unless the context otherwise requires:

(a) "Department" means the department of taxation of the State of Nevada.

(b) "Governing body" means the governmental entity that has the authority to make decisions for a tribe, commonly known as a tribal government.

(c) "Month" means a calendar month.

(d) "Reservation" means an Indian reservation, Indian colony or lands set aside for the use and occupancy of a tribe.

(e) "Retail dealer" means any person, other than a wholesale dealer or a smokeshop owned by a tribe, who is located on a reservation and who offers to sell or who is engaged in selling cigarettes, other tobacco products or both of them at retail on the reservation.

(f) "Tribe" means any Indian tribe, Indian band, Indian colony or group of Indians recognized by the Federal Government as possessing a government-to-government relationship with the United States.

2. Upon application being made by a governing body which meets the requirements of this section, the department shall refund to the governing body the tobacco taxes collected by the state on sales of tobacco to retail dealers in accordance with NRS 370.280 and 370.503.

3. A refund made pursuant to this section must be made at the tax rate less any discounts allowed for a tobacco wholesaler or importer.

4. Except as otherwise provided in subsection 6, only the governing body may apply for refunds of taxes on sales of cigarettes or other tobacco products to retail dealers. Each application for a refund



must be made for all sales which occurred during not less than 1 month. The application must include

- (a) The amount of tobacco purchased by retail dealers during the month or months for which the refund is requested;
- (b) The name and location of the wholesaler or importer from whom the tobacco was purchased; and
- (c) The county or counties where the retail dealers are located, and the quantity of tobacco purchased by retail dealers located in each county.

5. The governing body shall maintain, and provide to the department upon request, documentation substantiating all refunds requested. The documentation must include:

- (a) Identification of the purchasers of tobacco as retail dealers, by name and address;
- (b) For each transaction for which a refund is requested, the:
  - (1) Name and address of the retail dealer;
  - (2) Price paid;
  - (3) Quantity purchased; and
  - (4) Date of sale; and

(c) Such other information as the department determines is reasonably necessary to document that a purchase qualifies for a refund pursuant to this section.

6. If a governing body fails to maintain the records required by this section, files a fraudulent refund request or refuses to transmit to the department information required pursuant to this section, the department may alter the refund procedure authorized by this section and, in lieu thereof, make direct refunds to a retail dealer who:

- (a) Is located on the reservation;
- (b) Purchases tobacco;
- (c) Pays the applicable tax imposed on the tobacco by the tribe; and
- (d) Complies with the requirements of this section that are applicable to governing bodies

(Added to NAC by Tax Comm'n, eff. 5-27-92)

**Reviser's Note.**

The regulation of the Nevada tax commission filed with the secretary of state on May 27, 1992, the source of this section, became effective on that date and contains the following provision not included in NAC

"Section 2 of this regulation does not apply to claims for refunds filed for periods commencing before the effective date of this regulation."

**370.240 Refund of precollected state tax: Effect of provisions.** NAC 370.230 does not limit state statutes regarding the sale of cigarettes or other tobacco products, including, without limitation, chapter 370 of NRS, and is not a waiver of the sovereign powers of tribes.

(Added to NAC by Tax Comm'n, eff. 5-27-92)

**370.250 List of tribes eligible to purchase cigarettes with tribal tax stamps affixed and other products exempt from state tax.** The department will, as frequently as it deems necessary, publish and distribute to all licensed cigarette wholesale dealers a list of all tribes that are eligible to purchase:

1. Cigarettes to which tribal tax stamps are affixed instead of state tax stamps; and
2. Other products made from tobacco, exempt from the tax imposed by the state on products made from tobacco.

[Dep't of Taxation, Cigarette Tax Reg. part No. 8, eff. 5-26-78]—(NAC A by Tax Comm'n, 9-16-92)—(Substituted in revision for NAC 370.090)

## CHAPTER 365 TAXES ON FUELS

### GENERAL PROVISIONS

**365.010** Discount for costs of collection and handling losses not allowed if return, remittance filed late. 3

**365.020** Proof of date of mailing of reports, returns and remittances. 3

### FUEL FOR JET OR TURBINE-POWERED AIRCRAFT

**365.040** Remittance of excise tax: Form. 3

### REFUNDS

**365.060** Indian tribes. 3

### GENERAL PROVISIONS

**365.010 Discount for costs of collection and handling losses not allowed if return, remittance filed late.**

1 Except as provided in subsection 2, if the return, report or statement is not filed together with a remittance for the amount of the tax due, on or before the 25th day of each calendar month, the discount provided by NRS 365.330 will not be allowed.

2 A statement, report or return which is filed pursuant to an extension granted under NRS 365.170 shall be deemed to be punctually rendered for the purpose of the discount.

[Tax Comm'n, Motor Vehicle Fuel Tax Ruling part No. 1, eff. 7-24-70; A 10-9-71]

**365.020 Proof of date of mailing of reports, returns and remittances.**

1. A receipt for material sent by certified or registered mail, if different than the post office cancellation mark, will prevail if the date on the receipt is earlier than the cancellation date

2. A record authenticated by the post office that the cancellation date on certain batches of mail was erroneous is proof satisfactory to the department of taxation that the mailing was made on a date other than the post office cancellation date.

3 If it is known that the postal service was inoperative at a certain time due to strikes, riots, warfare, acts of God or other reasons, the department will consider the circumstances, and if there is other

evidence of timely mailing, will accept the evidence and deem the return or payment timely

4. The cancellation date affixed by a postage meter in the possession of the taxpayer or other person will be disregarded as proof of the date of mailing whenever it is contradicted by an official post office cancellation mark stamped upon the envelope containing it.

5. Statements by a taxpayer or his employees, alone, will not be sufficient to refute the post office cancellation date as the date of mailing.

[Tax Comm'n, Motor Vehicle Fuel Tax Ruling part No. 1, eff. 7-24-70; A 10-9-71]

### **FUEL FOR JET OR TURBINE-POWERED AIRCRAFT**

**365.040 Remittance of excise tax: Form.** A dealer's payment of the 1-cent excise tax per gallon of fuel for jet or turbine-powered aircraft, which is submitted pursuant to NRS 365 170, must be accompanied with a return on a form prescribed by the department of taxation.

(Added to NAC by Tax Comm'n, eff. 10-10-83)

### **REFUNDS**

#### **365.060 Indian tribes.**

1. As used in this section, unless the context otherwise requires:

(a) "Reservation" means an Indian reservation, Indian colony or lands set aside for the use and occupancy of a tribe.

(b) "Tribe" means any Indian tribe, Indian band or group of Indians recognized by the Federal Government as possessing a government-to-government relationship with the United States.

(c) "Governing body" means the governmental entity that has the authority to make decisions for a tribe.

(d) "Tribal member" includes an enrolled member of a tribe who resides within the governmental jurisdiction of the tribe, the enrolled member's spouse, the tribe itself and governmental agencies and affiliates of the tribe.

(e) "Quarter" means one quarter of a calendar year beginning with the month of January, April, July or October.



(f) "Department" means the department of taxation of the State of Nevada.

2. The department shall, upon request of the governing body of a tribe, refund to the governing body, all motor vehicle fuel taxes collected on sales of motor vehicle fuel to tribal members that occurred on the tribe's reservation. The department will either approve or deny that request within 30 days after receipt.

3. A refund made pursuant to this section must be made at the tax rate applicable in the county of purchase, less any discount allowed for a motor vehicle fuel dealer.

4. Except as otherwise provided in subsection 7, only the governing body of a tribe may apply for refunds for its tribal members. Each application for a refund must be made for all sales which occurred during a calendar quarter beginning on the first day of the month of January, April, July or October. The application must include:

(a) The amount of motor vehicle fuel purchased by tribal members on the reservation during the quarter for which the refund is requested.

(b) The name and location on the reservation of the retailer or retailers from whom the motor vehicle fuel was purchased.

(c) The county or counties where the tribal members' purchases occurred and the quantity of motor vehicle fuel purchased by tribal members in each county.

5. The governing body shall maintain, and provide to the department upon request, documentation substantiating all refunds requested. The documentation must include:

(a) Identification of the purchasers of motor vehicle fuel as tribal members, either by name and address or by the purchaser's tribal membership number.

(b) For each transaction for which a refund is requested, the:

(1) Name and address of the retailer;

(2) Price paid per gallon;

(3) Quantity purchased; and

(4) Date of sale.

6. If the governing body of a tribe requests and obtains a refund of motor vehicle fuel taxes from the department on sales of motor vehicle fuel to its tribal members and an individual tribal member files a claim for refund of motor vehicle fuel tax with the department for the same quarter, the department shall refer the claimant to the tribal government for processing and documentation of the claim for refund.

7. If a governing body fails to maintain the records required by this section, files a fraudulent refund request or refuses to transmit to the department information required pursuant to this section, the

department may alter the refund procedure authorized and, in lieu thereof, make direct refunds to tribal members who purchase motor vehicle fuel and comply with the requirements of this section that are applicable to governing bodies.

8. This section does not apply to claims for refunds filed for periods commencing before December 13, 1991.

(Added to NAC by Tax Comm'n, eff. 10-27-93)

Citation  
F T 372.800  
...R.S. 372.800

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NEVADA REVISED STATUTES ANNOTATED  
TITLE 32. REVENUE AND TAXATION.  
CHAPTER 372. SALES AND USE TAXES.  
Miscellaneous Provisions

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372.800 Indian reservations and colonies: Imposition and collection of sales tax.

1. The governing body of an Indian reservation or Indian colony may impose a tax on the privilege of selling tangible personal property at retail on the reservation or colony.

2. If a sales tax is imposed, the governing body may establish procedures for collecting the tax from any person authorized to do business on the reservation or colony.

CREDIT

9, ch. 525, § 2, p. 1109.)

<General Materials (GM) - References, Annotations, or Tables>

N. R. S. 372.800  
NV ST 372.800  
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Citation  
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NEVADA REVISED STATUTES ANNOTATED  
 TITLE 32. REVENUE AND TAXATION.  
 CHAPTER 372. SALES AND USE TAXES.  
 Miscellaneous Provisions

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Current through End of 1997 reg. Sess.

372.805 Indian reservations and colonies: Restriction on collection of tax by department.

The department of taxation shall not collect the tax imposed by this chapter on the sale of tangible personal property on an Indian reservation or Indian colony on which a tax has been imposed pursuant to NRS 372.800 if:

1. The tax is equal to or greater than the tax imposed by this chapter; and
2. A copy of an approved tribal tax ordinance imposing the tax has been filed with the department of taxation.

CREDIT

39, ch. 525, § 3, p. 1109.)

<General Materials (GM) - References, Annotations, or Tables>

N. R. S. 372.805  
 NV ST 372.805  
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Citation  
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and SA 1978, § 7-12-4

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NM-ST-ANN

TEXT

NEW MEXICO STATUTES 1978, ANNOTATED  
CHAPTER 7. Taxation  
ARTICLE 12. Cigarette Tax

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Current through End of 1997 Reg. Sess.

7-12-4 Exemption.

A. Exempted from the cigarette tax are sales of cigarettes:

- (1) to the United States or any agency or instrumentality thereof or the state of New Mexico or any political subdivision thereof;
- (2) to the governing body or to any enrolled tribal member licensed by the governing body of any Indian nation, tribe or pueblo for use or sale on that reservation or pueblo grant; and
- (3) sales which the state is prohibited from taxing by a provision of the United States constitution or the constitution of the state of New Mexico.

B. As used in this section, the term "agency or instrumentality" does not include persons who are agents or instrumentalities of the United States for a particular purpose or only when acting in a particular capacity or corporate agencies or instrumentalities.

(C) IT

History: Laws 1943, ch. 95, § 13; 1941 Comp. Supp., § 76-1613; reenacted as 1953 Comp., § 72-14-4 by Laws 1971, ch. 77, § 4; 1992, ch. 37, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

NOTES, REFERENCES, AND ANNOTATIONS

The 1992 amendment, effective May 20, 1992, added the subsection designations; in Subsection A, added the paragraph designations, added "to the governing body or to any enrolled tribal member licensed by the governing body of any Indian nation, tribe or pueblo for use or sale on that reservation or pueblo grant; and" at the beginning of Paragraph (2), added "sales" at the beginning of Paragraph (3), and made a stylistic change; and, in Subsection B, substituted "As used in this section" for "As used herein".

N. M. S. A. 1978, § 7-12-4  
NM ST § 7-12-4  
END OF DOCUMENT

Citation  
 1 T s 7-9-14  
 1SA 1978, § 7-9-14

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TEXT

NEW MEXICO STATUTES 1978, ANNOTATED  
 CHAPTER 7. Taxation  
 ARTICLE 9. Gross Receipts and Compensating Tax  
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 Current through End of 1997 Reg. Sess.

7-9-14 Exemption; compensating tax; governmental agencies; Indians.

A. Except as otherwise provided in this subsection, there is exempted from the compensating tax the use of property by the United States or the state of New Mexico or any governmental unit or subdivision, agency, department or instrumentality thereof. The exemption provided by this subsection does not apply to:

(1) the use of property that is or will be incorporated into a metropolitan redevelopment project under the Metropolitan Redevelopment Code; or

(2) the use of tangible personal property that becomes an ingredient or component part of a construction project.

B. Exempted from the compensating tax is the use of property by any Indian nation, tribe or pueblo or any governmental unit, subdivision, agency, department or instrumentality thereof on Indian reservations or pueblo grants.  
 ( ) IT

History: 1953 Comp., § 72-16A-12.2, enacted by Laws 1969, ch. 144, § 7; 1985, ch. 225, § 3; 1990, ch. 41, § 3; 1993, ch. 31, § 5.

NOTES, REFERENCES, AND ANNOTATIONS

#### NOTES, REFERENCES, AND ANNOTATIONS

Cross-references. -- For Development Incentive Act, see ch. 3, art. 64 NMSA 1978.

The 1990 amendment, effective July 1, 1990, designated the former first and second sentences of the section as present Subsections A and B, substituted "Except as otherwise provided in this subsection" for "Except for the use of property that is or will be incorporated into a metropolitan redevelopment project created under the Metropolitan Redevelopment Code" in the first sentence in Subsection A, added the second sentence of Subsection A, and in Subsection B, substituted "Indian nation, tribe or pueblo" for "Indian tribe or Indian pueblo".

The 1993 amendment, effective July 1, 1993, deleted "or any agency or instrumentality thereof" following "United States" and substituted "any governmental unit or subdivision, agency, department or instrumentality" for "any political subdivision" in the first sentence of Subsection A and, in Subsection B, deleted "the governing body of" preceding "any Indian nation" and

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# 7S, REFERENCES, AND ANNOTATIONS

Ported "or any governmental unit, subdivision, agency, department or instrumentality thereof".

Metropolitan Redevelopment Code. -- See 3-60A-1 NMSA 1978 and notes thereto.

Taxing contractor furnishing materials to federal government not taxing government. -- When general contractor was required by contracts with federal government to furnish materials to be used on federal reservation in New Mexico, the contractor purchased the materials, became the owner thereof, and was liable for the use or compensating tax under §§ 72-17-1, 1953 Comp., et seq. (now repealed); and this was not taxation of government land or other government property. Robert E. McKee, Gen. Contractor v. Bureau of Revenue, 63 N.M. 185, 315 P.2d 832 (1957).

Tax ultimately falling on tribal organization impermissible. -- If the economic burden of the gross receipts tax ultimately falls on a tribal organization, even though the legal incidence of the tax falls on the non-Indian contractor with whom the tribal organization contracted to build an Indian school, the imposition of the tax impermissibly impedes the clearly expressed federal interest in promoting the quality and quantity of educational opportunities for Indians by depleting the funds available for the construction of Indian schools. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982).

The comprehensive federal regulatory scheme and the express federal policy of encouraging tribal self-sufficiency in the area of education preclude the imposition of the state gross receipts tax on the construction of school facilities on tribal lands pursuant to a contract between a tribal organization and a non-Indian contracting firm. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982).

N. M. S. A. 1978, § 7-9-14

NM ST § 7-9-14

END OF DOCUMENT

Citation  
N.M.S.T. s 7-29-4  
NMSA 1978, § 7-29-4

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TEXT

NEW MEXICO STATUTES 1978, ANNOTATED  
CHAPTER 7. Taxation

ARTICLE 29. Oil and Gas Severance Tax

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Current through End of 1997 Reg. Sess.

7-29-4 Oil and gas severance tax imposed; collection; interest owner's liability to state; Indian liability.

A. There is imposed and shall be collected by the department a tax on all products that are severed and sold, except as provided in Subsection B of this section. The measure of the tax and the rates are:

(1) on natural gas severed and sold, except as provided in Paragraph (4) of this subsection, three and three-fourths percent of the taxable value determined under Section 7-29-4.1 NMSA 1978;

(2) on oil and on other liquid hydrocarbons removed from natural gas at or near the wellhead, except as provided in Paragraphs (3) and (5) of this subsection, three and three-fourths percent of taxable value determined under Section 7-29-4.1 NMSA 1978;

(3) on oil and on other liquid hydrocarbons removed from natural gas at or near the wellhead produced from a qualified enhanced recovery project, one and seven-eighths percent of the taxable value determined under Section 7-29-4.1 NMSA 1978, provided that the annual average price of west Texas intermediate crude oil, determined by the department by averaging the posted prices in effect on the last day of each month of the twelve-month period ending on May 31 prior to the fiscal year in which the tax rate is to be imposed, was less than twenty-eight dollars (\$28.00) per barrel;

(4) on the natural gas from a well workover project that is in excess of the production projection certified by the oil conservation division of the energy, minerals and natural resources department in its approval of the well workover project, one and seven-eighths percent of the taxable value determined under Section 7-29-4.1 NMSA 1978, provided that the annual average price of west Texas intermediate crude oil, determined by the department by averaging the posted prices in effect on the last day of each month of the twelve-month period ending on May 31 prior to the fiscal year in which the tax rate is to be imposed, was less than twenty-four dollars (\$24.00) per barrel;

(5) on the oil and other liquid hydrocarbons removed from natural gas at or near the wellhead from a well workover project that is in excess of the production projection certified by the oil conservation division of the energy, minerals and natural resources department in its approval of the well workover project, one and seven-eighths percent of the taxable value determined under Section 7-29-4.1 NMSA 1978, provided that the annual average price of west Texas intermediate crude oil, determined by the department by averaging the posted prices in effect on the last day of each month of the twelve-month period ending on May 31 prior to the fiscal year in which the tax rate is to be



NM ST s 7-29-4

imposed, was less than twenty-four dollars (\$24.00) per barrel; and  
(6) on carbon dioxide, three and three-fourths percent of the taxable value determined under Section 7-29-4.1 NMSA 1978.

B. The tax imposed in Subsection A of this section shall not be imposed on:

(1) natural gas severed and sold from a production restoration project during the first ten years of production following the restoration of production, provided that the annual average price of west Texas intermediate crude oil, determined by the department by averaging the posted prices in effect on the last day of each month of the twelve-month period ending on May 31 prior to each fiscal year in which the tax exemption is to be effective, was less than twenty-four dollars (\$24.00) per barrel; and

(2) oil and other liquid hydrocarbons removed from natural gas at or near the wellhead from a production restoration project during the first ten years of production following the restoration of production, provided that the annual average price of west Texas intermediate crude oil, determined by the department by averaging the posted prices in effect on the last day of each month of the twelve-month period ending on May 31 prior to each fiscal year in which the tax exemption is to be effective, was less than twenty-four dollars (\$24.00) per barrel.

C. Every interest owner shall be liable for the tax to the extent of his interest in such products. Any Indian tribe, Indian pueblo or Indian shall be liable for the tax to the extent authorized or permitted by law.

D. The tax imposed by this section may be referred to as the "oil and gas severance tax".

C...DIT

History: 1978 Comp., § 7-29-4, enacted by Laws 1980, ch. 62, §§ 3, 5; 1987, ch. 315, § 3; 1989, ch. 130, § 2; 1992, ch. 38, § 7; 1995, ch. 15, § 8.

NOTES, REFERENCES, AND ANNOTATIONS

#### NOTES, REFERENCES, AND ANNOTATIONS

Cross-references. -- For the Natural Gas and Crude Oil Production Incentive Act, see Chapter 7, Article 29B NMSA 1978.

The 1989 amendment, effective June 16, 1989, in Subsection A(1) substituted "taxable value determined under Section 7-29-4.1 NMSA 1978" for "value" in Subparagraph (a) and substituted all of the language of Subparagraph (b) beginning with "taxable" for "value of products"; and added Subsection A(3).

The 1992 amendment, effective March 6, 1992, in Subsection A, inserted "except as provided in Paragraph (3) of this subsection" in Paragraph (2), added Paragraph (3), made a related stylistic change, and redesignated former Paragraph (3) as Paragraph (4); and added Subsection C.

The 1995 amendment, effective June 16, 1995, in Subsection A, added the exception at the end of the first sentence, rewrote Paragraph (1), substituted "Paragraphs (3) and (5)" for "Paragraph (3)" in Paragraph (2), added

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## P S, REFERENCES, AND ANNOTATIONS

Paragraphs (4) and (5), and redesignated former Paragraph (4) as Paragraph (6); added subsection B; and redesignated former Subsections B and C as Subsections C and D.

Tribe's power to impose severance tax not limited by federal government. -- The federal interest in interstate commerce, manifested in traditional commerce clause analyses, does not limit the Jicarilla Apache tribe's power to impose an oil and gas severance tax to be measured by production of these products within the reservation. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).

Non-Indian producers operating on reservations. -- Oil and gas taxes imposed by the state against a non-Indian producer whose operations are located on an Indian Reservation do not constitute an impermissible burden on interstate commerce. *Cotton Petroleum v. State*, 106 N.M. 517, 745 P.2d 1170 (Ct. App. 1987), *aff'd* 490 U.S. 163, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989).

Law reviews. -- For article, "Nonneutral Features of Energy Taxation," see 20 *Nat. Resources J.* 853 (1980).

For note, "Court Picks New Test in Cotton Petroleum," see 30 *Nat. Resources J.* 919 (1990).

Am.Jur.2d, A.L.R. and C.J.S. references. -- 72 *Am. Jur. 2d State and Local Taxation* §§ 739 to 752.

33 *C.J.S. Licenses* §§ 65, 70; 84 *C.J.S. Taxation* §§ 640 to 643.

N. M. S. A. 1978, § 7-29-4

NM ST § 7-29-4

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1. NMSA 1978, § 7-30-4			ST-ANN-ALL

## TEXT

## NEW MEXICO STATUTES 1978, ANNOTATED

## CHAPTER 7. Taxation

## ARTICLE 30. Oil and Gas Conservation Tax

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7-30-4 Oil and gas conservation tax levied; collected by department; rate; interest owner's liability to state; Indian liability.

A. There is levied and shall be collected by the department a tax on all products that are severed and sold. The measure and rate of the tax shall be nineteen one-hundredths of one percent of the taxable value of sold products. Every interest owner shall be liable for this tax to the extent of the owner's interest in the value of such products or to the extent of the owner's interest as may be measured by the value of such products. Any Indian tribe, Indian pueblo or Indian shall be liable for this tax to the extent authorized or permitted by law.

B. In the event the unencumbered balance in the oil and gas reclamation fund equals or exceeds one million dollars (\$1,000,000) for any one-month period computed after receipt of the tax for that month, then the rate of the tax levied by this section shall be eighteen one-hundredths of one percent beginning with the first day of the second month following the month in which the unencumbered balance equaled or exceeded one million dollars (\$1,000,000), and no funds collected by the tax with respect to any period for which the rate is eighteen one-hundredths of one percent shall be distributed to the oil and gas reclamation fund. After having been reduced to eighteen one-hundredths of one percent, the rate of the tax imposed by this section shall remain at that rate until the unencumbered balance in the oil and gas reclamation fund is less than or equal to five hundred thousand dollars (\$500,000) for any one-month period computed after receipt of the tax for that month, in which event the rate of the tax levied by this section shall be increased to nineteen one-hundredths of one percent beginning with the first day of the second month following the month in which the unencumbered balance equaled or was less than five hundred thousand dollars (\$500,000), and the additional funds with respect to any period for which the rate is nineteen one-hundredths of one percent shall be distributed to the oil and gas reclamation fund in accordance with the provisions of the Tax Administration Act [Chapter 7, Article 1 NMSA 1978].

C. The department shall notify taxpayers of any change in the rate of tax imposed by this section.

## CREDIT

History: 1953 Comp., § 72-20-4, enacted by Laws 1959, ch. 53, § 4; 1975, ch. 289, § 15; 1977, ch. 237, § 6; 1985, ch. 65, § 31; 1989, ch. 130, § 6; 1996, ch. 72, § 1.

! :S, REFERENCES, AND ANNOTATIONS

NM ST s 7-30-4

1 S, REFERENCES, AND ANNOTATIONS

NOTES, REFERENCES, AND ANNOTATIONS

Cross-references. -- For the oil and gas reclamation fund, see 70-2-37 NMSA 1978.

The 1989 amendment, effective June 16, 1989, substituted "department" for "division" in the catchline; in Subsection A substituted "department" for "division" in the first sentence, inserted "and rate" in the second sentence, and made minor stylistic changes in the third sentence; rewrote the first and second sentences of Subsection B; and designated the former third sentence of Subsection B as Subsection C.

The 1996 amendment, made stylistic changes in Subsection A. Laws 1996, ch. 72 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective May 15, 1996, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

Severance alone does not give rise to taxable event. *Yankee Atomic Elec. Co. v. New Mexico & Ariz. Land Co.*, 632 F.2d 855 (10th Cir. 1980).

Severance, coupled with sale, triggers imposition of tax. *Yankee Atomic Elec. Co. v. New Mexico & Ariz. Land Co.*, 632 F.2d 855 (10th Cir. 1980).

Indian right to tax oil production not preempted by congress. -- Although it granted to the states the right to tax the production of oil and gas on Indian reservations, congress did not preempt similar tribal taxation. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).

Law reviews. -- For article, " 'New Mexican Nationalism' and the Evolution of Energy Policy in New Mexico," see 17 *Nat. Resources J.* 283 (1977).

*Am.Jur.2d*, *A.L.R.* and *C.J.S.* references. -- 84 *C.J.S. Taxation* §§ 121, 123, 126.

N. M. S. A. 1978, § 7-30-4

NM ST § 7-30-4

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: ST s 7-31-4			ST-ANN-ALL
and SA 1978, § 7-31-4			

TEXT

NEW MEXICO STATUTES 1978, ANNOTATED  
CHAPTER 7. Taxation

## ARTICLE 31. Oil and Gas Emergency School Tax

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7-31-4 Privilege tax levied; collected by department; rate; interest  
owner's liability to state; Indian liability.

A. There is levied and shall be collected by the department a privilege tax on the business of every person severing products in this state. The measure of the tax shall be:

(1) on oil and on oil and other liquid hydrocarbons removed from natural gas at or near the wellhead, three and fifteen one-hundredths percent of the taxable value determined under Section 7-31-5 NMSA 1978;

(2) on carbon dioxide, three and fifteen one-hundredths percent of the taxable value determined under Section 7-31-5 NMSA 1978; and

(3) on natural gas, four percent of the taxable value determined under Section 7-31-5 NMSA 1978.

B. Every interest owner, for the purpose of levying this tax, is deemed to be the business of severing products and is liable for this tax to the extent of his interest in the value of such products or to the extent of his interest as may be measured by the value of such products.

C. Any Indian tribe, Indian pueblo or Indian is liable for this tax to the extent authorized or permitted by law.

CREDIT

History: 1953 Comp., § 72-21-4, enacted by Laws 1959, ch. 54, § 4; 1963, ch. 179, § 24; 1983, ch. 213, § 21; 1993, ch. 360, § 2.

NOTES, REFERENCES, AND ANNOTATIONS

## NOTES, REFERENCES, AND ANNOTATIONS

Cross-references. -- For natural gas processors tax, see 7-33-1 to 7-33-8 NMSA 1978.

The 1993 amendment, effective June 18, 1993, inserted the subsection designations; substituted "department" for "division" in the catchline and in the first sentence of Subsection A; deleted "three and fifteen one-hundredths percent of the taxable value of such products" at the end of the introductory paragraph of Subsection A; and added paragraphs (1) to (3) of Subsection A.

Applicability. -- Laws 1993, ch. 360, § 3 makes the provisions of the act applicable to products severed on or after July 1, 1993.

NM ST s 7-31-4

REFERENCES, AND ANNOTATIONS

Indian right to tax oil production not preempted by congress. -- Although it granted to the states the right to tax the production of oil and gas on Indian reservations, congress did not preempt similar tribal taxation. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).

Non-Indian producers operating on reservations. -- Oil and gas taxes imposed by the state against a non-Indian producer whose operations are located on an Indian Reservation do not constitute an impermissible burden on interstate commerce. *Cotton Petroleum v. State*, 106 N.M. 517, 745 P.2d 1170 (Ct. App. 1987), *aff'd* 490 U.S. 163, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989).

Am.Jur.2d, A.L.R. and C.J.S. references. -- 84 C.J.S. Taxation §§ 121, 123, 126.

N. M. S. A. 1978, § 7-31-4

NM ST § 7-31-4

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NM ST § 7-32-4			ST-ANN-ALL
NM SA 1978, § 7-32-4			

## TEXT

## NEW MEXICO STATUTES 1978, ANNOTATED

## CHAPTER 7. Taxation

## ARTICLE 32. Oil and Gas Ad Valorem Production Tax

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7-32-4 Ad valorem tax levied; collected by division; rate; interest owner's liability to state; Indian liability.

There is levied and shall be collected by the division an ad valorem tax on the assessed value of products which are severed and sold from each production unit at the rate certified to the division by the department of finance and administration under the provisions of Section 7-37-7 NMSA 1978. Such rate shall be levied for each month following its certification and shall be levied monthly thereafter until a new rate is certified. Every interest owner shall be liable for this tax to the extent of his interest in the value of such products, or to the extent of his interest as may be measured by the value of such products. Provided, any Indian tribe, Indian pueblo or Indian shall be liable for this tax to the extent authorized or permitted by law.

## CREDIT

History: 1953 Comp., § 72-22-4, enacted by Laws 1959, ch. 55, § 4; 1981, ch. 37, § 58.

## NOTES, REFERENCES, AND ANNOTATIONS

## NOTES, REFERENCES, AND ANNOTATIONS

Law reviews. -- For article, "Nonneutral Features of Energy Taxation," see 20 Nat. Resources J. 853 (1980).

N. M. S. A. 1978, § 7-32-4

NM ST § 7-32-4

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Citation  
N T s 11-13-2  
LMSA 1978, § 11-13-2

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TEXT

NEW MEXICO STATUTES 1978, ANNOTATED  
CHAPTER 11. Intergovernmental Agreements and Authorities  
ARTICLE 13. Indian Gaming Compact  
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11-13-2 Revenue sharing of tribal gaming revenue.

The governor is authorized to execute a revenue-sharing agreement in the form substantially set forth in this section with any New Mexico Indian nation, tribe or pueblo that has also entered into an Indian gaming compact as provided by law. Execution of an Indian gaming compact is conditioned upon execution of a revenue-sharing agreement. The consideration for the Indian entity entering into the revenue-sharing agreement is the condition of the agreement providing limited exclusivity of gaming activities to the tribal entity. The revenue-sharing agreement shall be in substantially the following form and is effective when executed by the governor on behalf of the state and the appropriate official of the Indian entity:

"REVENUE-SHARING AGREEMENT

.. Summary and consideration. The Tribe shall agree to contribute a portion of its Class III Gaming revenues identified in and under procedures of this Revenue-Sharing Agreement, in return for which the State agrees that the Tribe:

A. has the exclusive right within the State to provide all types of Class III Gaming described in the Indian Gaming Compact, with the sole exception of the use of Gaming Machines, which the State may permit on a limited basis for racetracks and veterans' and fraternal organizations; and

B. will only share that part of its revenue arising from the use of Gaming Machines and all other gaming revenue is exclusively the Tribe's.

2. Revenue to State. The parties agree that, after the effective date hereof, the Tribe shall make the quarterly payments provided for in Paragraph 3 of the Revenue Sharing Agreement to the state treasurer for deposit into the General Fund of the State ("State General Fund").

3. Calculation of Revenue to State.

A. As used in this Revenue-Sharing Agreement, "net win" means the annual total amount wagered at a Gaming Facility on Gaming Machines less the following amounts:

- (1) the annual amount paid out in prizes from gaming on Gaming Machines;
- (2) the actual amount of regulatory fees paid to the state; and
- (3) the sum of two hundred fifty thousand dollars (\$250,000) per year as an amount representing tribal regulatory fees, with these amounts increasing by five percent (5%) each year beginning on the first day of January occurring after the Compact has been in effect for at least twelve months.

B. The Tribe shall pay the state sixteen percent (16%) of the net win.



NM ST s 11-13-2

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C. For purposes of these payments, all calculations of amounts due shall be based upon the quarterly activity of the gaming facility. Quarterly payments due to the State pursuant to these terms shall be paid no later than twenty-five (25) days after the last day of each calendar quarter. Any payments due and owing from the Tribe in the quarter the Compact is approved, or the final quarter the Compact is in force, shall reflect the net win, but only for the portion of the quarter the Compact is in effect.

4. Limitations. The Tribe's obligation to make the payments provided for in Paragraphs 2 and 3 of this section shall apply and continue only so long as there is a binding Indian Gaming Compact in effect between the Tribe and the State, which Compact provides for the play of Class III Gaming, but shall terminate in the event of any of the following conditions:

A. If the State passes, amends, or repeals any law, or takes any other action, which would directly or indirectly attempt to restrict, or has the effect of restricting, the scope of Indian gaming.

B. If the State permits any expansion of nontribal Class III Gaming in the State. Notwithstanding this general prohibition against permitted expansion of gaming activities, the State may permit: (1) the enactment of a State lottery, (2) any fraternal, veterans or other nonprofit membership organization to operate such electronic gaming devices lawfully, but only for the benefit of such organization's members, (3) limited fundraising activities conducted by nonprofit tax exempt organizations pursuant to Section 30-19-6 NMSA 1978, and (4) any horse racetracks to operate electronic gaming devices on days on which live or simulcast horse racing occurs.

5. Effect of Variance. In the event the acts or omissions of the State cause the Tribe's obligation to make payments under Paragraph 3 of this section to terminate under the provisions of Paragraph 4 of this section, such cessation of obligation to pay will not adversely affect the validity of the Compact, but the amount that the Tribe agrees to reimburse the State for regulatory fees under the Compact shall automatically increase by twenty percent (20%).

6. Third-Party Beneficiaries. This Agreement is not intended to create any third-party beneficiaries and is entered into solely for the benefit of the Tribe and the State."

CREDIT

History: Laws 1997, ch. 190, § 2.

NOTES, REFERENCES, AND ANNOTATIONS

## NOTES, REFERENCES, AND ANNOTATIONS

Effective dates. -- Laws 1997, ch. 190, § 70 does not contain an effective date provision applicable to the Indian Gaming Compact, but, pursuant to N.M. Const., art. IV, § 23, the compact is effective June 20, 1997, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

N. M. S. A. 1978, § 11-13-2

NM ST § 11-13-2

NM ST s 11-13-2

F 'S, REFERENCES, AND ANNOTATIONS  
END OF DOCUMENT

# An Act

ENROLLED SENATE  
BILL NO. 759

BY: CULLISON, FISHER and  
HENDRICK of the SENATE

and

JOHNSON (Glen) of the HOUSE

AN ACT RELATING TO REVENUE AND TAXATION; AMENDING 68 O.S. 1991, SECTIONS 301, 309, 321, 401, 403.1, 413, 419 AND 1355 (SECTION 1, CHAPTER 337, O.S.L. 1991), WHICH RELATE TO CIGARETTE STAMP TAXES, TOBACCO PRODUCTS TAXES AND SALES TAXES; SPECIFYING LEGISLATIVE FINDINGS AND INTENT; AUTHORIZING GOVERNOR TO ENTER INTO CERTAIN COMPACTS AND SPECIFYING CONDITIONS THEREOF; LIMITING CERTAIN TERM; PROVIDING THAT CERTAIN PROVISIONS NOT APPLY TO CERTAIN INDIAN TRIBES OR NATIONS OR THEIR LICENSEES; DEFINING TERMS; LEVYING CERTAIN TAX ON SALE OF CIGARETTES AND TOBACCO PRODUCTS AT TRIBALLY OWNED OR LICENSED STORE; PROVIDING PROCEDURES FOR CERTAIN REFUNDS; REQUIRING TAX COMMISSION TO PROMULGATE CERTAIN RULES AND REGULATIONS; REQUIRING CERTAIN STAMP BE AFFIXED; SPECIFYING UNLAWFUL ACTS AND PROVIDING PENALTIES THEREFOR; AUTHORIZING SALES BY CERTAIN PERSONS; REQUIRING TRIBALLY OWNED OR LICENSED STORE TO DO BUSINESS ONLY WITH STAMPED CIGARETTES; PROVIDING THAT CERTAIN CIGARETTES AND TOBACCO PRODUCTS BE SUBJECT TO SEIZURE AND FORFEITURE; SPECIFYING CERTAIN AUTHORITY OF PEACE OFFICERS; PROVIDING FOR APPORTIONMENT OF CERTAIN REVENUES; MODIFYING DEFINITIONS; PROVIDING THAT CERTAIN COMMON CARRIERS BE SUBJECT TO SEIZURE AND FORFEITURE OF INVENTORY; MODIFYING SALES WHICH ARE EXEMPT FROM CERTAIN TAXES; AUTHORIZING TAX COMMISSION TO ESTABLISH CERTAIN PROCEDURES; MODIFYING CERTAIN PROVISIONS IN THE EVENT OF CERTAIN DETERMINATION BY TAX COMMISSION; REPEALING 68 O.S. 1991, SECTION 1355 (SECTION 19, CHAPTER 235, O.S.L. 1991), WHICH IS A DUPLICATE SECTION AND WHICH RELATES TO SALES TAXES; PROVIDING FOR CODIFICATION; PROVIDING AN EFFECTIVE DATE; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 346 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. The Legislature finds that:

1. Federal law recognizes the right of Indian tribes and nations to engage in sales of cigarettes and tobacco products to their members free of state taxation;

2. The doctrine of tribal sovereign immunity prohibits the State of Oklahoma from bringing a lawsuit against an Indian tribe or nation to compel the tribe or nation to collect state taxes on sales made in Indian country to either members or nonmembers of the tribe or nation without a waiver of immunity by the tribe or nation or congressional abrogation of the doctrine; and

3. The Supreme Court of the United States, in "Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma", suggested that a state may provide other methods of collection of state taxes on sales of cigarettes and tobacco products made by Indian tribes or nations to persons who are not members of the tribe or nation, such as entering into mutually satisfactory agreements with Indian tribes or nations.

B. It is the intent of the Legislature to establish a system of state taxation of sales of cigarettes and tobacco products made by federally recognized Indian tribes or nations or their licensees, other than such tribes or nations which have entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of this section, under which the rate of payments in lieu of state taxes is less than the rate of state taxes on other sales of cigarettes and tobacco products in order to allow such tribes or nations or their licensees to make sales of cigarettes and tobacco products to tribal members free of state taxation.

C. The Governor is authorized by this enactment to enter into cigarette and tobacco products tax compacts on behalf of the State of Oklahoma with the federally recognized Indian tribes or nations of this state. The compacts shall set forth the terms of agreement between the sovereign parties regulating sale of cigarettes and tobacco products by the tribes or nations or their licensees in Indian country. All sales in Indian country by those compacting tribes or nations and their licensees shall be exempt from the taxes levied pursuant to the provisions of Section 301 et seq., Section 401 et seq. and Section 1350 et seq. of Title 68 of the Oklahoma Statutes and Sections 4 and 9 of this act, subject to the following terms and conditions:

1. A payment in lieu of state sales and excise taxes, as provided for in said compact, shall be paid to the State of Oklahoma by the tribes or nations, their licensees or their wholesalers upon purchase of all cigarettes and tobacco products intended for resale in Indian country by the tribes or nations or their licensees;

2. All cigarettes and tobacco products sold or held for sale to the public, without distinction between member and nonmember sales, shall bear a payment in lieu of tax stamp evidencing that payment in lieu of state taxes has been paid to the state. State and tribal officials may provide for use of a single joint stamp evidencing payment of both the payment in lieu of tax as specified in a compact pursuant to the provisions of this section and any tax levied by a tribe or nation;

3. Records of all sales of cigarettes and tobacco products to the tribes or nations and their licensees shall be kept by all wholesalers doing business in the State of Oklahoma and shall be made available for inspection by state officials on a timely basis. Copies of all invoices of wholesale sales of cigarettes or tobacco



products to tribally owned or licensed retail stores shall be forwarded by the wholesaler to the Oklahoma Tax Commission; and

4. For purposes of a compact pursuant to the provisions of this section, the term "tribal licensee" shall only extend to:

- a. members of the tribe or nation, and
- b. business entities in which the tribe or nation or tribal members have a majority ownership interest.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 347 of Title 68, unless there is created a duplication in numbering, reads as follows:

The provisions of Sections 3 through 6 of this act shall not apply to a federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of Section 1 of this act or to a licensee of such a tribe or nation during the period that such compact is effective.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 348 of Title 68, unless there is created a duplication in numbering, reads as follows:

As used in Sections 3 through 6 of this act:

1. "Tribally owned or licensed store" means a store or place of business which is owned and operated by a federally recognized Indian tribe or nation, other than a federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of Section 1 of this act during the period that such compact is effective, on Indian country within the territorial jurisdiction of that tribe or nation or which is duly licensed by such tribe or nation pursuant to tribal laws or ordinances to conduct business located on Indian country within the territorial jurisdiction of that tribe or nation;

2. "Federally recognized Indian tribe or nation" means an Indian tribal entity which is recognized by the United States Bureau of Indian Affairs as having a special relationship with the United States;

3. "Indian country" means:

- a. land held in trust by the United States of America for the benefit of a federally recognized Indian tribe or nation,
- b. all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, including rights-of-way running through the reservation,
- c. all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- d. all Indian allotments, the Indian titles to which have not been extinguished, including individual allotments held in trust by the United States or allotments owned in fee by individual Indians subject to federal law

restrictions regarding disposition of said allotments and including rights-of-way running through the same;

4. "Member of the tribe" or "tribal member" means a person who is duly enrolled within the membership of the federally recognized Indian tribe or nation which owns or licenses the store;

5. "Nonmember of the tribe" or "nontribal member" means, with respect to a particular Indian tribe or nation, any person who is not a duly enrolled member of that tribe or nation, and shall include any person who is a member of another Indian tribe or nation but not a member of that tribe or nation;

6. "Unstamped cigarettes" means packages of cigarettes which bear no evidence of a tax stamp required by state law;

7. "Contraband cigarettes" means unstamped cigarettes which are required by the provisions of Sections 3 through 6 of this act or Section 301 et seq. of Title 68 of the Oklahoma Statutes to bear stamps and which are in the possession, custody or control of any person, for the purpose of being consumed, sold, offered for sale or consumption or transported to any person in this state other than a wholesaler licensed under Section 304 of Title 68 of the Oklahoma Statutes; provided, contraband cigarettes shall not include unstamped cigarettes sold to veterans' hospitals, to state-operated domiciliary homes for veterans or to the United States for sale or distribution by said entities in accordance with Section 321 through 324 of Title 68 of the Oklahoma Statutes;

8. "Stamped cigarettes" means packages of cigarettes which bear a tax stamp required by state law;

9. "Commission" means the Oklahoma Tax Commission; and

10. "Person" shall include any individual, company, partnership, joint venture, joint agreement, association (mutual or otherwise), corporation, trust, estate, business trust receiver or trustee appointed by any state or federal court, syndicates or any combination acting as a unit, in the plural or singular number.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 349 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. There is hereby levied upon the sale of cigarettes at a tribally owned or licensed store a tax in the amount of seventy-five percent (75%) of the cigarette excise taxes imposed by Section 301 et seq. of Title 68 of the Oklahoma Statutes, which tax shall be in lieu of all sales and excise taxes on such cigarettes.

B. A federally recognized Indian tribe or nation may receive a refund for a portion of the tax imposed pursuant to the provisions of this section if it can provide sufficient documentation that sales of cigarettes to its tribal members exceed twenty-five percent (25%) of its total sales of cigarettes. The amount of the refund shall be the amount of tax paid which is attributable to sales of cigarettes made to tribal members which is in excess of twenty-five percent (25%) of the tribe's or nation's total sales of cigarettes. Refunds shall be paid quarterly. The Tax Commission shall promulgate rules and regulations to administer the provisions of this subsection.

C. All cigarettes which are sold or held for sale at a tribally owned or licensed store shall have affixed thereto a stamp or stamps

evidencing payment of the in lieu tax required by subsection A of this section.

D. It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes. Any person who engages in shipping, transporting, receiving, possessing, selling, distributing or purchasing contraband cigarettes shall, upon conviction, be guilty of a misdemeanor punishable by a fine of not more than One Thousand Dollars (\$1,000.00). Any person convicted of a second or subsequent violation hereof shall be guilty of a felony and shall be punishable by a fine of not more than Five Thousand Dollars (\$5,000.00), by a term of imprisonment in the State Penitentiary for not more than two (2) years, or by both such fine and imprisonment.

E. Any person who knowingly engages in shipping, transporting, receiving, possessing, selling, distributing or purchasing contraband cigarettes shall be subject to the forfeiture of property as is provided by Section 305 of Title 68 of the Oklahoma Statutes and assessment of penalty as provided thereby and assessment for any delinquent taxes found to be owing.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 350 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. Every wholesaler, jobber or warehouseman doing business within this state and required to secure a license as provided in Section 304 of Title 68 of the Oklahoma Statutes may sell cigarettes to tribally owned or licensed stores in this state. It shall be the duty of the wholesaler, jobber or warehouseman to affix the tax stamp required by Section 4 of this act to cigarette inventory sold to a tribally owned or licensed store.

B. Tribally owned or licensed stores may only purchase, receive, stock, possess, sell or distribute stamped cigarettes.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 351 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. All unstamped cigarettes sold or shipped to tribally owned or licensed stores in this state by wholesalers, jobbers or warehousemen not licensed by this state pursuant to the provisions of Section 304 of Title 68 of the Oklahoma Statutes for the purpose of selling or consuming unstamped cigarettes in this state in violation of this act shall be subject to seizure of the shipments and forfeiture of the inventory pursuant to the provisions of Section 305 of Title 68 of the Oklahoma Statutes.

B. Any peace officer of this state, including but not limited to officers of the Department of Public Safety or the Oklahoma State Bureau of Investigation, any sheriff, any salaried deputy sheriff or any municipal police officer is authorized to stop any vehicle upon any road or highway of this state in order to inspect the bill of lading or to take such action as may be necessary to determine if unstamped cigarettes are being sold or shipped in violation of the provisions of this section. Such officers shall also have the duty to cooperate with the Oklahoma Tax Commission to enforce the provisions of this act.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 352 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. Any revenue from a payment in lieu of excise taxes on cigarettes pursuant to a compact entered into by the State of Oklahoma and a federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 1 of this act shall be deposited to the General Revenue Fund.

B. Any revenue from payment of the tax imposed by Section 4 of this act shall be deposited to the General Revenue Fund.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 424 of Title 68, unless there is created a duplication in numbering, reads as follows:

The provisions of Sections 9 through 12 of this act shall not apply to a federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of Section 1 of this act or to a licensee of such a tribe or nation during the period that such compact is effective.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 425 of Title 68, unless there is created a duplication in numbering, reads as follows:

As used in Sections 9 through 13 of this act:

1. "Tribeally owned or licensed store" means a store or place of business which is owned and operated by a federally recognized Indian tribe or nation, other than a federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of Section 1 of this act during the period that such compact is effective, on Indian country within the territorial jurisdiction of that tribe or nation or which is duly licensed by such tribe or nation pursuant to tribal laws or ordinances to conduct business located on Indian country within the territorial jurisdiction of that tribe or nation;

2. "Federally recognized Indian tribe or nation" means an Indian tribal entity which is recognized by the United States Bureau of Indian Affairs as having a special relationship with the United States;

3. "Indian country" means:

- a. land held in trust by the United States of America for the benefit of a federally recognized Indian tribe or nation,
- b. all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation,
- c. all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- d. all Indian allotments, the Indian titles to which have not been extinguished, including individual allotments held in trust by the United States or allotments owned in fee by individual Indians subject to federal law



restrictions regarding disposition of said allotments and including rights-of-way running through the same;

4. "Member of the tribe" or "tribal member" means a person who is duly enrolled within the membership of the federally recognized Indian tribe or nation which owns or licenses the store;

5. "Nonmember of the tribe or nation" or "nontribal member" means, with respect to a particular Indian tribe or nation, any person who is not a duly enrolled member of that tribe or nation, and shall include any person who is a member of another Indian tribe or nation but not a member of that tribe or nation;

6. "Untaxed tobacco products" means packages of tobacco products upon which taxes required by state law have not been paid;

7. "Contraband tobacco products" means untaxed tobacco products for which taxes are required to be paid pursuant to the provisions of Sections 9 through 12 of this act or Section 401 et seq. of Title 68 of the Oklahoma Statutes and which are in the possession, custody or control of any person, for the purpose of being consumed, sold, offered for sale or consumption or transported to any person in this state other than a wholesaler licensed under Section 415 of Title 68 of the Oklahoma Statutes; provided, contraband tobacco products shall not include untaxed tobacco products sold to veterans' hospitals, to state-operated domiciliary homes for veterans or to the United States for sale or distribution by said entities in accordance with Sections 419 through 421 of Title 68 of the Oklahoma Statutes;

8. "Taxed tobacco products" means packages of tobacco products upon which taxes required by law have been paid;

9. "Commission" means the Oklahoma Tax Commission; and

10. "Person" shall include any individual, company, partnership, joint venture, joint agreement, association (mutual or otherwise), corporation, trust, estate, business trust receiver or trustee appointed by any state or federal court, syndicates or any combination acting as a unit, in the plural or singular number.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 426 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. There is hereby levied upon the sale of tobacco products at a tribally owned or licensed store a tax in the amount of seventy-five percent (75%) of the tobacco products excise taxes imposed by Section 401 et seq. of Title 68 of the Oklahoma Statutes, which tax shall be in lieu of all sales and excise taxes on said tobacco products.

B. A federally recognized Indian tribe or nation may receive a refund for a portion of the tax imposed pursuant to the provisions of this section if it can provide sufficient documentation that sales of tobacco products to its tribal members exceed twenty-five percent (25%) of its total sales of tobacco products. The amount of the refund shall be the amount of tax paid which is attributable to sales of tobacco products made to tribal members which is in excess of twenty-five percent (25%) of the tribe's or nation's total sales of tobacco products. Refunds shall be paid quarterly. The Tax Commission shall promulgate rules and regulations to administer the provisions of this subsection.

C. It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute or purchase contraband tobacco products. Any person who engages in shipping, transporting,

receiving, possessing, selling, distributing or purchasing contraband tobacco products shall, upon conviction, be guilty of a misdemeanor punishable by a fine of not more than One Thousand Dollars (\$1,000.00). Any person convicted of a second or subsequent violation hereof shall be guilty of a felony and shall be punishable by a fine of not more than Five Thousand Dollars (\$5,000.00), by a term of imprisonment in the State Penitentiary for not more than two (2) years, or by both such fine and imprisonment.

D. Any person who knowingly engages in shipping, transporting, receiving, possessing, selling, distributing or purchasing contraband tobacco products shall be subject to the forfeiture of property as is provided by Section 417 of Title 68 of the Oklahoma Statutes and assessment of penalty as provided thereby and assessment for any delinquent taxes found to be owing.

**SECTION 11. NEW LAW** A new section of law to be codified in the Oklahoma Statutes as Section 427 of Title 68, unless there is created a duplication in numbering, reads as follows:

Every wholesaler, jobber or warehouseman doing business within this state and required to secure a license as provided in Section 415 of Title 68 of the Oklahoma Statutes may sell tobacco products to tribally owned or licensed stores in this state. It shall be the duty of the wholesaler, jobber or warehouseman to collect, report and remit the tax imposed by Section 10 of this act on the tobacco products inventory sold to a tribally owned or licensed store.

**SECTION 12. NEW LAW** A new section of law to be codified in the Oklahoma Statutes as Section 428 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. All untaxed tobacco products sold or shipped to tribally owned or licensed stores in this state by wholesalers, jobbers or warehousemen not licensed by this state pursuant to the provisions of Section 415 of Title 68 of the Oklahoma Statutes for the purpose of selling or consuming untaxed tobacco products in this state in violation of this act shall be subject to seizure of the shipments and forfeiture of the inventory pursuant to the provisions of Section 417 of Title 68 of the Oklahoma Statutes.

B. Any peace officer of this state, including but not limited to officers of the Department of Public Safety or the Oklahoma State Bureau of Investigation, any sheriff, any salaried deputy sheriff or any municipal police officer is authorized to stop any vehicle upon any road or highway of this state in order to inspect the bill of lading or to take such action as may be necessary to determine if untaxed tobacco products are being sold or shipped in violation of the provisions of this section. Such officers shall also have the duty to cooperate with the Oklahoma Tax Commission to enforce the provisions of this act.

**SECTION 13. NEW LAW** A new section of law to be codified in the Oklahoma Statutes as Section 429 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. Any revenue from a payment in lieu of excise taxes on tobacco products pursuant to a compact entered into by the State of Oklahoma and a federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 1 of this act shall be deposited to the General Revenue Fund.

B. Any revenue from payment of the tax imposed by Section 10 of this act shall be deposited to the General Revenue Fund.

SECTION 14. AMENDATORY 68 O.S. 1991, Section 301, is amended to read as follows:

Section 301. For purposes of this article:

(a) The term "cigarette" is defined to mean and include all rolled tobacco or any substitute therefor, wrapped in paper or any substitute therefor and weighing not to exceed three (3) pounds per thousand cigarettes.

(b) The term "person" is defined to mean and include any individual, company, partnership, joint venture, joint agreement, association (mutual or otherwise), corporation, estate, trust, business trust receiver, or trustee appointed by any state or federal court, or otherwise, syndicate, or any political subdivision of the state or combination acting as a unit, in the plural or singular number.

(c) The term "wholesaler" and/or "jobber" is defined to mean and include a person, firm or corporation organized and existing, or doing business, primarily to sell cigarettes to, and render service to retailers in the territory such person, firm or corporation chooses to serve; that purchases cigarettes directly from the manufacturer; that at least seventy-five percent (75%) of whose gross sales are made at wholesale; that handles goods in wholesale quantities and sells through salesmen, advertising and/or sales promotion devices; that carries at all times at his or its principal place of business a representative stock of cigarettes for sale, and that comes into the possession of cigarettes for the purpose of selling them to retailers or to persons outside or within the state who might resell or retail such cigarettes to consumers.

In addition to the foregoing, and irrespective of the percentage or type of sales, the term "wholesaler" shall also include all purchasers of cigarettes making purchases directly from the manufacturer for distribution at wholesale or retail sale and this shall not affect the requirements relating to retail licenses.

(d) The term "retailer" is defined to be: (First) a person who comes into the possession of cigarettes for the purpose of selling, or who sells them at retail; or, (Second) a person, not coming within the classification of wholesaler and/or jobber as herein defined, having possession of more than one thousand cigarettes.

(e) The term "consumer" is defined to be a person who receives or who in any way comes into possession of cigarettes for the purpose of consuming them, giving them away, or disposing of them in a way other than by sale, barter or exchange.

(f) The term "Tax Commission" is defined to mean the Oklahoma Tax Commission.

(g) The term "sale" and/or "sales" is hereby defined to be and declared to include sales, barter, exchanges and every other manner, method and form of transferring the ownership of personal property from one person to another, and is also declared to be the use or consumption in this state in the first instance of cigarettes received from without the state or of any other cigarettes upon which the tax has not been paid. The term "first sale" shall mean and include the first sale or distribution of cigarettes in intrastate commerce or the first use or consumption of cigarettes within this state.



(h) The term "stamp" as herein used shall mean the stamp or stamps by use of which the:

1. The tax levied hereunder is paid pursuant to the provisions of Section 301 et seq. of this title is paid;

2. The tax levied pursuant to the provisions of Section 4 of this act is paid; or

3. The payment in lieu of taxes authorized pursuant to a compact entered into by the State of Oklahoma and a federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 1 of this act is paid.

(i) The term "drop shipment" shall mean and include any delivery of cigarettes received by any person within this state when payment for such cigarettes is made to the shipper or seller by or through a person other than the consignee.

(j) The term "distributing agent" shall mean and include every person in this state who acts as an agent of any person outside the state by receiving cigarettes in interstate commerce and storing such cigarettes subject to distribution or delivery upon order from said person outside the state to distributors, wholesale dealers and retail dealers, or to consumers. The term "distributing agent" shall also mean and include any person who solicits or takes orders for cigarettes to be shipped in interstate commerce to a person in this state by a person residing outside of Oklahoma, the tax not having been paid on said cigarettes.

(k) The term "vending machine" shall mean and include any coin operating machine, contrivance, or device, by means of which cigarettes are sold or dispensed in their original container.

(l) The term "use" means and includes the exercise of any right or power over cigarettes incident to the ownership or possession thereof, except that it shall not include the sale of cigarettes in the regular course of business.

SECTION 15. AMENDATORY 68 O.S. 1991, Section 309, is amended to read as follows:

Section 309. (a) The right of a common carrier in this state to carry unstamped cigarettes, as defined in this article, shall not be affected by this article; provided that common carriers delivering unstamped cigarettes to any person in this state for the purpose of selling or consuming unstamped cigarettes in this state in violation of Section 301 et seq. of this title or this act shall be subject to seizure of the shipments and forfeiture of the inventory pursuant to the provisions of Section 305 of this title. However, should Should any common carrier sell cigarettes to its passengers while being carried in this state, the sale shall be subject to the stamp tax and other provisions of this article, and to the rules and regulations of the Tax Commission.

(b) Common carriers transporting cigarettes to a point within the state, or a bonded warehouseman or bailee having possession of cigarettes, are required, under this article and the rules and regulations to be prescribed by the Commission, to transmit to the Commission a statement of such consignment of cigarettes, showing the date, point of origin, point of delivery, and to whom delivered, and such other information as the Commission may require. All common carriers, bailees or warehousemen shall permit an examination by the Commission, or its agents or legally authorized representatives, of their records relating to the shipment or receipt of cigarettes. Any



person who fails or refuses to transmit to the Commission the statements above provided for, or whoever refuses to permit the examination of the records by the Commission, shall be guilty of a misdemeanor.

SECTION 16. AMENDATORY 68 O.S. 1991, Section 321, is amended to read as follows:

Section 321. The following sales are hereby exempted from the stamp excise tax levied pursuant to the provisions of Section 301 et seq. of this title:

1. All cigarettes sold to veterans hospitals and state operated domiciliary homes for veterans located in the State of Oklahoma, for distribution or sale to disabled ex-servicemen or disabled ex-servicewomen interned in, or inmates of, such hospitals, or residents of such homes, ~~and all;~~

2. ~~All sales to the United States are hereby exempted from the stamp excise tax levied by this article;~~

3. All sales to a federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of Section 1 of this act or to a licensee of such a tribe or nation, upon which the payment in lieu of taxes required by the compact has been paid; and

4. All sales to a federally recognized Indian tribe or nation or to a licensee of such a tribe or nation upon which the tax levied pursuant to the provisions of Section 4 of this act has been paid.

SECTION 17. AMENDATORY 68 O.S. 1991, Section 401, is amended to read as follows:

Section 401. For the purpose of this article:

(a) The word "person" shall mean any individual, company, corporation, partnership, association, joint adventure, estate, trust, or any other group, or combination acting as a unit, and the plural as well as the singular, unless the intention to give a more limited meaning is disclosed by the context.

(b) The term "Tax Commission" shall mean the Oklahoma Tax Commission.

(c) The word "wholesaler" shall include dealers whose principal business is that of a wholesale dealer or jobber, and who is known to the trade as such, who shall sell any cigars or tobacco products to licensed retail dealers only for the purpose of resale, or giving them away, or exposing the same where they may be taken or purchased, or otherwise acquired by the retailer.

(d) The word "retailer" shall include every dealer, other than a wholesale dealer as defined above, whose principal business is that of selling merchandise at retail, who shall sell, or offer for sale, cigars or tobacco products, irrespective of quantity, number of sales, giving the same away or exposing the same where they may be taken, or purchased, or otherwise acquired by the consumer.

(e) The word "consumer" shall mean a person who comes into possession of tobacco for the purpose of consuming it, giving it away, or disposing of it in any way by sale, barter or exchange.

(f) The words "first sale" shall mean and include the first sale, or distribution, of cigars or tobacco products in intrastate

commerce, or the first use or consumption of cigars, or tobacco products within this state.

(g) The words "tobacco products" shall mean any cigars, cheroots, stogies, smoking tobacco (including granulated, plug cut, crimp cut, ready rubbed and any other kinds and forms of tobacco suitable for smoking in a pipe or cigarette), chewing tobacco (including cavendish, twist, plug, scrap and any other kinds and forms of tobacco suitable for chewing), however prepared; and shall include any other articles or products made of tobacco or any substitute therefor.

(h) The term "distributing agent" shall mean and include every person in this state who acts as an agent of any person outside the state by receiving cigars and tobacco products in interstate commerce and storing such items subject to distribution or delivery, upon order from said person outside the state, to distributors, wholesale dealers and retail dealers, or to consumers. The term "distributing agent" shall also mean and include any person who solicits or takes orders for cigars and tobacco products to be shipped in interstate commerce to a person in this state by a person residing outside of Oklahoma, the tax not having been paid on such cigars and tobacco products.

(i) The term "stamp" shall mean the stamp or stamps by use of which the:

1. The tax levied hereunder is paid pursuant to the provisions of Section 401 et seq. of this title is paid;

2. The tax levied pursuant to the provisions of Section 10 of this act is paid; or

3. The payment in lieu of taxes authorized pursuant to a compact entered into by the State of Oklahoma and a federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 1 of this act is paid.

(j) The term "drop shipment" shall mean and include any delivery of cigars or tobacco products received by any person within the state when payment for such cigars or tobacco products is made to the shipper or seller by or through a person other than the consignee.

(k) The term "cigars" shall include any roll of tobacco for smoking, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated or mixed with any other ingredients, where such roll has a wrapper made chiefly of tobacco.

(l) The word "dealer" shall include every person, firm, corporation, or association of persons, who manufactures cigars or tobacco products for distribution, sale, use or consumption in the State of Oklahoma. The word "dealer" is also further defined to mean any person, firm, corporation or association of persons, who imports cigars or tobacco products from any state or foreign country, for distribution, sale, use or consumption in the State of Oklahoma.

SECTION 18. AMENDATORY 68 O.S. 1991, Section 403.1, is amended to read as follows:

Section 403.1 The Oklahoma Tax Commission is hereby authorized and empowered, if in its discretion it deems practical and reasonable, to establish procedures for payment of excise taxes levied in Sections 401 et seq. of Title 68 this title, for the collection from a wholesaler, jobber or warehouseman of payments in lieu of excise taxes authorized pursuant to a compact entered into by

the State of Oklahoma and a federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 1 of this act or for the payment of the tax specified in Section 10 of this act, in respect to articles containing tobacco, pursuant to monthly tobacco products tax reports in lieu of payment by purchasing and affixing stamps, notwithstanding the provisions of Sections 403 et seq. of ~~Title 68~~ this title. Provided, exercise by the Tax Commission of the authority granted herein shall be by adoption of rules and regulations necessary to establish procedures for collection of such tax through monthly reporting procedures consistent with the provisions of Sections 401 et seq. of ~~Title 68~~ this title, other than those provisions relating directly to payment of such tax by purchasing and affixing stamps.

In the event the Tax Commission shall determine to collect such tax through monthly reporting procedures and adopt rules and regulations therefor:

1. All provisions of Sections 401 et seq. of ~~Title 68~~ this title relating to unstamped tobacco products shall be interpreted to include and shall be applicable to all tobacco products for which ~~such excise~~ the tax required by law has not been paid;

2. No person, dealer, distributing agent or wholesaler, as defined in Section 401 of ~~Title 68~~ this title, shall possess, sell, use, exchange, barter, give away or in any manner deal with any tobacco products within this state upon which such tax is levied and unpaid, unless such person, dealer, retailer, distributing agent or wholesaler holds a valid tobacco license issued pursuant to Section 415 of ~~Title 68~~ this title; and

3. Any person required to report and remit such taxes or payments in lieu of taxes required pursuant to a compact authorized by subsection C of Section 1 of this act to the Tax Commission shall be allowed a discount of two percent (2%) of the tax due for maintaining and collecting such tax or payments for the benefit of the state, if such tax or payment is timely reported and remitted.

SECTION 19. AMENDATORY 68 O.S. 1991, Section 413, is amended to read as follows:

Section 413. (a) The right of a common carrier in this state to carry unstamped cigars and tobacco products shall not be affected hereby; provided, ~~however, that common carriers delivering untaxed tobacco products to any person in this state for the purpose of selling or consuming untaxed tobacco products in this state in violation of this article shall be subject to seizure of the shipments and forfeiture of the inventory pursuant to the provisions of Section 417 of this title.~~ Provided further, that should any such carrier sell any cigars and tobacco products in this state, such sale shall be subject to the stamp tax and other provisions of this article and to the rules and regulations of the Tax Commission. The common carrier transporting tobacco products and cigars to a point within this state, or a bonded warehouseman or bailee having in its possession tobacco products and cigars, shall transmit to the Commission a statement of such consignment of tobacco products and cigars, showing the date, point of origin, point of delivery, and to whom delivered. All common carriers or bailees or warehousemen shall permit an examination by the Tax Commission, or its agents or legally authorized representatives, of their records relating to the shipment or receipt of tobacco products and cigars. Any person who fails or refuses to transmit to the Commission the aforesaid statement, or who refuses to permit the examination of his records by the Commission or its legally authorized agents or representatives, shall be guilty of a misdemeanor and shall be subject to a fine of not to exceed Five



Hundred Dollars (\$500.00) and not less than Twenty-five Dollars (\$25.00).

(b) Wholesalers, jobbers, and/or warehousemen shall make a monthly report to the Tax Commission. Such report must be received in the office of the Tax Commission not later than the fifteenth (15th) day of each month, showing purchases and invoices of all merchandise coming under this article, for the previous month; and the report shall also show the invoice number, the name and address of the consignee and consignor, the date, and such other information as may be requested by the Tax Commission. Retailers or consumers purchasing tobacco products and cigars in drop shipments shall be required to make monthly reports to the Oklahoma Tax Commission, as are required of wholesale dealers.

SECTION 20. AMENDATORY 68 O.S. 1991, Section 419, is amended to read as follows:

Section 419. The following sales are hereby exempted from the tobacco products tax levied pursuant to the provisions of Section 401 et seq. of this title:

1. All tobacco products sold to veterans hospitals and state-operated domiciliary homes for veterans located in the State of Oklahoma, for sale or distribution to disabled ex-servicemen or disabled ex-servicewomen interned in or inmates of such hospitals, or residents of such homes, are hereby exempted from the tobacco products tax levied under the provisions of this article;

2. All sales to a federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of Section 1 of this act or to a licensee of such a tribe or nation, upon which the payment in lieu of taxes required by the compact has been paid; and

3. All sales to a federally recognized Indian tribe or nation or to a licensee of such a tribe or nation upon which the tax levied pursuant to the provisions of Section 10 of this act has been paid.

SECTION 21. AMENDATORY 68 O.S. 1991, Section 1355 (Section 1, Chapter 337, O.S.L. 1991), is amended to read as follows:

Section 1355. Exemptions - Subject to other tax.

There are hereby specifically exempted from the tax levied pursuant to the provisions of this article:

(A) Sale of gasoline or, motor fuel, compressed natural gas, liquefied natural gas or liquefied petroleum gas on which the Motor Fuel Tax, Gasoline Excise Tax, or Special Fuels Tax or the fee in lieu of Special Fuels Tax levied in Article 5, 6, or 7 of this title has been, or will be paid;

(B) Sale of motor vehicles or any optional equipment or accessories attached to motor vehicles on which the Oklahoma Motor Vehicle Excise Tax levied in Article 21 of this title has been, or will be paid;

(C) Sale of crude petroleum or natural or casinghead gas and other products subject to gross production tax pursuant to the provisions of Articles 10 and 11 of this title. This exemption shall not apply when such products are sold to a consumer or user for consumption or use, except when used for injection into the earth for the purpose of promoting or facilitating the production of oil or



gas. This subsection shall not operate to increase or repeal the gross production tax levied by the laws of this state;

(D) Sale of aircraft on which the tax levied pursuant to the provisions of Sections 6001 through 6004 of this title has been, or will be paid;

(E) Sales from coin-operated devices on which the fee imposed by Sections 1501 through 1513 of this title has been paid; and

(F) Leases of twenty-four (24) months or more of motor vehicles in which the owners of the vehicles have paid the vehicle excise tax levied by Section 2103 of this title. ~~Provided any such lease exempt from the tax levied pursuant to the provisions of this article which is terminated prior to the expiration of the original term shall be subject to the tax levied by this article in an amount equal to the amount of tax which would have been due without the exemption plus a penalty of twenty percent (20%) of the principal amount of tax which would have been due; provided, however, the penalty provided by this subsection shall not apply if the original lessee acquires title to the leased vehicle within the original term of the lease; and~~

(G) Sales of cigarettes or tobacco products to:

1. A federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of Section 1 of this act or to a licensee of such a tribe or nation, upon which the payment in lieu of taxes required by the compact has been paid; or

2. A federally recognized Indian tribe or nation or to a licensee of such a tribe or nation upon which the tax levied pursuant to the provisions of Section 4 or Section 10 of this act has been paid.

SECTION 22. REPEALER 68 O.S. 1991, Section 1355 (Section 19, Chapter 235, O.S.L. 1991), is hereby repealed.

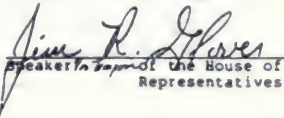
SECTION 23. Sections 2 through 22 of this act shall become effective January 1, 1993.

SECTION 24. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Passed the Senate the 21st day of May, 1992.

  
President of the Senate

Passed the House of Representatives the 22d day of May, 1992.

  
Speaker of the House of Representatives

## OFFICE OF THE GOVERNOR

Received by the Governor this 22nd  
 day of May 1992  
 at 6:59 o'clock P. M.

By: Susan Wittenger

Approved by the Governor of the State of Oklahoma the 28 day of  
May 1992 at 2:13 o'clock P. M.

Dan W. Walton  
 Governor of the State of Oklahoma

## OFFICE OF THE SECRETARY OF STATE

Received by the Secretary of State this  
28th day of May 1992  
 at 3:43 o'clock P. M.

By: John Henry

FILED

JUN - 8 1992

TRIBAL/STATE TOBACCO TAX COMPACT OKLAHOMA SECRETARY  
OF STATE

WHEREAS, the Cherokee Nation, the compacting Indian Nation (hereinafter referred to as "Nation"), is a federally recognized Indian Nation with sovereign powers of self-government;

WHEREAS, the State of Oklahoma (hereinafter referred to as "State") is an independent sovereign state within the United States of America possessed of full powers of state government;

WHEREAS, the Cherokee Nation and its membership are in possession of various tracts of land in its domain within the State, known and commonly referred to as "Indian Country";

WHEREAS, the State of Oklahoma by and through the United States Supreme Court decision in Oklahoma Tax Commission vs. Citizen Band Pottawatomie Indian Tribe of Oklahoma contends it is authorized to collect state taxes on cigarettes and tobacco products sold by tribal businesses to non-tribal members;

WHEREAS, federal Indian law recognizes that tribal jurisdiction is extant in Indian Country regarding the rights of Indian tribes to pass their own laws and be governed by them, including the right to sell cigarette and tobacco products to tribal members free from state taxation; and

WHEREAS, the State recognizes the financial, cultural, educational and economic contributions of the Nation to the State and its citizens and the Nation in turn recognizes the need to develop and maintain good tribal/state governmental relations in this period of cooperation.

NOW, THEREFORE, the Cherokee Nation by and through its Chief, Wilma Mankiller, and the State of Oklahoma by and through its Governor, David Walters, do hereby enter into this Compact for the mutual benefit of the Nation and the State to wit:

1. All sales of cigarettes and tobacco products in Indian Country as defined by federal law shall be governed by the provisions of this Compact, when said sales are made by businesses owned by the Nation, by licensees who are members of the Nation, or by businesses licensed by the Nation and in which the majority interest is owned by the Nation or by members of the Nation.

2. The Nation agrees to require as a condition to licensing that all the Nation's retail licensees who are members of the Nation, all the Nation's retail licensees which are businesses in which the majority interest is owned by the Nation or by members of the Nation, and wholesale licensees will comply with the provisions of this compact.

3. The Nation or its licensees shall make a payment to the State of Oklahoma in lieu of state tobacco excise and sales taxes in the amount of twenty-five percent (25%) of all applicable excise taxes on all cigarettes and tobacco products purchased by the Nation or the Nation's licensees for resale in Indian Country of the Nation, without reference to the membership or non-membership status of the purchasing public.

4. Any store, not tribal owned or licensed, operating within the Nation's Indian Country and engaging in the sale of cigarettes and tobacco products shall not be subject to the provisions of this compact.

5. All payments in lieu of state taxes shall be collected by all wholesalers, distributors, jobbers or warehousemen selling cigarettes and tobacco products to the Nation and to the Nation's licensees for resale in Indian Country and shall be collected at the time of the wholesale transaction and included in the wholesale purchase price for remission to the State.

6. The Nation agrees to purchase cigarettes and tobacco products only from wholesalers, distributors, jobbers or warehousemen licensed by the State, or from wholesalers, distributors, jobbers or warehousemen who agree to provide for verification to sales to the Nation and tribal licensees and who agree to allow verification of sales to be made by state officials on a timely basis. The Nation shall at all times maintain and provide the State with a current list of all its tribal owned and licensed retail stores and all wholesalers, distributors, jobbers or warehousemen shall forward copies of all invoices of wholesale sales to the Nation's tribal owned or licensed tobacco retail outlets to the State of Oklahoma and to the Nation.

7. All cigarettes sold shall bear tribal and state stamps or a single stamp approved by both parties, verifying that all applicable tribal taxes and payments in lieu of state taxes have been paid to the wholesaler at the time of purchase. In the event that both tribal and state stamps are used, each party shall bear its respective cost of affixing its stamp. In the event a single stamp is used,



the State shall bear all costs relative thereto, unless there is mutual agreement otherwise. At the option of the Nation, it, someone on behalf of the State or the wholesaler, distributors, jobbers or warehousemen shall affix the required stamp or stamps.

8. Both parties agree that unstamped cigarettes are contraband, and that each party has the right to seize contraband. The Nation may seize all contraband located within its Indian country. The State may seize all contraband located within the lawfully recognized boundaries of the State of Oklahoma, excluding Indian Country of the Nation.

9. The State shall exempt all sales of cigarettes and tobacco products to and by the Nation and its licensees from sales and excise taxes in lieu of the agreement by the Nation to make the aforementioned payment in lieu of state taxes.

10. Any dispute arising in the interpretation or performance of this Compact, which is not resolved by good faith negotiations within thirty (30) days, shall be subject to binding arbitration. Arbitration may be invoked by either party following the negotiation period should the dispute remain unresolved. Arbitration shall be the exclusive means of resolving such disputes subject only to review by the United States District Court having jurisdiction and venue. When arbitration is invoked a panel of arbitrators consisting of three (3) members shall be appointed. One shall be appointed by the Nation and one by the State. A third shall be appointed by the other two members or should they disagree, then by the American Arbitration Association. The expenses of arbitration shall be born equally by the parties. The arbitrators shall adopt their own procedural rules regarding the arbitration process in conformity with the Rules of the American Arbitration Association.

11. The term of this agreement shall be ten (10) years from its effective date. At the end of said term, this Compact shall continue in full force and effect for consecutive terms of ten (10) years, unless either party hereto gives to the other written notice that the Compact shall terminate at the end of the present term, provided that such notice is given at least six (6) months prior to said termination.

12. By entering into this compact, the Nation does not concede that the laws of the State of Oklahoma, including its tax laws, apply to the Nation or its members regarding activities and conduct on its Indian Country.

13. Each party shall hold the other, including its agents and licensees, harmless from any past taxes or payments in lieu of taxes on cigarettes and tobacco products.

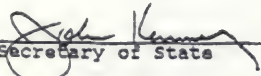
14. This compact shall be effective on January 1, 1993. provided that it shall not be effective until and unless it is fully executed by all parties and there is attached hereto the original, or a properly certified copy of the properly prepared and approved resolution of the Legislature of the Nation authorizing the Nation to enter into and execute this agreement.

IT IS AGREED this 8<sup>th</sup> day of June, 1992.

  
 Wilma Wankiller, Chief  
 Cherokee Nation

  
 David Walters, Governor  
 State of Oklahoma

ATTEST:

  
 Secretary of State

**OKLAHOMA STATUTES ANNOTATED  
TITLE 68. REVENUE AND TAXATION  
CHAPTER 1. TAX CODES  
ARTICLE 5. MOTOR FUEL TAX CODE**

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Current through End of 1997 1st Reg. Sess.

§ 500.63. Sale of motor fuels by Indian tribes

A. The Legislature hereby finds:

1. Some Indian tribes within the State of Oklahoma are engaged in the retail sales of motor fuels at locations within their sovereign territories;

2. Both Indian tribes and the government of the State of Oklahoma impose motor fuel taxes;

3. By reason of the ruling of the United States Supreme Court in "Oklahoma Tax Commission v. Chickasaw Nation", 115 S.Ct. 2214 (1995), the State of Oklahoma does not now collect state motor fuel taxes on sales made by Indian tribes. The Legislature hereby acknowledges that, as a matter of federal law, the existing law of the state may not be used to levy or enforce taxes on certain sales of motor fuel made by Indian tribes;

4. It is mutually beneficial to the State of Oklahoma and the federally recognized Indian tribes of this state, exercising their sovereign powers, to enter into contracts as set forth in subsection B of this section, for the purpose of limiting litigation on the issue of state government taxation of motor fuel sales made by Indian tribes. It is in the interest of this state to resolve disputes between the state and federally recognized Indian tribes on this issue by entering into contracts under which the Indian tribes are in part compensated for any tribal motor fuel tax revenues the Indian tribes might lose by reason of the adoption and enforcement of this act. [FN1] Such mutually beneficial agreements allow both the State of Oklahoma and the Indian tribes to benefit from tax revenues from sales of motor fuel on Indian country.

B. In lieu of the refund procedure provided in subsection E of Section 14 of this act [FN2] for the exemption provided for sales of motor fuels by an Indian tribe to its tribal members as provided in paragraph 10 of Section 10 of this act, [FN3] an Indian tribe, on its behalf and on behalf of its members, may elect to enter into a contract with the State of Oklahoma as provided in subsection C of this section.

C. The State of Oklahoma hereby makes the following offer to all federally recognized Indian tribes within this state which, if accepted, will constitute a contract between this state and the accepting tribe or tribes:

1. The accepting tribe shall agree that it will not challenge the constitutionality of this act or the application of this act to motor fuel sales on Indian country in any court or tribunal and shall include all state motor fuel taxes and assessments in the price of its motor fuel sales, including but not limited to sales to tribal members on tribal land. The accepting tribe shall agree as a material term of its agreement to abide with all parts of this act in its entirety and shall agree not to procure, or attempt to procure, motor fuel for sale in Indian country on which the tax imposed by this act has not been precollected as provided for herein;

2. In consideration of this agreement by the tribe or tribes, the State of Oklahoma, through the Oklahoma Tax Commission, shall withhold a percentage of its motor fuel tax revenues, as specified in paragraph 3 of this subsection, which shall be apportioned quarterly to the accepting Indian tribes. The funds apportioned as provided herein are deemed to be in lieu of tribal tax revenues that the tribes would otherwise have collected on sales of motor fuels. The first such apportionment shall be made not later than February 1, 1997, which shall be for motor fuels taxes received by the Tax Commission during the last calendar quarter of 1996, and subsequent apportionments shall be made no later than thirty (30) days after the end of each calendar quarter thereafter. The first such apportionment shall be

made to all tribes which have elected and accepted the terms of the contract specified in this subsection before October 1, 1996. Any tribe electing and accepting the terms of the contract specified in this subsection on or after October 1, 1996, shall be eligible to receive quarterly apportionments beginning with the calendar quarter following such election;

3. The percentage of state motor fuel tax and assessment revenues collected pursuant to the provisions of this act which shall be withheld monthly and apportioned quarterly to accepting Indian tribes shall be as follows:

- a. for the portion of the fiscal year beginning July 1, 1996, for which this act is effective, three percent (3%),
- b. for the fiscal year beginning July 1, 1997, four percent (4%), and
- c. for the fiscal year beginning July 1, 1998, and for each fiscal year thereafter, four and one-half percent (4 1/2 %);

4. The funds withheld by the Oklahoma Tax Commission pursuant to paragraph 3 of this subsection shall be apportioned quarterly to each accepting Indian tribe as follows:

- a. each accepting Indian tribe shall receive a base quarterly sum of Six Thousand Two Hundred Fifty Dollars (\$6,250.00). If the gross state motor fuel tax revenues collected do not exceed One Hundred Million Dollars (\$100,000,000.00) in any fiscal year, the provisions of this subparagraph shall not be applicable,

- b. to those tribes who were engaged in the sales of motor fuels during the fourth calendar quarter of the calendar year 1996:

- (1) for the fiscal year beginning July 1, 1996, an amount equal to ten cents (\$0.10) per gallon of motor fuels sold by such tribe during the fourth calendar quarter of 1996,

- (2) for the fiscal year beginning July 1, 1997, an amount equal to eight cents (\$0.08) per gallon of motor fuels sold by such tribe during the fourth calendar quarter of 1996,

- (3) for the fiscal year beginning July 1, 1998, an amount equal to six cents (\$0.06) per gallon of motor fuels sold by such tribe during the fourth calendar quarter of 1996,

- (4) for the fiscal year beginning July 1, 1999, an amount equal to four cents (\$0.04) per gallon of motor fuels sold by such tribe during the fourth calendar quarter of 1996, and

- (5) for the fiscal year beginning July 1, 2000, and thereafter for the duration of the contract, an amount equal to two cents (\$0.02) per gallon of motor fuels sold by such tribe during the fourth calendar quarter of 1996, and

- c. after determination of amounts to be apportioned pursuant to subparagraphs a and b of this paragraph, the remainder shall be apportioned according to the proportion the accepting Indian tribe's total Oklahoma resident membership bears to the total Oklahoma tribal resident membership of all accepting Indian tribes;

5. The funds withheld by the Oklahoma Tax Commission and apportioned quarterly pursuant to the provisions of this section shall be used by the accepting tribe exclusively for tribal government programs limited to highway and bridge construction, health, education, corrections, and law enforcement;

6. In the event, at any time during a calendar quarter, an accepting tribe selling motor fuel fails to procure, for whatever reason, motor fuel for sale in Indian country on which the tax imposed by this act has been precollected as provided in this act, or fails, for whatever reason, to include all state motor fuel taxes and assessments in the price of its motor fuels sales including, but not limited to, sales to tribal members on Indian country, the tribe shall not be eligible to receive an apportionment under this section for that calendar quarter. In such instances, the Tax Commission shall notify the tribe that its apportionment shall be withheld and the reasons therefor. The tribe shall have six (6) months from the date of issuance of the notice under this paragraph to file a legal action contesting the



decision of the state to withhold its apportionment. The amount withheld from the tribe pursuant to the provisions of this paragraph shall not be apportioned and shall be withheld from all tribes until the expiration of the six-month limitation period and during the pendency of any legal action filed pursuant to this paragraph.

7. Each tribe shall provide to the Oklahoma Tax Commission an audit of its tribal membership or citizenship rolls certified by a certified public accountant showing the correct number of its respective tribal members by blood, excluding members of bands, tribal towns and other tribes or affiliates which may be included on its rolls but who are ineligible for tribal services and benefits. Only tribal members who reside within the State of Oklahoma shall be included in the audit. Citizens of tribal towns, bands of Indians and tribes who are also counted in the audits as members of another tribe participating in the contract provided for in this section and eligible to receive services from the tribe shall not be eligible to also participate under this section. Any tribal member who is also a member of another tribe may only be counted once for purposes of determining tribal membership. Those tribes who were engaged in the sales of motor fuels during the fourth calendar quarter of calendar year 1996 shall also provide certified audited reports on or before January 10, 1997, showing the quantity of motor fuels sold by them during that period. For all tribes electing to accept the terms of the contract specified in this subsection before October 1, 1996, the membership audit report shall be submitted on or before October 1, 1996, and not later than July 1 of each year thereafter. The information provided shall be the basis from which the Oklahoma Tax Commission shall calculate the distribution of the funds withheld pursuant to the provisions of this section. The State of Oklahoma shall be absolved of any liability if the information submitted pursuant to the provisions of this section is not correct. If such information is not submitted by an accepting or participating tribe by October 1, 1996, or in subsequent years by July 1, the Tax Commission shall calculate the distribution of the funds on the basis of the information previously submitted by that tribe. Notwithstanding the provisions of Section 205 of Title 68 of the Oklahoma Statutes, copies of the audits and reports shall be made available to any requesting participating tribes;

8. Acceptance of the offer contained in this section shall be made in writing to the Oklahoma Tax Commission, signed by the chief executive officer of the tribal government, stating that the tribe accepts, without condition, the terms of this section, and for the sole purpose of resolving disputes arising out of a contract entered into pursuant to the provisions of this section, the tribe waives its immunity from suit and liability in state and federal court. In addition, proof of adoption of an ordinance or resolution by the governing body of the tribe accepting without condition the terms of this section, and an effective waiver of its immunity, as specified herein, shall be required. Notwithstanding the enactment of any future legislation on this topic, the term of the contract created by the acceptance of this offer shall extend through and include fiscal year 2016 and shall be renewed for successive ten-year terms unless a tribe notifies the State of Oklahoma of its intention not to participate further or the State of Oklahoma notifies the tribe of its intent not to participate further. Notification by the tribe shall be made in the same manner as required by this paragraph for acceptance of the offer to participate in the contract. Notification by the state shall be made by the Governor in writing to the tribe, and such notification shall be filed with the Secretary of State;

9. The State of Oklahoma hereby waives its immunities from suit granted by the Eleventh Amendment to the Constitution of the United States for the sole purpose of resolving disputes arising out of a contract entered into pursuant to the provisions of this section;

10. Both the State of Oklahoma and the accepting Indian tribe recognize, respect and accept the fact that under applicable laws each is a sovereign with dominion over their respective territories and governments. By entering into this proposed intergovernmental contractual relationship, neither the state nor the tribe has, in any way, caused the other's sovereignty to be diminished;

11. Members of accepting tribes shall not be individually eligible for the exemption provided in paragraph 10 of Section 10 of this act. Apportionment of funds to accepting tribes pursuant to the provisions of paragraph 4 of this subsection are in part in lieu of the refunds to individual tribal members as provided in paragraph 10 of Section 10 of this act. Indian tribes shall continue to be eligible for the tribal government exemption provided in paragraph 7 of Section 10 of this act;

12. A tribe accepting the offer contained in this section agrees to hold the state harmless from suit by its individual tribal members and further agrees that, if a final judgment is rendered against the state pursuant to such a suit, that the tribe will reimburse the state for the amount of any such judgment paid and any costs incurred by the state

OK ST T. 68 s 500.63

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pursuant to such suit. If a tribe fails to make such reimbursement within ninety (90) days of demand by the Oklahoma Tax Commission, the state shall withhold such amount from the apportionment of funds to the tribe pursuant to the provisions of paragraph 4 of this subsection; and

13. A tribe accepting the offer contained in this section agrees not to license or otherwise authorize an individual tribal member or other person or entity to make sales of motor fuel in violation of the terms of the contract.

## CREDIT(S)

1997 Electronic Pocket Part Update

Added by Laws 1996, c. 345, § 63, eff. Oct. 1, 1996.

[FN1] Title 68, § 500.1 et seq.

[FN2] Title 68, § 500.14.

[FN3] Title 68, § 500.10.

&lt; General Materials (GM) - References, Annotations, or Tables &gt;

68 Okl. St. Ann. § 500.63

OK ST T. 68 § 500.63

END OF DOCUMENT

**MOTOR FUEL TAX CONTRACTS BETWEEN  
THE STATE OF OKLAHOMA AND FEDERALLY RECOGNIZED  
INDIAN TRIBES**



OKLAHOMA HOUSE BILL 2208

**Senator Enoch Kelly Haney**

**Oklahoma State Senate**

STATE CAPITOL  
OKLAHOMA CITY, OKLAHOMA 73105

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Robert Thompson, Legal Staff Oklahoma State Senate



## I. BACKGROUND

On June 14, 1995, the United States Supreme Court issued its decision in the case of Oklahoma Tax Commission v. Chickasaw Nation. The Court found that Oklahoma's motor fuel tax laws as written could not be applied to sales of fuel by Indian tribes even if those sales were to non-Indians. Oklahoma imposes a 14 cent per gallon tax on diesel fuel and a seventeen cent per gallon tax on gasoline. In FY 95 the state of Oklahoma collected 370 million dollars in revenues from fuel taxes. This is a major source of revenue in a state with an approximately 4 billion dollar budget.

After the 10th circuit had handed down its decision in the case in the late summer of 1994, the State of Oklahoma had quit collecting any motor fuel tax on sales of fuel by Indian tribes. It was estimated that the state had lost approximately 2 million dollars in FY 95 and the forecast in loss of revenue for FY 96 ranged from 3.5 million dollars on up.

In its decision the Supreme Court had indicated that if the State of Oklahoma would change the legal incidence of its tax from the retailer to the consumer then the tax could legally be applied to sales of fuel by Indian tribes to non tribal members.

The Oklahoma House of Representatives spent last summer preparing legislation to move the incidence of the tax in an effort to address this issue. The Senate leadership was concerned that the House legislation did not sufficiently protect tribal sovereignty and would not withstand legal challenges in court. Unfortunately the State of Oklahoma has a long history of litigation with Indian tribes and has generally come out on the short end of these lawsuits. Beginning early last summer Senate leadership embarked on a long process designed to find a solution which would stop the erosion to the state's tax base, insure that there was no competitive advantage between Indian and non-Indian retailers, prevent future litigation on this issue and preserve Tribal sovereignty.

These issues are further complicated in Oklahoma because of the large number of tribes in the state and because of the checkerboard jurisdiction of the tribes. Oklahoma has 39 Federally

recognized tribes which are dispersed throughout the state. Tribal jurisdiction is not confined to distinct geographically contiguous blocks of land as is true in most states. Each tribe's jurisdiction is based primarily on Indian allotments. As a result there is some Indian jurisdiction in every part of the state.

## II. SENATE COMMITTEE

In June of 1995 the Senate President Pro Tem established a select committee of three senators whose job it was to devise an acceptable solution to this issue. The committee held a series of meetings with various interest groups involved with this issue. At one meeting, tribal officials from a number of tribes were invited to come and share their thoughts on this issue. The tribes were obviously concerned about tribal sovereignty and upholding the legal victories that they had achieved in the courts. At another meeting, a number of non-Indian oil marketers addressed the committee. The oil marketers had very strong concerns about being placed at a competitive disadvantage in the marketplace.

## III. COMPACTING PROPOSAL

At one meeting one of the larger tribes put forward a proposal that would have allowed tribes to enter into compacts with the state whereby tribes would agree to impose a tribal tax in the same amount as the state tax and would remit to the state an amount equal to half of that tax as an in-lieu payment for motor fuel taxes. The proposal would have required tribes who did not enter into such a compact to remit the full amount of state taxes on all sales except for sales to tribal members and for sales for tribal government use. While there was some support for this proposal among members of the Senate this proposal was opposed by most of the House members and was vigorously opposed by the oil marketers in the state who feared that the Tribes would retain a significant competitive advantage over non-Indian retailers.

#### IV. THE INTRODUCED BILL

When the 1996 legislative session began, the House introduced the original version of House Bill No. 2208 which moved the legal incidence of our motor fuel taxes to the consumer and moved the collection point for the tax to the refinery level. The bill provided for an exemption for fuel sold to a tribal government for tribal use and for fuel sold by an Indian tribe to its members. The tribal members would have to first pay the tax and then apply for a refund. By moving the collection point of taxes to the refinery level, it was felt that the motor fuel taxes would be more enforceable against all users of motor fuel. This bill was supported by the oil marketers but was strongly opposed by tribal leadership. The bill quickly passed the House and was passed by the Senate with the title stricken so that the bill would go to a conference committee.

#### V. THE SENATE BILL

While HB 2208 was pending in conference committee the Senate passed a floor substitute for another bill which would have authorized compacting by Indian tribes and the state on terms similar to those previously proposed by some tribes. This bill would have limited the uses which a tribe could make of any tribal tax imposed on fuel sales and would specifically prohibit using any of this tribal tax to subsidize the retail sale of motor fuels. House leadership refused to hear this bill and it died in the House.

#### VI. THE CONFERENCE COMMITTEE

House Bill No. 2208 was assigned to a conference committee consisting of 8 House members and 7 Senators. Under Oklahoma Legislative rules a majority of the members of each house had to approve any bill which came out of committee. In an effort to educate the conferees and to promote some type of consensus on the issues a conference committee meeting was held at which Dr. Rennard Strickland, Dean of Oklahoma City University Law School and noted scholar of Indian law addressed the committee concerning the legal issues involved in this effort. Dean Strickland praised the efforts of the committee in attempting to deal with this issue in a

responsible manner but pointed out numerous potential legal problems with the original version of House Bill 2208.

#### VII. MEDIATION

With the conference committee at an apparent impasse and the legislative clock ticking, the Senate leadership decided that a more pro-active approach to the problem was needed. Five tribal leaders and one attorney representing tribal interests and five of the oil marketers and one attorney representing the oil marketers were invited to attend a mediation session. An independent mediator met all day on a Saturday with the two groups to attempt to reach some sort of agreement that would satisfy both sides. While a complete agreement was not reached in this mediation a breakthrough was achieved in which the framework of a proposal that both sides could live with was hammered out.

#### VIII. THE FINAL PRODUCT

After much discussion between the Tribes, the oil marketers the Senate, the House and the Governor an agreement was reached that most of the original version of 2208 would be retained but that every tribe would be given the option to enter into an agreement with the State. Tribes who enter into these agreements would collect all state motor fuel taxes on sales of fuel by the Tribe including sales to tribal members and would agree not to litigate the Constitutionality of 2208. In return the tribe would share in a portion of the state motor fuel taxes based on a formula which included the tribe's population and motor fuel sales made by the tribe in the last quarter of 1996. These in-lieu payments by the state to the tribe could only be used for certain specified purposes such as road building, education and providing social services.

The Oklahoma Tax Commission felt that moving the point of collection of the motor fuel taxes to the refinery level would result in the collection of taxes on sales of motor fuel that had previously evaded paying taxes and generate sufficient money to make the payments to the tribes called for in the final bill. Support for this final product was obtained from the oil marketers in part because



the formula used to determine the payments to tribes would not be based on current motor fuel sales, so that the tribes would not have a monetary incentive to artificially inflate sales of motor fuels by cutting prices.

The Oklahoma Tax Commission is directed by the bill to promulgate rules for the implementation of this act. They have not yet completed this process and thus no tribes have yet made application to accept the agreement set forth in the act.

Oklahoma House Bill 2208 (1996)

HB 2208 is in response to the June 1995 decision of the U.S. Supreme Court in Oklahoma Tax Commission v. Chickasaw Nation. In Chickasaw, the Court unanimously upheld the Tenth Circuit Court of Appeals in invalidating Oklahoma's excise tax on motor fuel and diesel fuel sold by Chickasaw Nation retail stores in Indian country. The Court rejected Oklahoma's argument that the proper approach to evaluate a direct state imposed tax on Indian tribes or on tribal members inside Indian country is to employ a balancing test and weigh the relevant state and tribal interests. Instead, the Court embraced a categorical, per se approach. The proper initial inquiry in Indian tax cases is to determine who bears the legal incidence of a tax. The Court agreed with the Tenth Circuit that the Oklahoma motor fuels tax was an impermissible, direct tax on the Chickasaw tribe because the Indian retailer, not the distributor or consumer, bears the legal incidence of the tax. The Court stated that Oklahoma can address the problem by amending the law to shift the tax's legal incidence to the distributor or consumer.

HB 2208 clarifies that the legal incidence of the motor fuel tax falls on the consumer and the tax is being precollected at the terminal rack for the purpose of convenience and facility only. In addition, HB 2208 proposes a new motor fuel tax code which moves the point of collection of the motor fuel tax from licensed distributors to the suppliers at the terminal rack. In this sense the bill is seeking to "piggyback" upon the new federal excise system. This is a move that several states have made in the past couple of years primarily for the purpose to eliminate opportunities to evade motor fuel taxes.

Some of the significant anti-evasion provision are as follows:

- Tax accrues when the fuel levies the terminal - supplier is liable for the tax.
- The terminals provide the transporters with bills of lading which show a destination state.
- The transporters must have this document onboard and available for inspection by state officials and leave a copy with the retail station operators to whom they deliver the fuel.
- The terminals must report their disbursements of product, including intended destinations.
- Out of state suppliers are brought into the system on a voluntary basis as either "permissive suppliers" or electing suppliers.
- Substantial penalties are provided for lack of proper papers to improperly accepting receipt of fuel.

The legislation maintains all current motor fuel tax exemptions. Purchases for resale to federal and local governments, schools, FFA, 4-H, volunteer fire department, rural electric cooperatives, rural water and sewer districts, rural ambulance service districts and federally recognized Indian tribes for tribal government purposes are exempt at the terminal. The tax paid on undyed diesel fuel used off road by off-road users and agricultural purposes which is exempt from tax will be refunded to the user upon application by the user. Motor fuel sold at a tribal retail outlet to members of that tribe shall be exempt from motor fuel tax. Tribal members will perfect their exemption by applying for a refund for the tax paid to the Tax Commission. The Commission is directed to promulgate any necessary rules to administer this exemption.

In lieu of the refund procedure for tribal members, an Indian tribe may elect to enter into a contract with the State of Oklahoma. This contract will provide that the accepting tribe will not

challenge the constitutionality of this Act and in return the state will apportion quarterly to the accepting tribes a portion of the state motor fuel tax revenues. A formula is provided to determine the amount apportioned to each tribe. The tribes are required to use these monies exclusively for tribal government programs limited to highway and bridge construction, health, education, corrections and law enforcement. The term of the contract created by the acceptance of this offer shall extend through and include fiscal year 2016.

**PENALTIES** a) Any person who imports motor fuel into the state for retail sale without complying with the act or delivers or accepts motor fuel without the shipping documents required by the act or sells or uses motor fuel upon which the appropriate taxes have not been paid or knowingly uses dyed motor fuel unlawfully or knowingly evades payment of the tax shall be subject to a misdemeanor penalty of up to \$1,000.00 and/or one year in jail.

b) additionally, any vehicle operating on the highways of this state without the shipping papers required by this act is subject to seizure and forfeiture of the vehicle and its cargo.

**TRIBAL APPORTIONMENT** The fuel tax apportionment to Indian Tribes contracting with the State will be 3% of state fuel tax revenues for the fiscal year beginning July 1, 1996, 4% for the fiscal year beginning July 1, 1997 and 4 1/2% for the fiscal year beginning July 1, 1998 and thereafter.

The formula which will determine the amount received each quarter by each accepting tribe is as follows:

- a) \$6,250.00 plus
  - b) (1) for the fiscal year beginning July 1, 1996 ten cents (\$0.10) per gallon of motor fuel sold by the tribe during the fourth calendar quarter of 1996,
  - (2) for the fiscal year beginning July 1, 1997 eight cents (\$0.08) per gallon of motor fuel sold by the tribe during the fourth calendar quarter of 1996,
  - (3) for the fiscal year beginning July 1, 1998 six cents (\$0.06) per gallon of motor fuel sold by the tribe during the fourth calendar quarter of 1996,
  - (4) for the fiscal year beginning July 1, 1999 four cents (\$0.04) per gallon of motor fuel sold by the tribe during the fourth calendar quarter of 1996,
  - (5) for the fiscal year beginning July 1, 2000, and thereafter for the duration of the contract, two cents (\$0.02) per gallon of motor fuel sold by the tribe during the fourth calendar quarter of 1996, plus
- (c) after determination of amounts to be apportioned pursuant to (a) and (b) above, the remainder shall be apportioned according to the proportion the accepting Tribe's total Oklahoma resident membership bears to the total Oklahoma tribal resident membership of all accepting Indian tribes.

The existing motor fuel tax code would be repealed under this bill. The bill will go into effect October 1, 1996.

**MOTOR FUEL TAX CONTRACTS  
BETWEEN THE STATE OF OKLAHOMA AND FEDERALLY RECOGNIZED INDIAN TRIBE  
HB 2208 (Section 53)**

Under HB 2208, motor fuel sold within an Indian reservation or within Indian country by a federally recognized Indian tribe to a member of that tribe and used in vehicles owned by that tribal member will be exempt from the state motor fuels tax (Section 10, paragraph 10). The tax will be paid by the tribal member, who must then apply for a refund from the Tax Commission (Section 14, subsection E). (Tribal governments are also allowed an exemption for fuel used for governmental purposes (Section 10, paragraph 7).)

In lieu of this exemption and refund procedure, a federally recognized Indian tribe may elect to enter into a contract with the State of Oklahoma under which it will receive a percentage of the state motor fuel tax revenues. The terms of the contract include the following:

- The tribe agrees that it will not challenge the constitutionality or application of HB 2208 in any court or tribunal;
- The tribe will include all state motor fuel taxes and assessments in the price of its motor fuel sales;
- The Tax Commission will withhold a specified percentage of motor fuel tax revenues (3% in FY 97; 4% in FY 98 and 4.5% in FY 99 and thereafter), which will be apportioned quarterly to the tribes. The first apportionment will be for the fourth calendar quarter of 1996;
- The formula for the quarterly apportionments among the accepting tribes will be: (1) a base sum of \$6,250 (\$25,000 annually); (2) a payment for tribes engaged in sales of motor fuels in the fourth calendar quarter of 1996 (\$0.10 per gallon for FY 97, \$0.08 per gallon for FY 98, \$0.06 per gallon for FY 99, \$0.04 per gallon for FY 00 and \$0.02 for FY 01 and thereafter); and (3) a payment based proportionately on tribal resident population;
- Funds apportioned to tribes must be used for the following purposes: highway and bridge construction; education; law enforcement; corrections; and health;
- If a tribe fails to procure fuel on which the tax has been precollected as required by HB 2208 or fails to include the state taxes and assessments in the price of its motor fuel sales, the tribe will not be eligible to receive its payment for that quarter;
- Each tribe must provide the Tax Commission with a certified audit of its tribal membership or citizenship rolls, and tribes engaged in motor fuel sales in the fourth quarter of 1996 must also provide audited reports of the quantity of their sales. The State of Oklahoma is absolved of liability if the information submitted is not correct;
- Acceptance of the contract must be made in writing to the Tax Commission, signed by the chief executive officer of the tribal government. Proof of adoption of an ordinance or resolution by the tribal governing body is also required;
- The tribe waives its immunity from suit and liability in state and federal court for the purpose of resolving disputes arising out of a contract. The State of Oklahoma waives its Eleventh Amendment immunities for the same purpose;
- The term of the contract extends through and includes FY 2016 and is renewed for successive ten-year terms, unless either party notifies the other of its intent not to participate further;
- Both the State of Oklahoma and the accepting tribes recognize, respect and accept the fact that each is a sovereign with dominion over their respective territories and governments;
- Members of accepting tribes will not be individually eligible for the exemption provided in HB 2208, and payments to the tribes are in lieu of refunds to individual tribal members. Tribes will continue to be eligible for the tribal governmental exemption;
- The tribe agrees to hold the state harmless from suit by individual tribal members. If a judgment is rendered against the state under such a suit, the tribe must reimburse the state for the judgment and any costs incurred. If a reimbursement is not made, the state will withhold the amount from the tribal apportionment; and
- An accepting tribe agrees not to license or authorize individual tribal members to make motor fuel sales in violation of the contract.



## MOTOR FUEL TAX REVENUE STREAM

HB 2208

(all figures shown in millions of dollars)

Fiscal Year	Fuel Tax Revenues	Increased Revenues due to HB 2208	Total Fuel Tax Revenues	Tribal Fuel Tax Payment Percentage	Tribal Fuel Tax Payment	Net Revenue Change due to HB 2208	Accrued Balance
FY 96	\$354.083	\$11.934	\$366.017	3%	\$8.235	+\$3.699	+\$3.699
FY 97*	\$354.083	\$17.844	\$371.927	4%	\$14.877	+\$2.967	+\$6.667
FY 98	\$354.083	\$17.844	\$371.927	4.5%	\$16.737	+\$1.107	+\$7.773
FY 99	\$354.083	\$17.844	\$371.927	4.5%	\$16.737	+\$1.107	+\$8.880
FY 00	\$354.083	\$17.844	\$371.927	4.5%	\$16.737	+\$1.107	+\$9.987
FY 01	\$354.083	\$17.844	\$371.927	4.5%	\$16.737	+\$1.107	+\$11.094
FY 02	\$354.083	\$17.844	\$371.927	4.5%	\$16.737	+\$1.107	+\$12.201
FY 03	\$354.083	\$17.844	\$371.927	4.5%	\$16.737	+\$1.107	

\*Effective October 1, 1996.

Beginning in FY 99, the increased revenues due to HB 2208 exceed the tribal fuel tax payments by \$1.107 million each year.

According to the Oklahoma Tax Commission, HB 2208 will result in the following increased revenues:

	FY 97*	Full Implementation
Re-certification of revenue from Indian tribal sales (1)	\$2.256	\$3.400
Vendor retention fee for timely remittance (2)	\$3.491	\$5.210
Increased compliance (3)	\$6.187	\$9.234
TOTAL	\$11.934	\$17.844

- (1) For FY 97, the amount of motor fuel tax revenue certified was decreased by \$3.4 million due to anticipated tribal sales on which motor fuel taxes would not be collected. The Tax Commission has estimated that this amount would increase to \$13.342 million for FY 98.
- (2) Under current law, motor fuel tax is required to be reported on less than 100% of the gallonage (see Section 501 et seq. of Title 68 of the Oklahoma Statutes) to compensate vendors for the administrative expenses associated with collection and remittance of the taxes. HB 2208 allows vendors to retain 0.1% of the taxes as such compensation; the increased revenues result from this lower fee, which will also be retained by fewer vendors than under current law.
- (3) The Tax Commission estimates additional revenue due to increased compliance based on 2% increase in gasoline tax revenues and 6% increase in diesel tax revenues.

Citation  
O. R. S. 319.382  
U.R.S. § 319.382

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TEXT

1996 OREGON REVISED STATUTES  
TITLE 29. REVENUE AND TAXATION  
CHAPTER 319. MOTOR VEHICLE AND AIRCRAFT FUEL TAXES  
MOTOR VEHICLE FUEL AND AIRCRAFT FUEL TAXES  
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Current through End of 1995 Sp. Sess.

319.382. Agreements for refunds to Indian tribes.

Notwithstanding any other provision of law, the Department of Transportation may enter into agreements with the governing body of any Indian tribe residing on a reservation in Oregon to provide refunds to the tribe of state motor vehicle fuel taxes for fuel purchased on the reservation and used by tribal members on tribal reservation lands, other than for motor vehicle fuel used on state highways, county roads or city streets supported by the State Highway Fund.  
CREDIT

(1993 c. 706 § 2)

<General Materials (GM) - References, Annotations, or Tables>

O. R. S. § 319.382  
OR ST § 319.382  
END OF DOCUMENT

Citation  
 O. R. S. 323.401  
 U.S. § 323.401

Search Result

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Database  
 OR-ST-ANN

TEXT

1996 OREGON REVISED STATUTES  
 TITLE 29. REVENUE AND TAXATION  
 CHAPTER 323. CIGARETTE AND TOBACCO PRODUCTS TAX  
 CIGARETTE TAX  
 (COLLECTIONS AND REFUNDS)

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 Current through End of 1995 Sp. Sess.

323.401. Department authorized to make refund agreement with governing body of Indian reservation; contents; financing.

(1) The Department of Revenue is authorized to enter into a cigarette tax refund agreement with the governing body of any Indian reservation in Oregon. The agreement may provide for a mutually agreed upon amount as a refund to the governing body of any cigarette tax precollected on sales of cigarettes to Indians upon the reservation and paid into the State Treasury after April 27, 1976. This provision is in addition to other laws allowing tax refunds.

(2) There is annually appropriated to the Department of Revenue from the suspense account established under ORS 293.445 and 323.455, the amounts necessary to make the refunds provided by subsection (1) of this section.

CIT

(1979 c. 581 §§ 1,2,3; 1987 c. 758 § 13)

<General Materials (GM) - References, Annotations, or Tables>

O. R. S. § 323.401  
 OR ST § 323.401  
 END OF DOCUMENT

Citation  
 O.R.S. 323.615  
 U.S. § 323.615

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TEXT

1996 OREGON REVISED STATUTES  
 TITLE 29. REVENUE AND TAXATION  
 CHAPTER 323. CIGARETTE AND TOBACCO PRODUCTS TAX  
 TOBACCO PRODUCTS TAX  
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 Current through End of 1995 Sp. Sess.

323.615. Refund agreement with governing body of Indian reservation;  
 appropriation for refunds.

(1) The director is authorized to enter into a tobacco products tax refund agreement with the governing body of any Indian reservation in Oregon. The agreement may provide for a mutually agreed upon amount as a refund to the governing body of any tobacco tax collected under the Tobacco Products Tax Act in connection with the sale, use, storage or consumption of tobacco products on the Indian reservation. This provision is in addition to other laws allowing tax refunds.

(2) There is annually appropriated to the director from the suspense account established under ORS 293.445 and 323.625, the amounts necessary to make the refunds provided by subsection (1) of this section.

C T

(1985 c. 816 § 36)

<General Materials (GM) - References, Annotations, or Tables>

O. R. S. § 323.615  
 OR ST § 323.615  
 END OF DOCUMENT



Citation  
S D C L § 10-12A-4  
S D C L § 10-12A-4

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TEXT

## SOUTH DAKOTA CODIFIED LAWS

## TITLE 10. TAXATION

## CHAPTER 10-12A. TAX COLLECTION AGREEMENTS WITH INDIAN TRIBES

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Current through End of 1997 Sp. Sess.

10-12A-4 Agreement to collect taxes for tribes -- Department of Revenue  
fee.

The State Department of Revenue may enter into tax collection agreements with any Indian tribe under the provisions of chapter 1-24. These agreements may provide for the collection of any tribal sales and service, use, cigarette, and contractors' excise tax or any other tax or fee by the State Department of Revenue for the Indian tribe. The agreement may provide for the retention by the State Department of Revenue of an agreed upon percentage of the gross revenue as an administrative fee.

CREDIT

Source: SL 1974, ch 105, § 4; 1981, ch 86, § 2; 1991, ch 89, § 2.

NOTES, REFERENCES, AND ANNOTATIONS

## NOTES, REFERENCES, AND ANNOTATIONS

Opinions of Attorney General.

A city may not tax the gross receipts of Indian retailers, nor may it tax the gross receipts of non-Indian retailers from sales to Indians, Opinion No. 89-39.

S D C L § 10-12A-4

SD ST § 10-12A-4

END OF DOCUMENT

Citation  
S D C L § 10-12A-5  
S D C L § 10-12A-5

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TEXT

## SOUTH DAKOTA CODIFIED LAWS

## TITLE 10. TAXATION

## CHAPTER 10-12A. TAX COLLECTION AGREEMENTS WITH INDIAN TRIBES

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Current through End of 1997 Sp. Sess.

10-12A-5 Percentage of state and tribal tax proceeds remitted to tribe.

A tax collection agreement between the State Department of Revenue and an Indian tribe may provide, if agreed upon by the parties, that a fixed percentage of the total annual state and tribal tax proceeds from an area of Indian country shall be remitted to the Indian tribe in lieu of the exact amount of the revenue collected as a result of the imposition of tribal taxes.  
CREDIT

Source: SL 1974, ch 105, § 5.

S D C L § 10-12A-5  
SD ST § 10-12A-5  
END OF DOCUMENT

Citation  
 S DC 64:15:07:03  
 S.D. 64:15:07:03  
 S.D. Admin. R. 64:15:07:03

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 ADC-ALL

TEXT

ADMINISTRATIVE RULES OF SOUTH DAKOTA  
 TITLE 64. DEPARTMENT OF REVENUE  
 ARTICLE 64:15. FUEL TAXES  
 CHAPTER 64:15:07. TAX REFUND PROVISIONS  
 Current through July 17, 1997.

64:15:07:03. Sale of fuel to and refund of motor fuel tax to Indian tribes.

All sales of motor fuel to an Indian tribe are subject to the state fuel tax unless the tribe applies for and receives approval from the department to purchase tax-unpaid motor fuel. To qualify, tax-unpaid purchases of fuel must be used exclusively by a school funded and operated by an Indian tribe. The fuel must be delivered to and stored on the premises of the tribe-operated school and the tribe must provide a motor fuel tax exemption certificate to the seller.

A tribe may seek a motor fuel tax refund for fuel used for nonhighway, nontaxable purposes as set forth in SDCL 10-47A-46, whether consumed within or outside the legal boundaries of an Indian reservation. Applications for refund shall be made pursuant to SDCL chapter 10-47A and this chapter.

The sale of motor fuel to a federal agency which is billed to and paid for by the agency is not taxed even if the fuel is delivered to a tribal facility. At the time of the sale, the federal agency shall either present a United States exemption certificate to the selling distributor or sign a motor fuel tax exemption certificate for the purchaser.

CREDIT

Source: 17 SDR 4, effective July 18, 1990.

General Authority: SDCL 10-47A-3.

Law Implemented: SDCL 10-47A-46.

SD ADC 64:15:07:03

END OF DOCUMENT

TAX COLLECTION AGREEMENT

Agreement, dated December 15, 1977, by and between the Department of Revenue (the "Department") of the State of South Dakota (the "State") and the Rosebud Sioux Tribe of the Rosebud Indian Reservation (the "Tribe"), an Indian Tribe organized pursuant to the Federal Indian Reservation Act, 25 U.S.C. §461 et seq.

The Tribe and the Department each wish to derive significant revenues from taxation of certain activities on tribal territory (as that term is hereinafter defined) and to implement collection of such revenues while avoiding double taxation.

Accordingly, the parties agree as follows:

1. Jurisdiction to Tax

1.1 The Tribe has jurisdiction to tax certain activities by persons on all lands under the taxing jurisdiction of the Tribe.

1.2. The State has jurisdiction to tax certain activities of certain persons on tribal territory.

1.3. Neither party hereto by this Agreement, concedes in any way its asserted taxing jurisdiction; however, this Agreement shall be limited to collections in Todd County.

2. Representations

Each of the parties represents that:

(a) this Agreement has been duly and validly authorized that it has all requisite power to enter into this Agreement and to perform the terms hereof and that upon execution and delivery



to the other party this Agreement will constitute its valid and binding obligation enforceable in accordance with its terms;

(b) the execution, delivery and performance of the terms of this Agreement will not violate any provision of law, statute, rule or regulation to which any of the parties is subject

(c) all consents, authorizations or approvals of, or exemptions by, any governmental or public body or authority required in connection with the execution, delivery and performance of the terms of this Agreement have been received by the party requiring such consent, authorization, approval or exemption.

### 3. Collection of Tribal Taxes by the Department

3.1 The Department will collect on behalf of the Tribe the taxes imposed by the Rosebud Sioux Retail Sales, Service and Use Tax Ordinance and the Rosebud Sioux Tribal Cigarette Tax Ordinance (collectively, the "Ordinance") and will issue the stamps, licenses, and permits, supervise the keeping of records and filing of reports, and collect fees as required by such Ordinances. Such collection of taxes, issuance of stamps, licenses and permits, supervision of the keeping of records and filing of reports, and collection of fees will be conducted substantially in the same manner as conducted by the Department with respect to South Dakota taxes under SDCL 10-45, 10-46, 10-50 and other statutes dealing with the same type of taxes as Ordinances.

3.2 As a condition of the issuance of any license under the Ordinances pursuant to this Agreement, the person obtaining such license shall consent to the jurisdiction of the Rosebud Sioux Tribal Court to enforce such Ordinances.

3.3 The Tribe shall employ a Revenue Agent to assist the State in the collection efforts under this Agreement and shall not require contractors to take delivery of materials on lands within its taxing jurisdiction for purposes of determining the incidence of the use tax.

#### 4. Remittance of Tax Proceeds

4.1 The Department will remit to the Tribe on a quarterly basis (according to the State fiscal quarters) an amount equal to <sup>75%</sup>~~22%~~ of the total proceeds collected by the Department with respect to the preceding quarter of the taxes imposed by the Ordinances and by SDCL 10-45, 10-46, and 10-50.

4.2 The Department may retain out of its quarterly remittance to the Tribe a total annual amount not to exceed 1% of the total annual proceeds of the taxes collected pursuant to this Agreement to cover administration costs.

4.3 Remittances shall be by <sup>State warrant</sup>~~certified check~~ payable to the order of the Tribe.

4.4 The retention by the Department of <sup>25%</sup>~~21%~~ of the total proceeds collected by the Department pursuant to subsection 4.1 hereof shall be in lieu of any collection by the Department, the State of South Dakota, or any agency thereof, of the taxes imposed by SDCL 10-45, 10-46 and 10-50 <sup>in Todd County</sup>~~on tribal territory~~.

#### 5. Inspection of Books and Records

The Department will permit the Treasurer of the Tribe or any persons designaged by him to examine the Department's books of account and other records (and to make copies thereof and extracts therefrom) relating to the collection of taxes, issuance of stamps and licenses, keeping of records and filing

of reports, and collection of fees by the State on behalf of the Tribe, at such times and at such intervals as the Treasurer may reasonably request.

#### 6. Terms of Agreement

This Agreement shall be in effect for a term of one year from the date first above written and shall continue in effect thereafter subject to termination after the one-year period by either party upon at least 30 days written notice of termination effective at the end of any fiscal quarter of the State.

#### 7. Entire Agreement

This Agreement constitutes the entire agreement between the parties hereto and supersedes all prior agreements, understanding and arrangements, oral or written, between the parties hereto with respect to the subject matter hereof.

#### 8. Amendments and Waivers

This agreement may not be modified or amended, nor may compliance with any provision hereof be waived except by an instrument or instruments in writing signed by the party against whom enforcement of any such modification, amendment, or waiver is sought.

#### 9. Execution in Counterparts

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

FILED

RESOLUTION NO. 84-161  
OF THE ROSEBUD SIOUX TRIBE

WHEREAS, the Rosebud Sioux Tribe is a federally recognized Indian Tribe under the Indian Reorganization Act and possess inherent governmental authority over the Rosebud Indian Reservation, and

WHEREAS, the Rosebud Sioux Tribal Council by virtue of the Rosebud Sioux Tribal Constitution, Article IV, Section 1(B), has power and authority to levy taxes; and

WHEREAS, that Ordinance 77-01 entitled Rosebud Sioux Tribal Retail Sales, Service and Use Tax Ordinance, and that Ordinance 84-14 entitled Rosebud Sioux Tribal Contractors' Excise tax, should be and the same is hereby amended as follows:

1. Section 57. Amendments to Sales and Use Tax Laws.

Any change by the Legislature of the State of South Dakota to SDCL 10-45 and SDCL 10-46, shall constitute an amendment to this Ordinance unless the Rosebud Sioux Tribal Council disapproves the same no later than 30 days prior to its effective date. In the case of an emergency enactment by the South Dakota Legislature, the enactment shall constitute an amendment to this Ordinance unless the Rosebud Sioux Tribal Council disapproves the same no later than 30 days following the enactment by the South Dakota Legislature and approval thereof, which 30 day limit shall begin to run from the date a



certified letter is received by the RST Treasurer from the State of South Dakota, Department of Revenue. The Secretary of the Rosebud Sioux Tribe shall forward any such changes which have been approved to the Superintendent of the Rosebud Agency for consideration by the Secretary of the Interior.

Any change by the Legislature of the State of South Dakota to SDCL 10-45 and SDCL 10-46 from January 01, 1978, to the effective date of this resolution shall constitute an amendment to this Ordinance unless the Rosebud Sioux Tribal Council within 30 days from the date of this Ordinance disapproves the incorporation.

If the Rosebud Sioux Tribal Council disapproves a change made in the above statutes by the legislature of the State of South Dakota or disapproves any emergency enactment, the Council shall notify the Department of Revenue, in writing, within ten days of the disapproval.

2. Ordinance 84-14 entitled Rosebud Sioux Tribal Contractors' Excise Tax be amended to add:

Section 26. Amendments to Contractors' Excise Tax Laws.

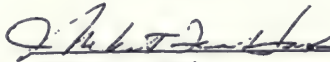
Any change by the legislature of the State of South Dakota to SDCL 10-46A and SDCL 10-46B shall constitute an amendment to this Ordinance, unless the Rosebud Sioux Tribal Council disapproves the same no later than 30 days prior to its effective date. In the case of an emergency enactment by the South Dakota Legislature, the enactment shall constitute an amendment to this Ordinance unless the Rosebud Sioux Tribal Council disapproves the same no later than 30 days following the approval thereof, which 30 day limit shall begin to run from the date a certified letter is received from the State of South Dakota, Department of Revenue. The Secretary of the Rosebud Sioux Tribe shall forward any such changes which have been approved to the Superintendent of the Rosebud Agency for consideration by the Secretary of the Interior.

Any change by the Legislature of the State of South Dakota to SDCL 10-46A and SDCL 10-46B from January 01, 1978, to the effective date of this resolution shall constitute an amendment to this Ordinance unless the Rosebud Sioux Tribal Council within 30 days from the date of this Ordinance disapproves the incorporation.

If the Rosebud Sioux Tribal Council disapproves a change made in the above statutes by the legislature of the State of South Dakota or disapproves any emergency enactment, the Council shall notify the Department of Revenue, in writing, within ten days of the disapproval. This is to establish that this Ordinance supersedes any and all other Excise Tax Ordinances.

### CERTIFICATION

This is to certify the Resolution No. 84-161 was duly passed by the Rosebud Sioux Tribal Council in session on July 31, 1984, by a vote of 21 in favor, 1 opposed, 2 not voting. The said Resolution was pursuant to authority vested in the Council. A quorum was present.



Webster Two Hawk  
President  
Rosebud Sioux Tribe



Lloyd B. One Star, Sr.  
Secretary  
Rosebud Sioux Tribe

## RETAIL SALES, SERVICE AND USE TAX ORDINANCE

Section 1. Definition of Terms. The following words, terms, and phrases, when used in this Ordinance, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect;

(b) "Gross receipts" means the amount received in money, credits, property, or other money's worth in consideration of sales at retail on tribal territory (as herein defined), without any deduction on account of the cost of the property sold, the cost of materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. Discounts for any purpose allowed and taken on sales shall not be included as gross receipts, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. On all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof



only such portion of the sale amount thereof shall be accounted, for the purpose of imposition of tax imposed by this chapter, as has actually been received in cash by the retailer during each quarterly period as defined herein;

(c) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, municipal corporation, estate, trust, business trust, receiver, or any group or combination acting as a unit, and the plural as well as the singular in number;

(d) "Relief agency" means the Tribe (as herein defined), the State of South Dakota, any county, city and county, city or district thereof, or any non-profit charitable organization which denotes its resources exclusively to the relief of the poor and distressed or underprivileged, and has been recognized as an exempt organization under Section 501(c)(3) of the Internal Revenue Code.

(e) "Retail sale" or "sale at retail" means the sale of tangible personal property to the consumer or user thereof, or to any person for any purpose other than for resale; the sale of natural or artificial gas, electric energy, water, and communication service to consumers or users; and the sale of tickets or admissions to places of amusement or athletic contests;

(f) "Retailer" includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or the furnishing of gas, electricity, water, and communication service, and tickets or admissions to places of amusement and athletic events as provided in this Ordinance.

"Retailer" also includes every person subject to the tax imposed by sections 4 and 5 hereof. The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as engaging in the business of selling such tangible personal property at retail does not constitute such person a retailer;

(g) "Sale" means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever for a consideration;

(h) "Tribe" means the Rosebud Sioux Indian Tribe;

(i) "Treasurer" means the Treasurer of the Tribe and his duly authorized agents or employees;

#### Section 2. Tax on Sale of Tangible Personal Property.

There is hereby imposed as a tax upon the privilege of engaging in business as a retailer, a tax of four percent upon the gross receipts of all sales of tangible personal property consisting of goods, wares, or merchandies, except as taxed by section 3 hereof and except as otherwise provided in this Ordinance, sold at retail on tribal territory to consumers or users.

Section 3. Use Tax. There is hereby imposed an excise tax at the same rate as the tax imposed by Section 2 of this Ordinance on the privilege of the use, storage, and consumption on tribal territory of tangible personal property not subject to the taxes imposed by this Ordinance by virtue of their purchase outside tribal territory. All contractors doing business on the Reservation shall be required to obtain a use tax permit prior to engaging in construction activity on tribal territory. The retainage on all contracts shall not be released until all Tribal tax obligations have been met. In the event any tax liabilities shall remain outstanding, the retainage may be applied against these liabilities.

The administration of this section shall be pursuant to regulations issued by the Treasurer except as otherwise provided in this Ordinance.

Section 4. Tax on Sale of Farm Machinery and Irrigation Equipment. There is hereby imposed a tax of two percent on the gross receipts from the sale or resale of farm machinery and attachment units other than replacement parts; or irrigation equipment used exclusively for agricultural purposes by retailers licensed by the Tribe; provided, however, that whenever any trade-in or exchange of used farm machinery is involved in the transaction, the tax shall only be due and collected on the cash difference.

Section 5. Tax on Receipts From Professional and Business Services. There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property on tribal

territory upon the gross receipts of any person from the engaging or continuing in the practice of any profession or of any business in which the service rendered is of a professional, technical, or scientific nature and is paid for on a fee basis, or by a consideration in the nature of a retainer--except it shall not apply to those persons engaged in the practice of the healing arts and veterinarians who are licensed to engage in such practice on tribal territory.

Section 6 Tax on Receipts From Specific Enumerated Businesses and Services. There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property on tribal territory upon the gross receipts of any person from engaging or continuing in any of the following businesses or services on tribal territory: abstracters; accountants; architects; barbers; beauty shops, blacksmith shops, car washing; dry cleaning, dyeing, exterminators; garage and service stations; garment alteration; cleaning and pressing; janitorial services and supplies; specialty cleaners; laundry; linen and towel supply; photography; photo developing and enlarging; tire recapping; welding and all repair services; cable television; and rentals of tangible personal property except personal property leased under a single contract for more than twenty-eight days, motor vehicles leased under a single contract for more than twenty-eight days and mobile homes provided, however, that the specific enumeration of businesses and professions made in this section is not intended to, in any way, limit the scope and effect of section 4 hereof.



Section 6.1. Coin-Operated Washers and Dryers--

License in Lieu of Tax--Collection--Penalty. There is hereby imposed an annual license fee of six dollars for each coin operated washer and dryer on tribal territory. Such license fee shall be in lieu of any sales or gross receipts taxes from the operation or ownership of coin operated washers and dryers. Any person who shall violate the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not more than five hundred dollars or imprisoned for a period not exceeding six months or punished by both such fine and imprisonment. The Treasurer shall promulgate the necessary rules and regulations for collection of the license fees as provided for in this section, except as otherwise provided in this Ordinance.

Section 7. Tax on Utility Services. There is hereby imposed a tax of four percent upon the gross receipts from sales, furnishing, or service of gas, electricity, and water, including the gross receipts from such sales by any municipal corporation furnishing gas, and electricity, to the public in its proprietary capacity, except as otherwise provided in this Ordinance, when sold at retail on tribal territory to consumers or users.

Section 7.1. Tax on Telephone and Teletypewriter Services--Computation--Coin telephones. There is hereby imposed on amounts paid for local telephone services, toll telephone services and teletypewriter services, a tax of four percent of the amount so paid. The taxes imposed by this section shall be paid by the person paying for the services. If a bill is rendered the taxpayer for local telephone service or toll

telephone service, the amount on which the tax with respect to such services shall be based shall be the sum of all charges for such services included in the bill; except that if a person who renders the bill groups individual items for purposes of rendering the bill and computing the tax, then the amount on which the tax for each such group shall be based shall be the sum of all items within that group, and the tax on the remaining items not included in any such group shall be based on the charge for each item separately. If the tax imposed by this section with respect to toll telephone service is paid by inserting coins in coin-operated telephones, the tax shall be computed to the nearest multiple of five cents, except that, where the tax is midway between multiples of five cents, the next higher multiple shall apply. The tax so paid shall be remitted at the same time as the sales tax imposed by this Ordinance.

Section 8. Tax on Room or Parking Site Rentals To Transient Guests. There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property on tribal territory upon the gross receipts from rentals of rooms or parking sites by lodging establishments or campgrounds received from transient guests. Lodging establishment shall mean any building, structure, property or premise kept, used, maintained, advertised, or held out to the public to be a

place where sites are available for the placing of tents, campers; trailers, mobile homes, or other mobile accommodations in two or more rental units to transient guests. Transient guest means any person who resides in a lodging establishment or campground less than twenty-eight consecutive days.

Section 9. Tax on Amusements and Athletic Events--

Records of Income from Amusement Devices. There is hereby imposed a tax of four percent upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this Ordinance, and upon the gross receipts derived from the operation of pinball machines and other mechanical devices for amusement for which a charge is made for the operation thereof, mechanical phonographs, shooting galleries, bowling alleys, pool and billiard tables. In case the operator is the lessee of the devices referred to in the last preceding sentence, such lessee shall be deemed the owner thereof for the purposes of this Section. The operator of the machines above described shall keep a record of the gross income derived from each of said machines and shall report the same to the Department of Revenue at the same time other sales tax reports are due pursuant to regulations prescribed by the Treasurer, or as otherwise provided in this Ordinance.

Section 10. Constitutional and Statutory Exemptions

From Taxation. There are hereby specifically exempted from the

provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from sales of tangible personal property not subject to taxation by the Tribe under the Constitution or laws of the United States.

- Section 11. Exemption of Sales to Public Agencies, Relief Agencies and Indian Tribes. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from sales to the United States, to any Indian Tribe or any agency thereof, to the State of South Dakota, to public or municipal corporations in the State of South Dakota, to any relief agency, which shall mean a nonprofit charitable organization which devotes its resources exclusively to the relief of the poor and distressed or underprivileged, and has been recognized as an exempt organization under section 501(c)(3) of the Internal Revenue Code.

Section 11.1. Exemption of Sale of Water by Political Subdivisions and Water User Districts. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from the sale of water by any Indian Tribes or agencies thereof, political subdivisions of the State of South Dakota and all public corporations organized under chapter 46-14 of the laws of such State.



Section 12. Exemption of Sales Otherwise Taxed. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the sale of gasoline, motor fuel, and use fuel subject to tax under any Use Fuel Tax Ordinance of the Tribe and cigarettes already taxed or exempt under the laws of the Tribe.

Section 12.1. Exemption of Goods and Services Furnished to Meet Warranty Obligation Without Charge. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from furnishing goods or services to the purchaser or his successor in interest of tangible personal property to fulfill a warranty obligation of the manufacturer to the extent that such goods or services are not charged to such purchaser or his successor in interest.

Section 13. Exemption of Transportation Services. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from the sale, furnishing, or service of transportation.

Section 14. Exemption of Receipts Used for Civic and Non-Profit Associations and Purposes. There are hereby specifically exempted from the provisions of this Ordinance and from the

computation of the amount of tax imposed by it, the gross receipts from the sales of tickets or admissions to the grounds and grandstands attractions of tribal, state, county, district, regional and local fairs and pow wows and except for the state fair of the State of South Dakota and the pow wow of the Tribe, without regard to the number of days such fairs and attractions may be conducted, and community operated celebrations or shows sponsored by chambers of commerce or similar nonprofit corporations or associations; and the gross receipts from educational, religious, benevolent, fraternal, or charitable activities, where the entire amount of such receipts after deducting all costs directly related to the conduct of such activities is expended for educational, religious, benevolent, fraternal or charitable purposes, and which receipts are not the result of engaging for more than five consecutive days in a business or occupation otherwise taxable and provided that all organizations claiming this exemption shall pay this tax on all goods and services otherwise subject hereto and used in the conduct of such activities.

Section 15. Exemption of Sales to Religious Educational Institutions and Hospitals--Purchases for Members or Employees Taxable--Motor Vehicle Registration Fee--Quarterly Report by Exempt Institutions. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from

sales of tangible personal property and the gross receipts from sales, furnishing, or service of gas, electricity, water, and communication service to and for use by religious educational institutions and nonprofit, charitable hospitals when purchases are made by authorized officials, payment made from the institution funds, and title to the property retained in the name of such institution.

This exemption will not extend to sales to or purchases of tangible personal property for the personal use of officials, members or employees of such institutions or to sales to or purchases of tangible personal property used in the operation of a taxable retail business.

The exemption provided in this section shall not in any manner relieve such institution from the payment of the additional and further license fee, if any, imposed on the registration of motor vehicles.

All such institutions claiming exemption hereunder shall at the end of each quarter of each calendar year file with the Treasurer a list of all purchases on which exemption was claimed, fully itemized, showing name and address of vendors, description of property purchased, purchase price and brief explanation of use or intended use.

Section 15.1. Exemption of Prescription Drugs and Medicines for Human Use. There are hereby specifically exempted

from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, all drugs and medicines to the extent used by humans, when such drugs or medicines are prescribed by prescription, dispensed, or administered by a physician or other licensed person or dispensed by a pharmacist.

Section 16. Exemption of Seed Used for Agricultural Purposes. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the sale of seed legumes, seed grasses, and seed grains, when twenty-five pounds or more are sold in a single sale to be used exclusively for agricultural purposes.

Section 16.1. Exemption of Cattle Semen Used for Agricultural Purposes. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the sale of cattle semen for the artificial insemination of domestic animals whenever the vendee has made the purchase exclusively for agricultural purposes.

Section 17. Exemption of Commercial Fertilizer Used for Agricultural Purposes. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the sale of commercial fertilizers, either liquid or solid, when



five hundred pounds or more are sold in a single sale to be used exclusively for agricultural purposes.

Section 17.1. Exemption of Pesticides Used for Agricultural Purposes. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the sale of insecticides, herbicides, pesticides, rodenticides and fumigants to be used exclusively by the purchaser for agricultural purposes.

Section 18. Exemption of Exchange of Agricultural Products. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the exchange of processed agricultural products for unprocessed agricultural products, of a kind required for such processing when such exchange is between the producer and processor and, provided such processed articles are for consumption by the producer's family, household, or employees.

Section 19. Exemption of Livestock and Poultry Sales Other Than Ultimate Retail Use. No gross receipts from sales of livestock or live poultry, when such sales are a part of a series of transactions incident to producing a finished product intended to be offered for an ultimate retail sale, shall be taxable under this Ordinance except that an ultimate retail

sale interrupting the series of transactions with an intended final use or consumption shall be taxable.

Section 20. Exemption of Fuel Use for Agricultural or Railroad Purposes. Motor fuel, including kerosene, tractor fuel, liquefied, petroleum gas, diesel fuels and distillate, when used for agricultural or railroad purposes is hereby exempt from excise taxes imposed under this Ordinance.

For the purposes of this section the term agricultural purposes shall not include the lighting or heating of a farm residence or residences.

For the purposes of this section the term railroad purposes shall include only locomotives or track motor cars being operated on railroad tracks in road service on tribal territory.

Section 21. Exemptions Applied to Taxable Services. The exemptions from sales tax relative to sales of tangible personal property shall apply to services included in sections 4 and 5 hereof.

Section 22. Tax Additional To Other Occupation and Privilege Taxes. The taxes imposed under this Ordinance shall be in addition to all other occupation or privilege taxes imposed by the Tribe or by any state, municipal corporation or political subdivision of any state unless otherwise specifically exempted by this Ordinance.

Section 23. Addition of Tax to Price of Sale or Service--Absorption of Price by Retailer Not to be Advertised.

Retailers may add the tax imposed under this Ordinance, as provided by law and where no provision is made, the average equivalent may be added. Any person whose services are taxed in sections 4 or 5 hereof may add the tax under said sections, or their average equivalent thereof, to his price or charge. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly that the tax or any part thereof imposed by this Ordinance will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it, or any part thereof, will be refunded. —

Section 24. Schedule for Collection of Tax From Consumer. The following schedule is hereby adopted as the basis for collection of the tax imposed by this Ordinance from the public where the same is applicable.

\$ .01 to \$ .12	None
.13 to .37	\$ .01
.38 to .62	.02
.63 to .87	.03
.88 to 1.12	.04
1.13 to 1.37	.05
1.38 to 1.62	.06
1.63 to 1.87	.07
1.88 to 2.12	.08

and on each additional dollar or fraction thereof an increment in tax according to this schedule.

The rate prescribed herein shall be applicable to all excise, registration or use taxes whose rate is fixed to or determined by the rate prescribed in sections 2 to 8 hereof, inclusive, except for the purpose of determining the license fee for the first or original registration of a motor vehicle, house car, house trailer or trailer coach under a Tribble Ordinance and upon the gross receipts reported from the operation of all vending machines, including but not limited to pinball machines, phonographs, and all other mechanical devices for amusement, the rate of tax shall be three percent, except on aircraft manufactured and exclusively used for agricultural spraying, dusting, crop seeding, fertilizing or defoliating purposes, the rate of tax shall be two percent provided, however, that registration of aircraft identifies its specific use.

Section 25. Application for Retailer Permit--Contents and Execution. Every retailer or person engaging in a business on tribal territory whose receipts are subject to sales tax shall file with the Treasurer an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the Treasurer and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and



and such other information as the Treasurer may require. The application shall be signed by the owner, if a natural person; in the case of an association or partnership, by a member or partner thereof; or in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. The applicant must have a permit for each place of business.

Section 26. Issuance of Retailer Permit--Limited to Person and Place Designated--Display in Place of Business--Effective Until Canceled or Revoked. The Treasurer shall grant and issue to each applicant a permit for each place of business on tribal territory. A permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued. Permits issued shall be valid and effective without further payment of fees until canceled or, revoked.

Section 27. Refusal of Permit to Delinquent Taxpayer--Bond to Secure Payment of Tax. The Treasurer may, at his discretion, refuse to issue a permit to any person who is delinquent in payment of occupation taxes levied by the Tribe. He may also, in his discretion, require an applicant to furnish a bond to the Tribe, or other adequate security, as security for payment of any sales tax that may become due, or require a

bond or security as a condition precedent to remaining in business as a retailer.

Section 28. Quarterly Return and Remittance Required of Retailers--Extension of Time for Filing. On or before the fifteenth day of the month following each quarter of the year, every person who is the holder of a sales tax permit, or is a retailer whose receipts are subject to sales tax in this state during such quarter, shall make a return and remittance to the Treasurer on forms prescribed and furnished by such Treasurer. The Treasurer may grant an extension of not more than fifteen days for filing a return and remittance.

Section 29. Returns Filed on Other Than Quarterly Basis. The Treasurer, at his discretion, may require some or all returns and remittances to be filed on a monthly, semiannual or annual basis, in which event the return and remittance is due the fifteenth day of the month following the reporting period.

Section 30. Deduction Allowed for Sales Refunds. Refunds made by a retailer during the reporting period shall be allowed as a deduction in case the retailer included the receipts, for which a refund is made, in the net taxable sales or has previously paid the sales tax.

Section 31. Credit for Taxes Paid on Worthless Accounts Tax Paid if Account Collected. Taxes paid on gross receipts represented by accounts found to be worthless and actually charged

off for income tax purposes, may be credited upon a subsequent payment of the tax herein provided; if such accounts are thereafter collected by the retailer, a tax shall be paid upon the account so collected.

Section 32. Receipts Not Issued for Taxes Remitted.

The Treasurer shall not be required to issue receipts for sales tax remitted to him.

Section 33. Correction of Incorrect Return by Treasurer-

Notice of Person Filing Return--Appeal. If the Treasurer has reason to believe, and does believe, that a return is incorrect, after notice to such person and hearing thereon, he shall correct such return to his best judgment and information, which return so corrected shall be prima facie correct. Such person having filed an incorrect return shall be notified by ordinary mail of the Treasurer's determination from which he may appeal within ten days.

Section 34. Determination of Amount of Tax in Absence

of Return--Notice of Person Failing to Make Return--Appeal.

In case any person subject to tax fails to make a return as required, the Treasurer, after notice to such person and hearing thereon, shall determine the amount of such tax according to his best judgment and information, which amount so fixed shall be prima facie correct and such person having failed to make the return shall be notified by ordinary mail of the determination, from which he may appeal within ten days.

Section 35. Revocation of Retailer's License for Failure to File Return or Pay Tax--Continuation in Business as Engaging in Business Without License. Every person who is the holder of a sales tax license and who has failed to file a return, or who has filed a return and has failed to pay the tax due the Tribe under this law on or before the fifteenth of the second month following the quarter, or any other reporting period authorized, shall no longer continue as a retailer and his sales tax license is hereby revoked and canceled. Any person who shall continue in a taxable business after his license has been revoked or canceled, as herein provided, shall be guilty of engaging as a retailer without a sales tax license.

Section 36. Appeal From Treasurer to Tribal Court--Notice of Appeal--Hearing de novo. An appeal from the decision of the Treasurer may be taken by a taxpayer to the Tribal Court. Notice of appeal must be filed within thirty days after notice of the decision of the Treasurer. All appeals shall be heard by the court de novo.

Section 37. Reinstatement of Revoked Retailer's License--Fee. The license of a retailer which has been canceled or revoked as provided in section 34 hercof shall not be reinstated by the Treasurer until all the sales tax due the Tribe and a ten dollar reinstatement fee has been paid.



Section 38. Jeopardy Assessment of Sales Tax--Lien and Distress Warrant--Bond to Pay Tax. If the Treasurer believes that the assessment or collection of taxes will be jeopardized by delay, he may immediately make an assessment of the estimated tax and penalty, and demand payment thereof from the taxpayer. If such payment is not made, a lien may be filed and a distress warrant issued. The Treasurer shall be permitted to accept a bond from the taxpayer to satisfy collection until the amount of tax legally due shall be determined and paid.

Section 39. Civil Action for Tax and Penalty--Injunction Against Engaging in Business Without Sales Tax License; Consent to Jurisdiction; Termination of Lease.

39.1. In any case of failure to pay the tax or penalty when due, the amount of such tax or penalty may be recovered in action of debt in the Tribal Court or any other court of competent jurisdiction. The remedy of injunction is applicable where a person fails to hold a sales tax license or when the license has been cancelled or revoked by the Treasurer.

39.2. Consent to Jurisdiction. As a condition to the granting of any license or permit under this Ordinance, the person obtaining such license or permit shall consent to the jurisdiction of the Tribal Court to enforce this Ordinance.

39.3. Termination of Lease. The Tribal Council is hereby authorized to terminate upon fifteen days notice any lease or other agreement between the Tribe and any person who fails to pay the tax, fees, or penalties provided for herein, when due.

Section 40. Lien of Tax and Penalty--Notice of Lien Filed with Register of Deeds. Any tax or penalty due the Tribe from a taxpayer shall be a lien in favor of the Tribe upon all property and rights to property, whether real or personal, belonging to the taxpayer. In order to preserve the lien against subsequent mortgages, purchasers, or judgment creditors for value and without notice of the lien, on any property, the Treasurer may file with the register of deeds in the area in which the property is located, a notice of said lien in such form as he shall elect.

Section 41. Tax Lien Index Book--Contents--Endorsement and Recording of Notice. The register of deeds shall prepare and keep in his office a tax lien index book which will provide:

1. Taxpayers alphabetically arranged;
2. Tribe as claimant;
3. Time notice of lien was received;
4. Date of notice;
5. Amount of lien;
6. When satisfied.

The register of deeds shall endorse on each notice of lien the day, hour and minute when received, and shall forthwith index said notice in said book and record the lien in the manner provided for recording real estate mortgages.

Section 42. Distress warrant for collection of Tax--  
Seizure and Sale of Property--Compensation of Sheriff. After a  
 notice of lien has been filed as provided in section 34 hereof,  
 the Treasurer or his agents may at any time issue a distress  
 warrant and deliver said warrant to the appropriate official for  
 execution. Immediately upon receipt of the warrant, such official  
 shall proceed to collect the tax by seizure and sale of personal  
 property and shall remit the tax so collected to the Treasurer.  
 For such services, such official shall be permitted to  
 collect from the taxpayer and retain as compensation an amount to  
 be determined by regulation by the Treasurer.

Section 43. Endorsement and Return of Uncollectible  
Warrant--Liability of Officer for Failure to Issue or Execute  
Warrant. When such officer is unable to find property of the  
 taxpayer which may be seized and sold, he shall, within thirty  
 days after receipt of the warrant, endorse upon the case of  
 the warrant the word "uncollectible" and return the warrant  
 to the Treasurer. Failure or refusal of the Treasurer to  
 issue a distress warrant when requested to do so, or of such  
 official to attempt to execute the same, shall make the official  
 failing to perform his duty personally liable for the delinquent  
 tax, and said tax may be recovered in an action brought against  
 him and his sureties by the Treasurer.

Section 44. Satisfaction of Lien Filed with Register of Deeds. Upon payment of the tax and penalty, the Treasurer shall forthwith file a satisfaction with the register of deeds who shall file such notice in his office and indicate said fact on the index described in section 40 hereof.

Section 45. Recording of Liens and Satisfaction Without Cost to State. The filing and recording of sales tax liens and satisfactions by a register of deeds shall be done without cost to the Tribe.

Section 46. Records Preserved by Persons Subject to Tax--Inspection by Department. Every person subject to tax under this Ordinance shall keep records and books of all receipts and sales, together with invoices, bills of lading, copies of bills of sale, and other pertinent papers and documents. Such books and records and other papers and documents shall, at all times during business hours of the day, be subject to inspection by the Treasurer or his duly authorized agents and employees to determine the amount of tax due. Such books and records shall be preserved for a period of three years unless the Treasurer, in writing, authorizes their destruction or disposal at an earlier date.

Section 47. Returns and Investigations Confidential--Unauthorized Disclosure of Information as Misdemeanor--Penalty. All information received by the Treasurer from returns filed under this Ordinance, or from any investigations conducted under the



provisions of this Ordinance, shall be confidential, except for official purposes, and it shall be unlawful for any officer or employee of the Treasurer to divulge any such information in any manner, except in accordance with a proper judicial order or as otherwise provided by law. Any officer or employee of such Treasurer who divulges any such information in any manner, except in accordance with a proper judicial order or as otherwise provided by law, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned for not less than one nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

Section 48. Penalty for Delinquency in Payment of Tax--Enforcement of Unpaid Penalties. Any person subject to tax under this Ordinance who fails to pay such tax within the time prescribed shall be subject to a penalty of two percent of the tax for the first thirty days of delinquency or part thereof and eight percent for each additional year or part thereof, provided that the minimum penalty shall be five dollars. Unpaid penalties may be enforced in the same manner as the tax imposed by this Ordinance.

Section 49. Violation of Requirements as Misdemeanor--Penalty. Any person engaged in the business of selling tangible personal property at retail on tribal territory who fails to secure and hold a permit as provided in this Ordinance, or who fails to make a return, or who shall make the return required but shall fail to pay the tax or any part thereof when due, or to

keep books and records as required herein, or who willfully violates any rule or regulation of the Treasurer for the administration and enforcement of the provisions of this Ordinance, or who refuses to exhibit to the Treasurer or his agents for the purpose of examination, his books and records as required herein, or who refuses to furnish a supplemental return or other data required by the Treasurer shall be guilty of a misdemeanor and upon conviction thereof, subject to a fine of not to exceed one hundred dollars for each offense, or to imprisonment not to exceed thirty days, or to both such fine and imprisonment in the discretion of the court.

Section 50. Delay in Filing Return as Misdemeanor.

Any person who shall fail to file a return on or before the fifteenth of the second month following the reporting period shall be guilty of a misdemeanor.

Section 51. False Return with Intent to Evade as

Felony--Penalty. Any person required to make, render, sign or certify any return or supplementary return who makes any false or fraudulent return in attempting to defeat or evade the tax imposed by this Ordinance shall be guilty of a felony and shall, for each offense be fined not less than two hundred fifty dollars and not more than five thousand dollars or be imprisoned not exceeding one year, or be subject to both such fine and imprisonment, in the discretion of the court.

Section 52. Fraudulent Possession of Spurious Stamps or Devices as Felony--Penalty. It shall be unlawful for any person to sell or have in his possession, with intent to defraud this state, any spurious or counterfeit receipts, stamps, tokens, coupons, or devices for the purpose of imitation or counterfeit of or substitution for any genuine receipts, stamps, tokens, coupons or devices adopted or required by the Treasurer for the purpose of collection of the retail occupational sales tax provided for in this Ordinance. Any violation of this section shall be a felony and the person guilty thereof shall be subject to a fine of one thousand dollars or imprisonment for a period of one year, or by both such fine and imprisonment:-- — — — —

Section 53. Tax Proceeds Credited to General Fund. All taxes and license fees collected by the Treasurer shall be credited to the general fund of the Tribe.

Section 54. Credit or Refund of Erroneous Overpayment--Time Allowed for Asserting Claim. If it shall appear that an amount of tax, penalty, or interest has been paid which was not due under the provisions of this Ordinance, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Ordinance from the person who made the erroneous payment, or such amount shall be refunded to such person by the Treasurer, provided that claim for a credit or refund as above provided

shall be filed with the Treasurer within three years after such erroneous payment was made or said claim shall be forever barred.

Section 55. Tax Collection Agreement. The Business Committee of the Tribe is hereby authorized to enter into an agreement with the Department of Revenue ("Department") of the State of South Dakota for the collection of the taxes, issuance of licenses, and permits, supervision of the keeping of records and filing of reports; and collection of fees required by this Ordinance on behalf of the Tribe by the Department. Such agreement may provide that the collection of taxes, issuance of licenses and permits, supervision of the keeping of records and filing of reports, and collection of fees shall be substantially in the same manner as conducted by the State of South Dakota under SDCL chapter 10-45. This agreement may also provide for the retention by the Department of a collection fee not to exceed one percent of the total taxes collected pursuant to such agreement, and for the retention by the State of a additional portion of such taxes collected, in lieu of the collection of taxes under SDCL 10-45 on activities on tribal territory, as agreed upon by the Business Committee of the Tribe and the Department. Upon the effectiveness of such provisions, the collection of taxes, issuance of licenses and permits, supervision of keeping of records and filing of reports, and collection of fees pursuant to such provisions shall, notwithstanding any other provision herein, constitute the manner of such collections,

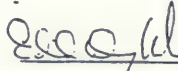


issuances and supervision required by this Ordinance. Any reports, applications or other filings filed with the Department pursuant to this section shall also be filed with the Treasurer.

Section 56. Effectiveness. This Ordinance shall be effective immediately upon enactment by the Tribal Council.

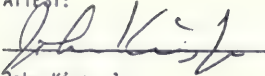
CERTIFICATION

This is to certify that the above Ordinance 77-01 was duly passed by the Rosebud Sioux Tribal Council in session, December 15, 1977, by a vote of twenty-three (23) in favor and none opposed. The said Ordinance was adopted pursuant to authority vested in the Council. A quorum was present.



Edward Driving Hawk  
PRESIDENT  
Rosebud Sioux Tribe

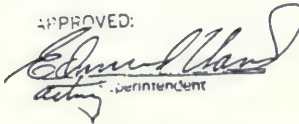
ATTEST:



John King, Jr.  
SECRETARY  
Rosebud Sioux Tribe

Date Submitted 8-15-78  
to Rosebud Agency Supt.

APPROVED:



Superintendent

## RESOLUTION NO. 84-

## OF THE ROSEBUD SIOUX TRIBE

- WHEREAS, The Rosebud Sioux Tribe is a federally recognized Indian tribe organized pursuant to the Indian Reorganization Act of 1934 and all pertinent amendments thereof; and
- WHEREAS, the Tribe, in order to establish its tribal organization, to conserve its tribal property; to develop its common resources; and to promote the general welfare of its people, had ordained and established a Constitution and by-laws; and
- WHEREAS, declining federal funds for the reservation have created additional urgent financial needs on the reservation; and
- WHEREAS, expended service requirements due to an increase in population have created additional financial needs on the reservation; and
- WHEREAS, the Indian Tribal Governmental Tax Status Act of 1982., Public Law No. 97-473, enable taxes paid to the Indian Tribal Governments to be deducted from federal tax liability; and
- WHEREAS, the Contractor's Excise Tax will generate additional revenue for the Tribe; now
- THEREFORE BE IT RESOLVED, that the Rosebud Sioux Tribe hereby approves the proposed Contractor's Excise Tax.

C E R T I F I C A T I O N

This is to certify that Resolution No. 84- was duly passed by the Rosebud Sioux Tribal Council in session on 1984 by a vote of in favor, opposed, and not voting. The said resolution was adopted pursuant to authority vested in the council. A quorum was present.

---

Webster Two Hawk  
President  
Rosebud Sioux Tribe

ATTEST:

---

Lloyd B. One Star  
Tribal Secretary  
Rosebud Sioux Tribe

## TAX COLLECTION AGREEMENT

This agreement, dated June 17, 1976 , by and between the Department of Revenue of the State of South Dakota (the "State") and the Cheyenne River Sioux Tribe of the Cheyenne River Sioux Indian Reservation (the "Tribe"), an Indian tribe organized under the Federal Indian Reorganization Act:

WHEREAS, the Cheyenne River Sioux Tribe has jurisdiction to tax sales by Indians and sales by non-Indians to Indians within the limits of the Cheyenne River Sioux Indian Reservation, and

WHEREAS, the State of South Dakota has jurisdiction to tax sales by non-Indians to non-Indians within the limits of the Cheyenne River Sioux Reservation, and

WHEREAS, the Department of Revenue is authorized, pursuant to SDCL 10-12A, to enter into tax collection agreements with Indian tribes;

NOW THEREFORE, in order to implement effectively their respective tax jurisdictions and derive therefrom significant revenues to be expended for public purposes and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto mutually agree as follows:

1. Collection of Tribal Retail Sales, Service and Use Tax and Tribal Cigarette Tax. The State hereby agrees to collect on behalf of the Tribe the various taxes imposed by the Cheyenne River Sioux Tribal Retail Sales, Service and Use Tax

Tax 1 Agreement  
 2

Ordinance (the "Sales Tax Ordinance") and the tax upon cigarettes imposed by the Cheyenne River Sioux Tribal Cigarette Tax Ordinance (the "Cigarette Tax Ordinance"), and issue the permits and stamps provided for in the Ordinances; provided, however, the collection of tax imposed by the Cigarette Tax Ordinance shall be contingent upon enactment of the Ordinance by the Tribe in July, 1976.

2. Remittance of Tax Proceeds. The State agrees to remit to the Tribe on a quarterly basis an amount equal to 50% of the total proceeds collected by the State with respect to the preceding quarter of the taxes imposed by the Ordinances, (with respect to taxable transactions within the Cheyenne River Sioux Indian Reservation; the tax imposed by the South Dakota Retail Occupational Sales and Service Tax Act and the South Dakota Excise Tax, SDCL 10-50. The State may retain out of its quarterly remittances to the Tribe a total amount not in excess of one percent (1%) of the total annual proceeds of the taxes imposed by the Ordinances. Remittances shall be by certified check, payable to the order of the Cheyenne River Sioux Tribe.

3. Term. This Agreement shall become effective on July 1, 1976, shall be for a term of one (1) year and shall renew thereafter for a term of one (1) year on the same terms and conditions unless terminated in writing by either party on or before June 1.



tion Agreement  
Page 3

IN WITNESS WHEREOF, the State and the Tribe have caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized.

THE DEPARTMENT OF REVENUE OF  
THE STATE OF SOUTH DAKOTA

BY *John W. Rendell*  
Commissioner of Revenue

CHEYENNE RIVER SIOUX TRIBE OF  
THE CHEYENNE RIVER SIOUX RESERVATION

BY *William T. Harrison*  
Chairman

BY *Hazel Garreans*  
Secretary



(TRIBAL SEAL)

TAX COLLECTION AGREEMENT

This agreement is an amendment to the Tax Collection Agreement dated June 17, 1976, between the Department of Revenue of the State of South Dakota (the "State") and the Cheyenne River Sioux Tribe of the Cheyenne River Sioux Reservation (the "Tribe"), an Indian tribe organized under the Indian Reorganization Act.

1. Paragraph 1 of the original agreement is amended to read as follows:

1. Collection of Tribal Retail Sales, Service, Use, Contractors' Excise, and Cigarette Taxes. Provided that the subject taxes remain substantially similar to the corresponding state taxes, the State agrees to collect and administer on behalf of the Tribe the various taxes imposed by the tribal retail sales, service, use, Contractors' Excise, and cigarette tax ordinances; and to issue pertinent licenses, permits and stamps.


2. Paragraph 2 of the original agreement is amended to read as follows:

2. Remittance of Tax Proceeds. The State agrees to remit to the Tribe an amount equal to 58% of the total proceeds collected pursuant to this agreement within thirty days of collection by the State. Before remitting the 58% the State may deduct the amount of any refunds made and costs of administration not to exceed 1% of the amount remitted to the Tribe. Unless otherwise requested in writing by the Tribe the remittance shall be by certified check, payable to the order of the Tribe.


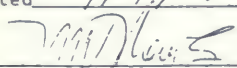
the purpose of this agreement is to insure that persons subject to taxes covered by this agreement pay only one tax either that of the Tribe or the State. Therefore, this agreement applies to all receipts reportable to the Department of Revenue after January 1, 1986.

In Witness whereof, the State and the Tribe have caused this Agreement to be executed by their authorized officers.

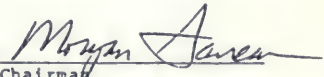

STATE OF SOUTH DAKOTA

By   
Secretary of Revenue  
Dated 16 Nov 85

Approved by:

  
Governor  
Dated 11-19-85  
  
Attorney General  
Dated 11-22-85

CHEYENNE RIVER SIOUX TRIBE

By   
Chairman  
Dated 11/13/85  
By   
Secretary  
Dated 11-13-85

October 1975

## MODIFICATION OF SALES, SERVICE AND USE TAX COLLECTION AGREEMENT

This Agreement, dated October 10, 1975, by and between the Department of Revenue of the State of South Dakota (the "State") and the Oglala Sioux Tribe of the Pine Ridge Indian Reservation (the "Tribe"), an Indian Tribe organized under the Federal Indian Reorganization Act:

WHEREAS, the Tribe by Ordinance No. 70-03 levied a Sales, Service and Use Tax on sales by Indian retailers to any consumers or users and on sales by non-Indian retailers to Indian consumers and users,

WHEREAS, the Tribe entered into a Tax Collection Agreement (the "Agreement") with the State of South Dakota, whereby the State, acting as an agent for the Tribe, collects the retail taxes imposed by Ordinance No. 70-03. The State, pursuant to this Agreement, remits to the Tribe an amount equal to 83% of the total proceeds of the Tribal and State taxes collected within the Pine Ridge Reservation, of which 1% is retained by the State to meet its administrative costs,

WHEREAS, the Tribe wishes to implement more effectively the Ordinance and to collect the taxes provided therein,



particularly with respect to the taxation of sales by Indian retailers,

NOW THEREFORE, in order to more effectively enforce Ordinance No. 70-03 and to derive thereby significant revenues to be expended for public purposes, the parties hereto mutually agree as follows:

1. Collection of certain taxes by the Tribe. The Agreement notwithstanding, the Tribe is hereby authorized to collect on its own behalf from Indian retailers the various taxes imposed by the Oglala Sioux Tribal Retail Sales, Service and Use Tax Ordinance.

2. Remittance of Tax Proceeds. The Tribe agrees to remit to the State on a quarterly basis an amount equal to 17% of the total proceeds collected by the Tribe pursuant to this Agreement during the preceding quarter.

3. Depository. Records of Tribal Collections. The Tribe agrees to deposit all taxes collected pursuant to this Agreement in a special account and to provide the State on a quarterly basis with a full statement of all taxes collected and all disbursements from the account. Remittances to the State shall be by certified check payable to the order of the Secretary of Revenue, to be made jointly.

This Agreement shall be considered as a supplement to the Agreement between the State of South Dakota and the Oglala Sioux Tribe of December 30, 1970 as extended by the Agreement of July 1, 1974.

IN WITNESS WHEREOF, the State and the Tribe have caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized.

THE OGLALA SIOUX TRIBE OF  
THE PINE RIDGE RESERVATION

THE DEPARTMENT OF REVENUE OF  
THE STATE OF SOUTH DAKOTA

by \_\_\_\_\_  
(President)

by \_\_\_\_\_  
(Secretary of Revenue)

by \_\_\_\_\_  
(Secretary)

TRIBAL SEAL

DEPARTMENT SEAL

October 1975

## MODIFICATION OF SALES, SERVICE AND USE TAX COLLECTION AGREEMENT

This Agreement, dated October 10, 1975, by and between the Department of Revenue of the State of South Dakota (the "State") and the Oglala Sioux Tribe of the Pine Ridge Indian Reservation (the "Tribe"), an Indian Tribe organized under the Federal Indian Reorganization Act:

WHEREAS, the Tribe by Ordinance No. 70-03 levied a Sales, Service and Use Tax on sales by Indian retailers to any consumers or users and on sales by non-Indian retailers to Indian consumers and users,

WHEREAS, the Tribe entered into a Tax Collection Agreement (the "Agreement") with the State of South Dakota, whereby the State, acting as an agent for the Tribe, collects the retail taxes imposed by Ordinance No. 70-03. The State, pursuant to this Agreement, remits to the Tribe an amount equal to 83% of the total proceeds of the Tribal and State taxes collected within the Pine Ridge Reservation, of which 1% is retained by the State to meet its administrative costs,

WHEREAS, the Tribe wishes to implement more effectively the Ordinance and to collect the taxes provided therein,

particularly with respect to the taxation of sales by Indian retailers,

NOW THEREFORE, in order to more effectively enforce Ordinance No. 70-03 and to derive thereby significant revenues to be expended for public purposes, the parties hereto mutually agree as follows:

1. Collection of certain taxes by the Tribe. The Agreement notwithstanding, the Tribe is hereby authorized to collect on its own behalf from Indian retailers the various taxes imposed by the Oglala Sioux Tribal Retail Sales, Service and Use Tax Ordinance.

2. Remittance of Tax Proceeds. The Tribe agrees to remit to the State on a quarterly basis an amount equal to 17% of the total proceeds collected by the Tribe pursuant to this Agreement during the preceding quarter.

3. Depository. Records of Tribal Collections. The Tribe agrees to deposit all taxes collected pursuant to this Agreement in a special account and to provide the State on a quarterly basis with a full statement of all taxes collected and all disbursements from the account. Remittances to the State shall be by certified check payable to the order of the Secretary of Revenue, to be made within



This Agreement shall be considered as a supplement to the Agreement between the State of South Dakota and the Oglala Sioux Tribe of December 30, 1970 as extended by the Agreement of July 1, 1974.

IN WITNESS WHEREOF, the State and the Tribe have caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized.

THE OGLALA SIOUX TRIBE OF  
THE PINE RIDGE RESERVATION

THE DEPARTMENT OF REVENUE OF  
THE STATE OF SOUTH DAKOTA

by \_\_\_\_\_  
(President)

by \_\_\_\_\_  
(Secretary of Revenue)

by \_\_\_\_\_  
(Secretary)

TRIBAL SEAL

DEPARTMENT SEAL



DEPARTMENT OF REVENUE

## **STATE/TRIBAL TAX AGREEMENTS**

### **A Piece of the Puzzle**

**Presented at the  
National Conference of State Legislatures  
Annual Meeting  
August 8, 1990  
Nashville, Tennessee**

**Presented by  
Roger Novotny  
Director of Sales Tax  
South Dakota Department of Revenue  
700 Governors Drive  
Pierre, SD 57501-2276  
(605) 773-3311**

## AN ACT

ENTITLED, An Act to permit the state to enter into agreements with Indian tribes for the collection of taxes and fees.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 10-12A be amended by adding thereto a new section to read as follows:

For the purposes of this chapter only, the term, Indian country, includes lands held in trust for any Indian or Indian tribe within the boundaries of any disestablished Indian reservation or within the disestablished portion of any Indian reservation.

Section 2. That § 10-12A-4 be amended to read as follows:

10-12A-4. The state department of revenue may enter into tax collection agreements with any Indian tribe under the provisions of chapter 1-24. These agreements may provide for the collection of any tribal sales and service, use, cigarette, and contractors' excise tax or any other tax or fee by the state department of revenue for the Indian tribe. The agreement may provide for the retention by the state department of revenue of an agreed upon percentage of the gross revenue as an administrative fee.

Section 3. That chapter 10-12A be amended by adding thereto a new section to read as follows:

Except as specifically set out in § 10-12A-3, nothing in this chapter may be construed to relinquish any jurisdiction the state might have to levy or collect from any person any tax or fee within Indian country.



## STATE/TRIBAL TAX AGREEMENTS A PIECE OF THE PUZZLE

This past winter, South Dakota Governor George Mickelson declared the year 1990 as the "Year of Reconciliation," a year designed to help launch a better understanding between Indians and non-Indians. The Governor stated, "It is time for the two cultures to come together to reconcile our differences and begin a second century together, respecting each other and working toward common goals." During this Year of Reconciliation, the South Dakota Department of Revenue has been reviewing our relationship with the Indian community, and so it certainly seems appropriate that we are here to discuss cooperative efforts with Indian tribes.

For this conference I was asked to present you with the "nuts and bolts" of administering a state and tribal sales tax under a joint agreement, an option that we have selected in South Dakota and have used since 1971.

In this age of miracle medical cures, electronic mail, fast food, and rapid transportation, we often learn to expect immediate gratification and prompt solutions to the many problems that face us. It is extremely important to realize that there are no "quick fixes" to curing the jurisdictional issues, including taxes. I promote to my fellow employees the theory that there are many pieces to the tax puzzle and no one piece will solve it. The same holds true when we look at



the overall Tribal/State relationship, the tax agreements that we are simply a small imperfect piece to the jurisdictional puzzle that we encounter. However, the agreements do provide a viable alternative to countless court cases or asking for guidance and assistance from the Federal Government, neither of which ultimately aid us in resolving the real-life, day-to-day issues that are faced by the Indians and non-Indians that live in our states.

Before I left South Dakota, I spent some time discussing Indian/non-Indian relationships with Francis Whitebird, Coordinator of Indian Affairs for the State of South Dakota. I asked Francis what he thought the future was for the states and the tribes. He said, "This is the time for agreements between the states and the tribes. We must all realize that it is not a sign of weakness to compromise our stands and we must reach out to develop a meaningful, long lasting relationship." In addition, he cautioned that we will encounter disappointments and that mistakes will be made, but we must remember that we are sailing on uncharted waters and we must recognize that a better relationship will develop if everyone has a firm commitment to improving the future.

In the 1970's, by enacting a chapter in our state tax code, our Legislature found that the public interest of both Indians and non-Indians is best served by close cooperation between state government and the Indian tribes. The legislature authorized the state department of revenue to enter into tax collection agreements with the In-

dian Tribes. The state relinquished any jurisdiction it had to levy and collect from Indians within Indian country the sales, use, contractors' excise, and cigarette taxes.

Any tax collection agreement which the department of revenue enters into becomes effective only AFTER it is approved by the Governor and the attorney general of South Dakota. In addition, notice of the pending agreement must be published by the department in the legal newspaper of the county or counties to be affected by the agreement not less than two weeks prior to approval. These approval provisions were added in 1978, in order to inform local residents (both Indians and non-Indians) that agreement negotiations were underway and that public input would be considered.

In 1971, the State of South Dakota entered into a joint tax collection agreement with the Oglala Sioux Tribe to collect sales, use, and cigarette taxes. Since that initial agreement, the Cheyenne River Sioux Tribe was added in 1977 and the Rosebud Sioux Tribe in 1978. The Standing Rock Sioux Tribe is currently scheduled to begin a joint effort on January 1, 1991. In addition, we have had negotiations with other Tribal governments, however, no others have been finalized at this point in time. Currently, all the agreements are with Tribal governments that have closed boundaries, no agreements with "checkerboard" reservations have been completed .

The agreements provide for the state to administer and collect the state tax and a parallel Tribal tax which is identical to the state tax. Tribal ordinances provide for an automatic amendment to reflect any changes which may occur in state law, however the Tribal Council reviews the amendments and has the authority to disapprove the change to their ordinances and re-enter agreement negotiations. We have constantly promoted the necessity that the Tribal ordinances be uniform with our state's tax laws.

Through the agreements, the state and tribes agree to a percentage split of the revenues, since exact revenues resulting from the imposition of the tribal taxes would be impossible to calculate. In the past these splits were based upon Indian/non-Indian population figures, however, at the request of the Tribal governments, we are currently reviewing whether or not the population method accurately reflects the appropriate dollar distribution. Other factors, such as buying patterns, disposable income, agricultural activities, and the mobility of the residents are presently being considered. The tax split for the particular tribes is as follows:

Oglala = 91% Tribe, 9% State  
 Cheyenne River = 58% Tribe, 42% State  
 Rosebud = 75% Tribe, 25% State

The State also deducts a minimal 1% administrative fee from the Tribal proceeds to cover expenses. The Tribal portion of the tax receipts are sent to them every two weeks!

While the following tax distributions are not megabucks to many other governmental agencies, they have really become an important and vital source of revenue to the Tribal Governments located in our state.

#### Tribal Tax Distribution

Tribes	Total Since 1977	Year	1% Admin Fee	Tribal Paym't	Net to State
Cheyenne River Sioux	\$5,454,063.40	1988	\$6,309.77	\$624,666.88	\$463,223.90
		1989	\$6,126.56	\$606,529.47	\$449,774.03
		1990	\$5,912.70	\$585,357.15	\$434,073.63
Rosebud Sioux	\$5,362,319.55	1988	\$5,547.81	\$549,232.82	\$190,474.69
		1989	\$7,752.10	\$767,457.91	\$266,155.45
		1990	\$7,265.70	\$719,304.08	\$249,455.63
Oglala Sioux	\$3,076,156.43	1988	\$3,387.72	\$335,383.99	\$72,774.70
		1989	\$2,924.91	\$289,566.21	\$45,752.72
		1990	\$3,460.58	\$342,597.72	\$37,686.13

Retailers doing business on the reservation simply separate their gross receipts resulting from that activity in a space provided on their regular state sales tax return. The computer system tabulates those figures and provides for the appropriate split of revenue. If they are licensed for state sales tax purposes, they are automatically licensed for the reporting of Tribal sales tax, thus avoiding a burdensome duplication of a licensing effort.

Each Tribe has established a Tribal Tax Office that offers assistance to Indian operated businesses. In addition, the office conducts compliance activities on those Indian businesses that may become delinquent in paying their taxes. Our office extends invitations to



the staff members of the Tribal Tax Offices to attend any of the training classes conducted for our own revenue employees, an offer that they frequently accept.

The agreements have not been without disappointments. Tribal politics and administration changes are not always conducive to a fair and firm application of the tax law to all businesses. We have occasionally experienced differing degrees of commitment on the part of Tribal leaders. Indian citizens are often confused on how the revenues are being appropriated and are suspicious about the state's approach to fairly distribute the collections. Prejudices often surface making tax collection difficult. Coordinating compliance efforts with the Tribal Tax offices is not always an easy task. The state has encountered difficulty in monitoring which off-reservation retailers and contractors are actually conducting business on the reservation. Tribes have had trouble in responding to Indian owned businesses that develop payment or filing problems. In my opinion, the Tribal court systems and enforcement procedures do not lend themselves to promptly reacting to non-complying licensees.

The positives obviously have outweighed the negatives or the agreements would have been cancelled a long time ago. Jurisdictional issues are diminished, thus reducing expensive litigation costs and legal time. Taxes are more equitable, thus reducing some of the prejudices that do exist. The Tribal Governments have access to a relatively efficient means of collecting revenues using the state department of revenue and its associated resources. The state and the Tribes become partners, with each having a stake in the outcome.

Businesses are more confident in knowing how the taxes apply to their activities, enhancing their ability to conduct commerce on the reservation.

Would I recommend that we administer the program a little differently, if it could be done over again? Yes. I believe incentive programs and reward systems should be a part of the agreements. Also, our state should have a specialized fulltime department of revenue employee, preferably an Indian, who serves as a liaison with the Tribal Governments, someone who could furnish advice on a regular basis and provide guidance during those difficult and frequent changes in the leadership of the Tribes.

In the future, an effort should be made to have a comprehensive state-wide effort which would include all of the Tribes, including those that do not have closed boundaries. In addition, the Tribal governments are requesting the state to consider expanding the agreement authority to include all types of taxes, which would enable the Tribes to enact a more balanced tax structure.

The cooperative effort between the Tribes and the state is not an easy path to follow, and without the constant monitoring done by both parties the agreements would certainly fail. If you wait for someone to make the first move, no solution will be found, however, if you take the initiative and understand that you may need to compromise your position, a lasting and positive partnership can be created.

Governor Mickelson expressed, "...it is my sincere hope and prayer that the Indian and non-Indian people of South Dakota can overcome our fears of each other and our differences, and, ultimately, experience the rewards of a healed friendship."

I doubt that we will ever see the day that the tax puzzle is completely solved. However, we must keep looking for that next piece that brings us closer to seeing the overall picture. We believe that these Tribal/State tax agreements are truly an important piece to the tax puzzle and bring us a little closer to finding the solution.

# Executive Proclamation

## State of South Dakota

### Office Of The Governor

WHEREAS, As the State of South Dakota celebrates the beginning of its second century, we must also remember that statehood was a very sad time for the Native American; and,

WHEREAS, Two tragic events, the killing of Sitting Bull, on December 15, 1890, and the Wounded Knee massacre on December 29, 1890, occurred just 13 months after South Dakota became a state; and,

WHEREAS, The anniversary of these tragic conflicts, as well as the celebration of 100 years of statehood, offer an opportunity for South Dakotans to learn more about the life and culture of the Dakota-Lakota people; and,

WHEREAS, Strife between the cultures in South Dakota has, for 100 years, been of grave concern and continues to be of grave concern; and,

WHEREAS, Any improvement in cultural understanding in the past can be attributed to the work of the Indian and non-Indian people of South Dakota who have striven to understand our differences and to educate those of us who have grown up together but who have never made the effort to bridge the cultural gap; and,

WHEREAS, A statewide effort to develop trust and respect between Indians and non-Indians can, and must, include participation from the private and the public sector, from churches and church associations, from tribal and state governments, and from individuals, communities and community organizations; and,

WHEREAS, That mutuality of interest provides a sound basis for constructive change, given a shared commitment to achieving our goals of equal opportunity, social justice and economic prosperity; and,

WHEREAS, By celebrating our cultural differences and drawing on those differences for the betterment of all, we can create a new respect among our citizens:

NOW, THEREFORE, I, GEORGE S. MICKELSON, Governor of the State of South Dakota, do hereby proclaim, with the advice and consent of the state's tribal leaders, 1990 as a

#### YEAR OF RECONCILIATION

In South Dakota, and call on our citizens, both Indian and non-Indian to look for every opportunity to lay aside our fears and mistrust, to build friendships, to join together and take part in shared cultural activities, to learn about one another, to have fun with one another, and to begin a process of mutual respect and understanding that will continue to grow into South Dakota's second hundred years.



10-12-37

## TAXATION

10-12-37. (Effective through December 30, 1989) Refund due to erroneously reported budget. If an error has been made in the budget reported to the county auditor by the business manager, finance officer or clerk of a political subdivision within a county, the board of county commissioners shall abate or refund the taxes levied as a result of the error in such reported budget. The board of county commissioners shall abate or refund taxes erroneously levied only in that political subdivision that submitted a budget with an error. This section is repealed on December 31, 1989. (Repealed by SL 1989, ch 91, § 2, effective December 31, 1989.)

Source: SL 1989, ch 91, § 2.

## CHAPTER 10-12A

## TAX COLLECTION AGREEMENTS WITH INDIAN TRIBES

## Section

- |             |  |
|-------------|--|
| 10-12A-1.   | Definition of terms.   |
| 10-12A-2.   | Legislative findings — Agreements authorized.  |
| 10-12A-3.   | Jurisdiction relinquished for sales, use, cigarette and contractors' excise taxes.     |
| 10-12A-4.   | Agreement to collect taxes for tribes — Department of revenue fee.                     |
| 10-12A-4.1. | Approval by Governor and attorney general required — Publication in counties affected. |
| 10-12A-5.   | Percentage of state and tribal tax proceeds remitted to tribe.                         |
| 10-12A-6.   | Duration of collection agreements — Renewal.   |

10-12A-1. Definition of terms. Terms as used in this chapter, unless the context otherwise requires, mean:

- (1) "Indian country," those areas subject to federal and tribal jurisdiction as defined in 18 U.S.C. § 1151 (a) and (c); and
- (2) "Tribal tax," any sales or cigarette tax imposed by an Indian tribe on persons subject to the Indian tribe's taxing powers.

Source: SL 1974, ch 105, § 1.

## Collateral References.

- 41 Am Jur 2d, Indians, § 63.  
42 CJS Indians, §§ 88, 89.

## Cross-References.

"Indian tribe" defined, § 2-14-2 (12A).

10-12A-2. Legislative findings — Agreements authorized. The Legislature finds that the public interest of both Indians and non-Indians is best served by close cooperation between the state government and the Indian tribes. The Legislature finds this cooperation to be especially important in the area of taxation. Accordingly, the Legislature hereby authorizes the state department of revenue to enter into tax collection agreements with Indian tribes.

Source: SL 1974, ch 105, § 2.

**10-12A-3. Jurisdiction relinquished for sales, use, cigarette and contractors' excise taxes.** The state of South Dakota hereby relinquishes any jurisdiction it may have to levy and collect from Indians within Indian country the following state taxes:

- (1) The retail sales and service tax imposed by chapter 10-45;
- (2) The use tax imposed by chapter 10-46;
- (3) The cigarette tax imposed by chapter 10-50;
- (4) The contractors' excise tax imposed by chapter 10-46A; and
- (5) The alternate contractors' excise tax imposed by chapter 10-46B.

Source: SL 1974, ch 105, § 3; 1981, ch 86,  
§ 1; 1985, ch 15, § 27.

**10-12A-4. Agreement to collect taxes for tribes — Department of revenue fee.** The state department of revenue may enter into tax collection agreements with any Indian tribe under the provisions of chapter 1-24. These agreements may provide for the collection of any tribal sales and service, use, cigarette, and contractors' excise tax by the state department of revenue for the Indian tribe. The agreement may provide for the retention by the state department of revenue of an agreed upon percentage of the gross revenue as an administrative fee.

Source: SL 1974, ch 105, § 4; 1981, ch 86,  
§ 2.

**10-12A-4.1. Approval by Governor and attorney general required — Publication in counties affected.** Any tax collection agreement entered into pursuant to this chapter shall be binding and effective only after it is approved by the Governor and attorney general of the state of South Dakota. Prior to approval by the Governor and the attorney general, notice of the pending agreement shall be published by the department of revenue in the legal newspaper of the county or counties to be affected by the agreement, not less than two weeks prior to approval.

Source: SL 1978, ch 78.

**10-12A-5. Percentage of state and tribal tax proceeds remitted to tribe.** A tax collection agreement between the state department of revenue and an Indian tribe may provide, if agreed upon by the parties, that a fixed percentage of the total annual state and tribal tax proceeds from an area of Indian country shall be remitted to the Indian tribe in lieu of the exact amount of the revenue collected as a result of the imposition of tribal taxes.

Source: SL 1974, ch 105, § 5.

## 10-12A-6

## TAXATION

**10-12A-6. Duration of collection agreements — Renewal.** Any tax collection agreements between the state department of revenue and an Indian tribe shall be for a term not to exceed five years. Such agreement, however, shall be renewable upon expiration by the mutual consent of the parties.

Source: SL 1974, ch 105, § 6.

## CHAPTER 10-12B

## LIMITATION ON PROPERTY TAXES

Section	
10-12B-1.	Limitation on property tax levy for school purposes.
10-12B-2.	Limitation on property tax levy for county, civil township or other taxing district purposes.
10-12B-3.	Use of tax levy reduction of one taxing district by another.
10-12B-4.	Assessment of additions, improvements or change of use not assessed in 1988.
10-12B-5.	Formula assessment and taxation — Limitation on taxes.
10-12B-6.	Effect of limitations on bonded indebtedness incurred after December 31, 1988 or taxes levied to pay scheduled increases on bonded indebtedness incurred prior to December 31, 1988.
10-12B-7.	Effect of limitation on capital outlay certificates or lease-purchase agreements approved before December 31, 1988.
10-12B-8.	Exemption of property annexed to another government entity subsequent to December 31, 1988.
10-12B-9.	Effect of tax limitation on property within school district reorganized subsequent to December 31, 1988.
10-12B-10.	Exemption of taxing district created subsequent to December 31, 1988.
10-12B-11.	Levy by court for paying judgment levied against taxing district.
10-12B-12.	Effect of tax limitations on property subject to adjustment or reduction under chapters 10-4, 10-6, 10-6A and 10-6B.
10-12B-13.	Exemption of taxing entity from limitations if taxes will be insufficient to meet entity needs — Petition for referendum — Procedure.
10-12B-14.	Type of referral election — Election procedure — Combined notice — Expenses.
10-12B-15.	Notification to taxpayer whose taxes or special assessment in 1990 or 1991 exceed 1989 taxes — Form.
10-12B-16.	Effective date or rule or law resulting in mandatory expenditure by political subdivision.
10-12B-17.	Assessment and budget in anticipation of removal of limitations.
10-12B-18.	Lease, sale, gift or conveyance of real or personal property by taxing entity to state or public corporation for public purpose.
10-12B-19.	Transfer of surplus funds by taxing entity — Exemptions.
10-12B-20.	Separability effect of this chapter.
10-12B-21.	Limitation on existing tax rates.

[Repealed by SL 1989, ch 89, § 21, effective January 1, 1992.]

**10-12B-1. (Effective through December 31, 1991) Limitation on property tax levy for school purposes.** Notwithstanding any provision of law to the contrary, the total amount of property tax dollars levied on any property for school purposes which is assessed in 1989 and 1990, and payable in 1990 and 1991, shall not exceed, but may be less than, the total amount of property tax dollars on such property for school purposes levied in 1988 and payable in 1989. (Repealed by SL 1989, ch 89, § 21, effective January 1, 1992.)

## "Into Our Second Century"

By Governor George S. Mickelson



### Meeting to focus on reconciliation issues

Relations between our state's Indian tribes and non-Indians living on reservation lands have been strained over the years by an increasing number of complicated issues ranging from jurisdiction to hunting and fishing rights to taxation. Legal disputes between tribal, local, and state governments have been the impetus of tension and frustration since before my father was governor of this state 40 years ago.

Over the past several months, I have met with the leaders of the Cheyenne River and Standing Rock Tribes, and with city and county officials to gain further insight into these issues. These meetings have made me acutely aware that something needs to be done to diffuse the tensions resulting from disputes over a variety of issues.

This year, during the Year of Reconciliation, we are trying to address areas of controversy at all levels of government, including tribal government. To do so, I've called a meeting on August 15 and 16 in Pierre that will be aimed at resolving our disputes without resorting to the legal system. The meeting will be mediated by Jim Waldo, an attorney from Seattle, Washington, with a background in mediating tribal issues.

I've invited representatives from the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and Corson, Ziebach, and Dewey counties to attend the meeting. Encouragingly, all of the parties invited have expressed a willingness to take part in the meeting. I've also invited the state's congressional delegation.

During the two-day meetings, Mr. Waldo will meet separately with representatives of the counties and then representatives of the tribes. He wants to use the time to determine people's attitudes and get a better understanding of the topics of the disputes. On the second day, Mr. Waldo will meet with the group as a whole to explain the dispute resolution process and facilitate discussion.

Although I do not expect all differences to be ironed out in this process, I am very optimistic we can overcome

some of the hurdles we've encountered and have been unable to resolve. This meeting is a beginning and I'm convinced we are better off, financially and emotionally, to sit down and talk through as many of our differences as possible instead of taking them all to court.

During our second century, it is my sincere hope and prayer that the Indian and non-Indian people of South Dakota can overcome our fears of each other and our differences and, ultimately, experience the rewards of a healed friendship. It's important to note, however, that this meeting, like the Year of Reconciliation, is only a beginning. Many injustices have occurred in the past. Today, treaties and special laws created by the federal government to offset past injustices continue to create disagreements between us.

I realize reconciliation will not happen overnight. It's a process — a change in attitude — that must begin at the local level and work its way through our entire society. And, its success depends solely on the willingness of Indians and non-Indians to work together at all levels of government to rebuild friendships that were destroyed years ago. One, two or 100 people across this state will make a difference in the attitudes between Indians and non-Indians, but reconciliation efforts will only be truly effective if local communities throughout the state believe in this concept and work together.

The Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe, along with the counties that border them, have expressed an interest in reconciliation. I want to help them be successful in their reconciliation efforts. Sitting Bull once said, "Let's put our minds together to see how we can build a better life for our children." The words should certainly carry the message of reconciliation as the first step toward a better life for all of us. The more we can do to keep the federal government out of our disputes, the more we'll accomplish and the sooner we'll get it done.



October 1975

## MODIFICATION OF SALES, SERVICE AND USE TAX COLLECTION AGREEMENT

This Agreement, dated October 10, 1975, by and between the Department of Revenue of the State of South Dakota (the "State") and the Oglala Sioux Tribe of the Pine Ridge Indian Reservation (the "Tribe"), an Indian Tribe organized under the Federal Indian Reorganization Act:

WHEREAS, the Tribe by Ordinance No. 70-03 levied a Sales, Service and Use Tax on sales by Indian retailers to any consumers or users and on sales by non-Indian retailers to Indian consumers and users,

WHEREAS, the Tribe entered into a Tax Collection Agreement (the "Agreement") with the State of South Dakota, whereby the State, acting as an agent for the Tribe, collects the retail taxes imposed by Ordinance No. 70-03. The State, pursuant to this Agreement, remits to the Tribe an amount equal to 83% of the total proceeds of the Tribal and State taxes collected within the Pine Ridge Reservation, of which 1% is retained by the State to meet its administrative costs,

WHEREAS, the Tribe wishes to implement more effectively the Ordinance and to collect the taxes provided therein,

particularly with respect to the taxation of sales by Indian retailers,

NOW THEREFORE, in order to more effectively enforce Ordinance No. 70-03 and to derive thereby significant revenues to be expended for public purposes, the parties hereto mutually agree as follows:

1. Collection of certain taxes by the Tribe. The Agreement notwithstanding, the Tribe is hereby authorized to collect on its own behalf from Indian retailers the various taxes imposed by the Oglala Sioux Tribal Retail Sales, Service and Use Tax Ordinance.

2. Remittance of Tax Proceeds. The Tribe agrees to remit to the State on a quarterly basis an amount equal to 17% of the total proceeds collected by the Tribe pursuant to this Agreement during the preceding quarter.

3. Depository. Records of Tribal Collections. The Tribe agrees to deposit all taxes collected pursuant to this Agreement in a special account and to provide the State on a quarterly basis with a full statement of all taxes collected and all disbursements from the account. Remittances to the State shall be by certified check payable to the order of the Secretary of Revenue, to be countersigned by the Tribal Council.

This Agreement shall be considered as a supplement to the Agreement between the State of South Dakota and the Oglala Sioux Tribe of December 30, 1970 as extended by the Agreement of July 1, 1974.

IN WITNESS WHEREOF, the State and the Tribe have caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized.

THE OGLALA SIOUX TRIBE OF  
THE PINE RIDGE RESERVATION

THE DEPARTMENT OF REVENUE OF  
THE STATE OF SOUTH DAKOTA

by \_\_\_\_\_  
(President)

by \_\_\_\_\_  
(Secretary of Revenue)

by \_\_\_\_\_  
(Secretary)

TRIBAL SEAL

DEPARTMENT SEAL



# SOUTH DAKOTA LEGISLATIVE RESEARCH COUNCIL

State Capitol, 500 East Capitol, Pierre, South Dakota 57501-5070 (605) 773-3251

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—•—  
Director

Terry C. Anderson

TO: Judy Zello, NCSL  
FROM: Dale Bertsch, Chief Fiscal Analyst  
DATE: March 29, 1989  
RE: Sales Tax Agreements

*Dale*

Enclosed are copies of South Dakota's Department of Revenue agreements of collection of sales tax with tribal governments.

My apologies for taking so long to get these to you.

DB:RP

Enc.





TAX COLLECTION AGREEMENT

Agreement, dated December 15, 1977, by and between the Department of Revenue (the "Department") of the State of South Dakota (the "State") and the Rosebud Sioux Tribe of the Rosebud Indian Reservation (the "Tribe"), an Indian Tribe organized pursuant to the Federal Indian Reservation Act, 25 U.S.C. §461 et seq.

The Tribe and the Department each wish to derive significant revenues from taxation of certain activities on tribal territory (as that term is hereinafter defined) and to implement collection of such revenues while avoiding double taxation.

Accordingly, the parties agree as follows:

1. Jurisdiction to Tax

1.1 The Tribe has jurisdiction to tax certain activities by persons on all lands under the taxing jurisdiction of the Tribe.

1.2. The State has jurisdiction to tax certain activities of certain persons on tribal territory.

1.3. Neither party hereto by this Agreement concedes in any way its asserted taxing jurisdiction; however, this Agreement shall be limited to collections in Todd County.

2. Representations

Each of the parties represents that:

(a) this Agreement has been duly and validly authorized, that it has all requisite power to enter into this Agreement and to perform the terms hereof and that upon execution and delivery

to the other party this Agreement will constitute its valid and binding obligation enforceable in accordance with its terms;

(b) the execution, delivery and performance of the terms of this Agreement will not violate any provision of law, statute, rule or regulation to which any of the parties is subject.

(c) all consents, authorizations or approvals of, or exemptions by, any governmental or public body or authority required in connection with the execution, delivery and performance of the terms of this Agreement have been received by the party requiring such consent, authorization, approval or exemption.

### 3. Collection of Tribal Taxes by the Department

3.1 The Department will collect on behalf of the Tribe the taxes imposed by the Rosebud Sioux Retail Sales, Service and Use Tax Ordinance and the Rosebud Sioux Tribal Cigarette Tax Ordinance (collectively, the "Ordinance") and will issue the stamps, licenses, and permits, supervise the keeping of records and filing of reports, and collect fees as required by such Ordinances. Such collection of taxes, issuance of stamps, licenses and permits, supervision of the keeping of records and filing of reports, and collection of fees will be conducted substantially in the same manner as conducted by the Department with respect to South Dakota taxes under SDCL 10-45, 10-46, 10-50 and other statutes dealing with the same type of taxes as Ordinances.

3.2 As a condition of the issuance of any license under the Ordinances pursuant to this Agreement, the person obtaining such license shall consent to the jurisdiction of the Rosebud Sioux Tribal Court to enforce such Ordinances.

3.3 The Tribe shall employ a Revenue Agent to assist the State in the collection efforts under this Agreement and shall not require contractors to take delivery of materials on lands within its taxing jurisdiction for purposes of determining the incidence of the use tax.

#### 4. Remittance of Tax Proceeds

4.1 The Department will remit to the Tribe on a quarterly basis (according to the State fiscal quarters) an amount equal to <sup>75%</sup> ~~92%~~ of the total proceeds collected by the Department with respect to the preceding quarter of the taxes imposed by the Ordinances and by SDCL 10-45, 10-46, and 10-50.

4.2 The Department may retain out of its quarterly remittance to the Tribe a total annual amount not to exceed 1% of the total annual proceeds of the taxes collected pursuant to this Agreement to cover administration costs.

4.3 Remittances shall be by <sup>State agent</sup> ~~certified check~~ payable to the order of the Tribe.

4.4 The retention by the Department of <sup>25%</sup> ~~8%~~ of the total proceeds collected by the Department pursuant to subsection 4.1 hereof shall be in lieu of any collection by the Department, the State of South Dakota, or any agency thereof, of the taxes imposed by SDCL 10-45, 10-46 and 10-50 <sup>in Todd County</sup> ~~on tribal territory~~.

#### 5. Inspection of Books and Records

The Department will permit the Treasurer of the Tribe or any persons designaged by him to examine the Department's books of account and other records (and to make copies thereof and extracts therefrom) relating to the collection of taxes, issuance of stamps and licenses, keeping of records and filing

of reports, and collection of fees by the State on behalf of the Tribe, at such times and at such intervals as the Treasurer may reasonably request.

6. Terms of Agreement

This Agreement shall be in effect for a term of one year from the date first above written and shall continue in effect thereafter subject to termination after the one-year period by either party upon at least 30 days written notice of termination effective at the end of any fiscal quarter of the State.

7. Entire Agreement

This Agreement constitutes the entire agreement between the parties hereto and supersedes all prior agreements, understanding and arrangements, oral or written, between the parties hereto with respect to the subject matter hereof.

8. Amendments and Waivers

This agreement may not be modified or amended, nor may compliance with any provision hereof be waived except by an instrument or instruments in writing signed by the party against whom enforcement of any such modification, amendment, or waiver is sought.

9. Execution in Counterparts

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.



## RESOLUTION NO. 84-161

## OF THE ROSEBUD SIOUX TRIBE

WHEREAS, the Rosebud Sioux Tribe is a federally recognized Indian Tribe under the Indian Reorganization Act and possess inherent governmental authority over the Rosebud Indian Reservation, and

WHEREAS, the Rosebud Sioux Tribal Council by virtue of the Rosebud Sioux Tribal Constitution, Article IV, Section 1(E), has power and authority to levy taxes; and

WHEREAS, that Ordinance 77-01 entitled Rosebud Sioux Tribal Retail Sales, Service and Use Tax Ordinance, and that Ordinance 84-14 entitled Rosebud Sioux Tribal Contractors' Excise tax, should be and the same is hereby amended as follows:

1. Section 57. Amendments to Sales and Use Tax Laws.

Any change by the Legislature of the State of South Dakota to SDCL 10-45 and SDCL 10-46, shall constitute an amendment to this Ordinance unless the Rosebud Sioux Tribal Council disapproves the same no later than 30 days prior to its effective date. In the case of an emergency enactment by the South Dakota Legislature, the enactment shall constitute an amendment to this Ordinance unless the Rosebud Sioux Tribal Council disapproves the same no later than 30 days following the enactment by the South Dakota Legislature and approval thereof, which 30 day limit shall begin to run from the date a

certified letter is received by the RST Treasurer from the State of South Dakota, Department of Revenue. The Secretary of the Rosebud Sioux Tribe shall forward any such changes which have been approved to the Superintendent of the Rosebud Agency for consideration by the Secretary of the Interior.

Any change by the Legislature of the State of South Dakota to SDCL 10-45 and SDCL 10-46 from January 01, 1978, to the effective date of this resolution shall constitute an amendment to this Ordinance unless the Rosebud Sioux Tribal Council within 30 days from the date of this Ordinance disapproves the incorporation.

If the Rosebud Sioux Tribal Council disapproves a change made in the above statutes by the legislature of the State of South Dakota or disapproves any emergency enactment, the Council shall notify the Department of Revenue, in writing, within ten days of the disapproval.

2. Ordinance 84-14 entitled Rosebud Sioux Tribal Contractors' Excise Tax be amended to add:

Section 26 . Amendments to Contractors' Excise Tax Laws.

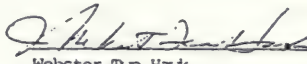
Any change by the legislature of the State of South Dakota to SDCL 10-46A and SDCL 10-46B shall constitute an amendment to this Ordinance, unless the Rosebud Sioux Tribal Council disapproves the same no later than 30 days prior to its effective date. In the case of an emergency enactment by the South Dakota Legislature, the enactment shall constitute an amendment to this Ordinance unless the Rosebud Sioux Tribal Council disapproves the same no later than 30 days following the approval thereof, which 30 day limit shall begin to run from the date a certified letter is received from the State of South Dakota, Department of Revenue. The Secretary of the Rosebud Sioux Tribe shall forward any such changes which have been approved to the Superintendent of the Rosebud Agency for consideration by the Secretary of the Interior.

Any change by the Legislature of the State of South Dakota to SDCL 10-46A and SDCL 10-46B from January 01, 1978, to the effective date of this resolution shall constitute an amendment to this Ordinance unless the Rosebud Sioux Tribal Council within 30 days from the date of this Ordinance disapproves the incorporation.

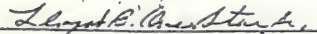
If the Rosebud Sioux Tribal Council disapproves a change made in the above statutes by the legislature of the State of South Dakota or disapproves any emergency enactment, the Council shall notify the Department of Revenue, in writing, within ten days of the disapproval. This is to establish that this Ordinance supersedes any and all other Excise Tax Ordinances.

C E R T I F I C A T I O N

This is to certify the Resolution No. 84-161 was duly passed by the Rosebud Sioux Tribal Council in session on July 31, 1984, by a vote of 21 in favor, 1 opposed, 2 not voting. The said Resolution was pursuant to authority vested in the Council. A quorum was present.



Webster Two Hawk  
President  
Rosebud Sioux Tribe



Lloyd B. One Star, Sr.  
Secretary  
Rosebud Sioux Tribe



## RETAIL SALES, SERVICE AND USE TAX ORDINANCE

Section 1. Definition of Terms. The following words,

terms, and phrases, when used in this Ordinance, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect;

(b) "Gross receipts" means the amount received in money, credits, property, or other money's worth in consideration of sales at retail on tribal territory (as herein defined), without any deduction on account of the cost of the property sold, the cost of materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. Discounts for any purpose allowed and taken on sales shall not be included as gross receipts, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. On all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof

only such portion of the sale amount thereof shall be accounted, for the purpose of imposition of tax imposed by this chapter, as has actually been received in cash by the retailer during each quarterly period as defined herein;

(c) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, municipal corporation, estate, trust, business trust, receiver, or any group or combination acting as a unit, and the plural as well as the singular in number;

(d) "Relief agency" means the Tribe (as herein defined), the State of South Dakota, any county, city and county, city or district thereof, or any non-profit charitable organization which denotes its resources exclusively to the relief of the poor and distressed or underprivileged, and has been recognized as an exempt organization under Section 501(c)(3) of the Internal Revenue Code.

(e) "Retail sale" or "sale at retail" means the sale of tangible personal property to the consumer or user thereof, or to any person for any purpose other than for resale; the sale of natural or artificial gas, electric energy, water, and communication service to consumers or users; and the sale of tickets or admissions to places of amusement or athletic contests;

(f) "Retailer" includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail; or the furnishing of gas, electricity, water, and communication service, and tickets or admissions to places of amusement and athletic events as provided in this Ordinance.

"Retailer" also includes every person subject to the tax imposed by sections 4 and 5 hereof. The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as engaging in the business of selling such tangible personal property at retail does not constitute such person a retailer;

(g) "Sale" means any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever for a consideration;

(h) "Tribe" means the Rosebud Sioux Indian Tribe;

(i) "Treasurer" means the Treasurer of the Tribe and his duly authorized agents or employees;

## Section 2. Tax on Sale of Tangible Personal Property.

There is hereby imposed as a tax upon the privilege of engaging in business as a retailer, a tax of four percent upon the gross receipts of all sales of tangible personal property consisting of goods, wares, or merchandises, except as taxed by section 3 hereof and except as otherwise provided in this Ordinance, sold at retail on tribal territory to consumers or users.

Section 3. Use Tax. There is hereby imposed an excise tax at the same rate as the tax imposed by Section 2 of this Ordinance on the privilege of the use, storage, and consumption on tribal territory of tangible personal property not subject to the taxes imposed by this Ordinance by virtue of their purchase outside tribal territory. All contractors doing business on the Reservation shall be required to obtain a use tax permit prior to engaging in construction activity on tribal territory. The retainage on all contracts shall not be released until all Tribal tax obligations have been met. In the event any tax liabilities shall remain outstanding, the retainage may be applied against these liabilities.

The administration of this section shall be pursuant to regulations issued by the Treasurer except as otherwise provided in this Ordinance.

Section 4. Tax on Sale of Farm Machinery and Irrigation Equipment. There is hereby imposed a tax of two percent on the gross receipts from the sale or resale of farm machinery and attachment units other than replacement parts; or irrigation equipment used exclusively for agricultural purposes by retailers licensed by the Tribe; provided, however, that whenever any trade-in or exchange of used farm machinery is involved in the transaction, the tax shall only be due and collected on the cash difference.

Section 5. Tax on Receipts From Professional and Business Services. There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property on tribal



territory upon the gross receipts of any person from the engaging or continuing in the practice of any profession or of any business in which the service rendered is of a professional, technical, or scientific nature and is paid for on a fee basis, or by a consideration in the nature of a retainer--except it shall not apply to those persons engaged in the practice of the healing arts and veterinarians who are licensed to engage in such practice on tribal territory.

Section 6 Tax on Receipts From Specific Enumerated Businesses and Services. There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property on tribal territory upon the gross receipts of any person from engaging or continuing in any of the following businesses or services on tribal territory: abstractors; accountants; architects; barbers; beauty shops, blacksmith shops, car washing; dry cleaning, dyeing, exterminators; garage and service stations; garment alteration; cleaning and pressing; janitorial services and supplies; specialty cleaners; laundry; linen and towel supply; photography; photo developing and enlarging; tire recapping; welding and all repair services; cable television; and rentals of tangible personal property except personal property leased under a single contract for more than twenty-eight days, motor vehicles leased under a single contract for more than twenty-eight days and mobile homes provided, however, that the specific enumeration of businesses and professions made in this section is not intended to, in any way, limit the scope and effect of section 4 hereof.

person within the exterior boundaries of the Pine Ridge Reservation shall henceforth contain the following provision:

"The undersigned (insert name of lessee, permittee, employee or other contract party who is not a tribal member) hereby irrevocably stipulates, consents and agrees to the jurisdiction of the Oglala Sioux Tribal Court in any action for the purpose of collecting or enforcing any Oglala Sioux Tribal Tax".

No such agreement entered into after the effective date of this Ordinance which does not contain the provision set forth above shall be valid and binding upon the Oglala Sioux Tribal Court.

11. Enforcement Against Non-Members. In addition to the institution of legal proceedings for the collection of the occupation tax, the Oglala Sioux Tribal Executive Committee is authorized and empowered, with respect to any person not a tribal member, (i) to prohibit such person from coming within the exterior boundaries of the Pine Ridge Reservation and to enforce such prohibition pursuant to Section 112 of the Oglala Sioux Tribal Code; (ii) to prohibit such person from engaging in any business or other occupation within the exterior bounds of the Pine Ridge Reservation; (iii) to prohibit such person going upon any land owned by the Oglala Sioux Tribe for any purpose whatsoever and enforce such prohibition pursuant to Section III of the Oglala Sioux Tribal Code; (iv) to cancel a rescind the ground of failure to comply with the lawful order of the Tribe.

12. Definitions. The following terms used in the Ordinance shall have the following respective meanings:

compensation: salaries, wages or other sums paid for personal services of whatever kind and in whatever form paid by employer, including without limitation, the United States of America or the State of South Dakota, to an employee, excluding any amount paid as a contribution by the employer to accident health plans for compensation (through insurance or otherwise) to an employee for personal injuries or sickness.

doing business: engaging in any occupation which consists in whole or in part, in the rendering of personal services by an employee to an employer in exchange for compensation.

employee: any person receiving compensation for personal services rendered within the exterior boundaries of the Pine Ridge Reservation who, under the usual common law rules applicable to the employer-employee relationship, has the status of an employee.

PAGE FOUR

employer: any person, partnership, corporation, association, government, governmental subdivision or other public body including, without limitation, the United States of America or the State of South Dakota, paying any compensation to any employ

person: individual natural person, whether or not individual is a member of the Oglala Sioux Tribe.

13. Ordinance Subject to Applicable Law. All rights, remedies, and powers provided for herein may be exercised only to the extent that the exercise thereof does not violate the Constitution of the United States and the laws of Congress enacted thereunder. If any provision of this Ordinance shall be held to be invalid, unconstitutional or unenforceable, the validity of the other provisions of this Ordinance shall not be affected thereby.

14. Effective Date. The effective date of the Ordinance shall be Thursday, August 12, 1982.

## C-E-R-T-I-F-I-C-A-T-I-O-N

I, as undersigned, Secretary of the Oglala Sioux Tribal Council hereby certify that this resolution was adopted by a vote of: 19 for; 0 against; and 1 not voting, during a Regular Session held on the 12th day of August, 1982.

Eileen H. Iron Cloud  
Eileen H. Iron Cloud  
Secretary  
Oglala Sioux Tribe

A-T-T-E-S-T:

Joe American Horse  
Joe American Horse  
President  
Oglala Sioux Tribe

RECEIVED

AUG 16 1982

Pine Ridge Agency

Section 42. Distress warrant for collection of Tax--  
Seizure and Sale of Property--Compensation of Sheriff. After a notice of lien has been filed as provided in section 34 hereof, the Treasurer or his agents may at any time issue a distress warrant and deliver said warrant to the appropriate official for execution. Immediately upon receipt of the warrant, such official shall proceed to collect the tax by seizure and sale of personal property and shall remit the tax so collected to the Treasurer. For such services, such official shall be permitted to collect from the taxpayer and retain as compensation an amount to be determined by regulation by the Treasurer.

Section 43. Endorsement and Return of Uncollectible Warrant--Liability of Officer for Failure to Issue or Execute Warrant. When such officer is unable to find property of the taxpayer which may be seized and sold, he shall, within thirty days after receipt of the warrant, endorse upon the case of the warrant the word "uncollectible" and return the warrant to the Treasurer. Failure or refusal of the Treasurer to issue a distress warrant when requested to do so, or of such official to attempt to execute the same, shall make the official failing to perform his duty personally liable for the delinquent tax, and said tax may be recovered in an action brought against him and his sureties by the Treasurer.



Section 44. Satisfaction of Lien Filed with Register of Deeds. Upon payment of the tax and penalty, the Treasurer shall forthwith file a satisfaction with the register of deeds who shall file such notice in his office and indicate said fact on the index described in section 40 hereof.

Section 45. Recording of Liens and Satisfaction Without Cost to State. The filing and recording of sales tax liens and satisfactions by a register of deeds shall be done without cost to the Tribe.

Section 46. Records Preserved by Persons Subject to Tax--Inspection by Department. Every person subject to tax under this Ordinance shall keep records and books of all receipts and sales, together with invoices, bills of lading, copies of bills of sale, and other pertinent papers and documents. Such books and records and other papers and documents shall, at all times during business hours of the day, be subject to inspection by the Treasurer or his duly authorized agents and employees to determine the amount of tax due. Such books and records shall be preserved for a period of three years unless the Treasurer, in writing, authorizes their destruction or disposal at an earlier date.

Section 47. Returns and Investigations Confidential--Unauthorized Disclosure of Information as Misdemeanor--Penalty. All information received by the Treasurer from returns filed under this Ordinance, or from any investigations conducted under the

provisions of this Ordinance, shall be confidential, except for official purposes, and it shall be unlawful for any officer or employee of the Treasurer to divulge any such information in any manner, except in accordance with a proper judicial order or as otherwise provided by law. Any officer or employee of such Treasurer who divulges any such information in any manner, except in accordance with a proper judicial order or as otherwise provided by law, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned for not less than one nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

Section 48. Penalty for Delinquency in Payment of Tax--Enforcement of Unpaid Penalties. Any person subject to tax under this Ordinance who fails to pay such tax within the time prescribed shall be subject to a penalty of two percent of the tax for the first thirty days of delinquency or part thereof and eight percent for each additional year or part thereof, provided that the minimum penalty shall be five dollars. Unpaid penalties may be enforced in the same manner as the tax imposed by this Ordinance.

Section 49. Violation of Requirements as Misdemeanor--Penalty. Any person engaged in the business of selling tangible personal property at retail on tribal territory who fails to secure and hold a permit as provided in this Ordinance, or who fails to make a return, or who shall make the return required but shall fail to pay the tax or any part thereof when due, or to

keep books and records as required herein, or who willfully violates any rule or regulation of the Treasurer for the administration and enforcement of the provisions of this Ordinance, or who refuses to exhibit to the Treasurer or his agents for the purpose of examination, his books and records as required herein, or who refuses to furnish a supplemental return or other data required by the Treasurer shall be guilty of a misdemeanor and upon conviction thereof, subject to a fine of not to exceed one hundred dollars for each offense, or to imprisonment not to exceed thirty days, or to both such fine and imprisonment in the discretion of the court.

Section 50. Delay in Filing Return as Misdemeanor.

Any person who shall fail to file a return on or before the fifteenth of the second month following the reporting period shall be guilty of a misdemeanor.

Section 51. False Return with Intent to Evade as Felony--Penalty. Any person required to make, render, sign or certify any return or supplementary return who makes any false or fraudulent return in attempting to defeat or evade the tax imposed by this Ordinance shall be guilty of a felony and shall, for each offense be fined not less than two hundred fifty dollars and not more than five thousand dollars or be imprisoned not exceeding one year, or be subject to both such fine and imprisonment, in the discretion of the court.

Section 52. Fraudulent Possession of Spurious Stamps or Devices as Felony--Penalty. It shall be unlawful for any person to sell or have in his possession, with intent to defraud this state, any spurious or counterfeit receipts, stamps, tokens, coupons, or devices for the purpose of imitation or counterfeit of or substitution for any genuine receipts, stamps, tokens, coupons or devices adopted or required by the Treasurer for the purpose of collection of the retail occupational sales tax provided for in this Ordinance. Any violation of this section shall be a felony and the person guilty thereof shall be subject to a fine of one thousand dollars or imprisonment for a period of one year, or by both such fine and imprisonment.

Section 53. Tax Proceeds Credited to General Fund. All taxes and license fees collected by the Treasurer shall be credited to the general fund of the Tribe.

Section 54. Credit or Refund of Erroneous Overpayment--Time Allowed for Asserting Claim. If it shall appear that an amount of tax, penalty, or interest has been paid which was not due under the provisions of this Ordinance, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Ordinance from the person who made the erroneous payment, or such amount shall be refunded to such person by the Treasurer, provided that claim for a credit or refund as above provided



shall be filed with the Treasurer within three years after such erroneous payment was made or said claim shall be forever barred.

Section 55. Tax Collection Agreement. The Business Committee of the Tribe is hereby authorized to enter into an agreement with the Department of Revenue ("Department") of the State of South Dakota for the collection of the taxes, issuance of licenses, and permits, supervision of the keeping of records and filing of reports; and collection of fees required by this Ordinance on behalf of the Tribe by the Department. Such agreement may provide that the collection of taxes, issuance of licenses and permits, supervision of the keeping of records and filing of reports, and collection of fees shall be substantially in the same manner as conducted by the State of South Dakota under SDCL chapter 10-45. This agreement may also provide for the retention by the Department of a collection fee not to exceed one percent of the total taxes collected pursuant to such agreement, and for the retention by the State of an additional portion of such taxes collected, in lieu of the collection of taxes under SDCL 10-45 on activities on tribal territory, as agreed upon by the Business Committee of the Tribe and the Department. Upon the effectiveness of such provisions, the collection of taxes, issuance of licenses and permits, supervision of keeping of records and filing of reports, and collection of fees pursuant to such provisions shall, notwithstanding any other provision herein, constitute the manner of such collections,

October 1975

## MODIFICATION OF SALES, SERVICE AND USE TAX COLLECTION AGREEMENT

This Agreement, dated October 10, 1975, by and between the Department of Revenue of the State of South Dakota (the "State") and the Oglala Sioux Tribe of the Pine Ridge Indian Reservation (the "Tribe"), an Indian Tribe organized under the Federal Indian Reorganization Act:

WHEREAS, the Tribe by Ordinance No. 70-03 levied a Sales, Service and Use Tax on sales by Indian retailers to any consumers or users and on sales by non-Indian retailers to Indian consumers and users,

WHEREAS, the Tribe entered into a Tax Collection Agreement (the "Agreement") with the State of South Dakota, whereby the State, acting as an agent for the Tribe, collects the retail taxes imposed by Ordinance No. 70-03. The State, pursuant to this Agreement, remits to the Tribe an amount equal to 83% of the total proceeds of the Tribal and State taxes collected within the Pine Ridge Reservation, of which 1% is retained by the State to meet its administrative costs,

WHEREAS, the Tribe wishes to implement more effectively the Ordinance and to collect the taxes provided therein,

particularly with respect to the taxation of sales by Indian retailers,

NOW THEREFORE, in order to more effectively enforce Ordinance No. 70-03 and to derive thereby significant revenues to be expended for public purposes, the parties hereto mutually agree as follows:

1. Collection of certain taxes by the Tribe. The Agreement notwithstanding, the Tribe is hereby authorized to collect on its own behalf from Indian retailers the various taxes imposed by the Oglala Sioux Tribal Retail Sales, Service and Use Tax Ordinance.

2. Remittance of Tax Proceeds. The Tribe agrees to remit to the State on a quarterly basis an amount equal to 17% of the total proceeds collected by the Tribe pursuant to this Agreement during the preceding quarter.

3. Depository. Records of Tribal Collections. The Tribe agrees to deposit all taxes collected pursuant to this Agreement in a special account and to provide the State on a quarterly basis with a full statement of all taxes collected and all disbursements from the account. Remittances to the State shall be by certified check payable to the order of the Secretary of Revenue, State of South Dakota.

ORDINANCE NO. 57-01

ORDINANCE OF THE OGLALA SIOUX TRIBAL COUNCIL  
OF THE OGLALA SIOUX TRIBE  
(An Unincorporated Tribe)

ORDINANCE TO ESTABLISH AN OCCUPATION TAX.

WHEREAS, the Oglala Sioux Tribal Council is empowered by Article IV, Section 1 (h), of the Constitution and By-Laws of the Oglala Sioux Tribe to levy taxes upon members of the tribe and to levy taxes or license fees subject to review by the Secretary of the Interior, upon non-members doing business within the Pine Ridge Reservation, and

WHEREAS, in order to carry out its constitutional functions the Oglala Sioux Tribal Council requires revenue sufficient to finance the discharge of its responsibilities, and

WHEREAS, the financial burdens of tribal government should fairly fall upon those who use and benefit from public facilities and services furnished by the tribe to the residents of the Pine Ridge Reservation, now

THEREFORE BE IT ORDAINED, that Ordinance Nos 74-01, 74-04 75-01, and 82-05, be, and hereby are rescinded, and

BE IT FURTHER ORDAINED:

1. Imposition of Tax. An occupation tax is hereby imposed upon all persons who are doing business within the Pine Ridge Reservation as employees of governmental agencies, including Federal, State and Tribal entities, or of commercial, industrial or manufacturing enterprises.

2. Rate. The occupation tax shall be levied at the rate of:

\$ 5,000 - 10,000	-	1%
10,000 - 15,000	-	2%
15,000 - 20,000	-	2%
20,000 - 25,000	-	3%
25,000 and over	-	3%

3. Payroll Deductions. Any employer on the Pine Ridge Reservation shall, unless otherwise prohibited by law, deduct from the compensation of any employee doing business on said Reservation at regular pay periods an amount computed by multiplying the amount of compensation otherwise due with respect to such pay period by the applicable occupation tax rate, all for the purpose of paying over such deducted amounts to the Treasurer.



4. Report By Employer. Any employer on the Pine Ridge Reservation shall by April 20 of every year file with the Treasurer a list of all employees of such employer doing business on said Reservation during the quarter year January 1 - March 31, together with a statement of the compensation paid to such employees. Similar lists shall be filed by July 20 for the period April 1 - June 30, by October 20 for the period July 1 - September 30 and by January 20 for the period October 1 - December 31.

5. Payment by Employer. Any employer subject to the payroll deduction provision of para. 3 hereof shall accompany the filing of the list under para. 4 hereof with a payment of the amount of tax due.

6. Payment by Employee. Any employee who is liable to pay this tax under the provisions of para. 1 hereof but whose employer is not subject to the payroll deduction requirement provided for in para. 3 hereof shall pay to the Treasurer by the same day by which payment is to be made under para. 5 hereof the amount of tax due for the preceding quarter year.

7. Liability of Employers. Upon the failure of any employer subject to the provisions of para. 3 hereof to pay over to the Treasurer any amount of unpaid occupation tax on the due date such employer shall forfeit and pay the amount of such tax for each such person whose taxes are not paid over together with a penalty of one percentum per month or any fraction thereof added thereto and such obligation shall become a personal debt of the employer until paid in full.

8. Liability of Employees. Any employee liable to make direct payment to the Treasurer under para 6 hereof who fails to make payment by the date the tax is due shall become liable for a penalty of one percentum per month or any fraction thereof.

9. Collection by Legal Proceedings. The Treasurer is authorized and empowered on behalf of the Oglala Sioux Tribe to collect from any person or any employer owing any amount of occupation tax by legal proceedings in any court of competent jurisdiction the amount of such tax and penalty due and unpaid together with interest at the rate of six percentum per annum. The Tax imposed by this Ordinance, together with all increases interest and penalties thereon, shall become from the time it is due and payable a personal debt of the person owing the tax until paid in full.

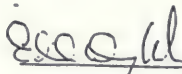
10. Consent to Jurisdiction. All leases or other agreements which permit or authorize the lawful presence of persons who are not tribal members upon tribal land or individually owned fee trust land, including all agricultural or commercial leases or all grazing permits and all agreements for employment of any

issuances and supervision required by this Ordinance. Any reports, applications or other filings filed with the Department pursuant to this section shall also be filed with the Treasurer.

Section 56. Effectiveness. This Ordinance shall be effective immediately upon enactment by the Tribal Council.

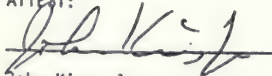
CERTIFICATION

This is to certify that the above Ordinance 77-01 was duly passed by the Rosebud Sioux Tribal Council in session, December 15, 1977, by a vote of twenty-three (23) in favor and none opposed. The said Ordinance was adopted pursuant to authority vested in the Council. A quorum was present.



Edward Driving Hawk  
PRESIDENT  
Rosebud Sioux Tribe

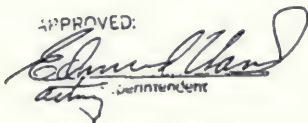
ATTEST:



John King, Jr.  
SECRETARY  
Rosebud Sioux Tribe

Date Submitted 8-15-78  
to Rosebud Agency Supt.

APPROVED:



Superintendent

## RESOLUTION NO. 84-

## OF THE ROSEBUD SIOUX TRIBE

- WHEREAS, The Rosebud Sioux Tribe is a federally recognized Indian tribe organized pursuant to the Indian Reorganization Act of 1934 and all pertinent amendments thereof; and
- WHEREAS, the Tribe, in order to establish its tribal organization, to conserve its tribal property; to develop its common resources; and to promote the general welfare of its people, had ordained and established a Constitution and by-laws; and
- WHEREAS, declining federal funds for the reservation have created additional urgent financial needs on the reservation; and
- WHEREAS, expended service requirements due to an increase in population have created additional financial needs on the reservation; and
- WHEREAS, the Indian Tribal Governmental Tax Status Act of 1982, Public Law No. 97-473, enable taxes paid to the Indian Tribal Governments to be deducted from federal tax liability; and
- WHEREAS, the Contractor's Excise Tax will generate additional revenue for the Tribe; now
- THEREFORE BE IT RESOLVED, that the Rosebud Sioux Tribe hereby approves the proposed Contractor's Excise Tax.

C E R T I F I C A T I O N

This is to certify that Resolution No. 84- was duly passed by the Rosebud Sioux Tribal Council in session on 1984 by a vote of in favor, opposed, and not voting. The said resolution was adopted pursuant to authority vested in the council. A quorum was present.

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Webster Two Hawk  
President  
Rosebud Sioux Tribe

ATTEST:

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Lloyd B. One Star  
Tribal Secretary  
Rosebud Sioux Tribe

This Agreement shall be considered as a supplement to the Agreement between the State of South Dakota and the Oglala Sioux Tribe of December 30, 1970 as extended by the Agreement of July 1, 1974.

IN WITNESS WHEREOF, the State and the Tribe have caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized.

THE OGLALA SIOUX TRIBE OF  
THE PINE RIDGE RESERVATION

THE DEPARTMENT OF REVENUE OF  
THE STATE OF SOUTH DAKOTA

by \_\_\_\_\_  
(President)

by \_\_\_\_\_  
(Secretary of Revenue)

by \_\_\_\_\_  
(Secretary)

TRIBAL SEAL

DEPARTMENT SEAL



ORDINANCE OF THE OGLALA SIOUX TRIBAL COUNCIL  
OF THE OGLALA SIOUX TRIBE  
(An Unincorporated Tribe)

ORDINANCE TO ESTABLISH AN OGLALA SIOUX TRIBE MOTOR FUEL TAX

WHEREAS, the Oglala Sioux Tribal Council is empowered by Article IV, Section 1 (h), of the Constitution and By-Laws of the Oglala Sioux Tribe to levy taxes upon members of the Tribe and to levy taxes or license fees, subject to review by the Secretary of the Interior, upon non-members doing business within the Pine Ridge Indian Reservation, and

WHEREAS, in order to carry out its constitutional functions, the Oglala Sioux Tribal Council requires revenue sufficient to finance the discharge of its responsibilities, and

WHEREAS, the financial burdens of tribal government should fairly fall upon those who use and benefit from the facilities and economy of the Pine Ridge Indian Reservation, now

THEREFORE BE IT ORDAINED:

1. A tax is hereby imposed upon all wholesale operators of Motor Fuel on the Pine Ridge Reservation.
2. The tax shall be known as the "Motor Fuel Tax".
3. The Motor Fuel Tax shall be levied at thirteen cents a gallon.
4. Any wholesaler of Motor Fuel on the Pine Ridge Indian Reservation shall file a monthly report with the Oglala Sioux Tribe Tax Office indicating the amount of Motor Fuel sold on the Pine Ridge Indian Reservation in that month, to whom sold and how transported. Such reports shall be on the forms prescribed by the Tax Office and shall include such other information as shall be described by the Tax Office. Such forms shall be sworn to by an officer or agent in case of Corporations, and by owner or agent in case of a firm, association or individual.
5. Any wholesale dealer of Motor Fuel shall, on or before the tenth day of each calendar month render to the Oglala Sioux Tribe Tax Office a statement under oath showing the number of gallons of Motor Fuel sold to Motor Fuel Retailers on the Pine Ridge Indian Reservation during the preceding calendar month and such other information as the Tax Office may prescribe.

6. The amount of tax collected or required to be paid upon the sale of Motor Fuel by Whole sale Dealers shall be transmitted or paid to the Oglala Sioux Tribe--Tax Office by a dealer at the same time as the filing of the monthly report required above. The Tax Office shall deposit the taxes collected with the Tribal Treasurer who shall credit the amount to a Motor Fuel Tax Fund.
7. Any person subject to tax under this Ordinance who fails to pay such tax within the time prescribed is subject to an interest charge on the unpaid tax at the rate of one and one half percent per month of part thereof commencing immediately after the date the tax becomes due and payable. If such person fails to file a required report or fails to transmit or pay the tax due on or before the time for the filing thereof, such person is subject to an additional amount by way of penalty equal to ten percent of such tax, at no time less than ten dollars with additional interest also accruing on such penalty.
8. The Tax Office is authorized and empowered by the Tribe to collect from any person or any business by legal proceedings in Tribal Court the amount of such tax and penalty due and unpaid to gether with interest.
9. In addition to the institution of legal proceedings for the collection of the Motor Fuel Tax, the Oglala Sioux Tribal Executive Committee upon the recommendation of the Tax Office is authorized to and empowered with respect to any person not a tribal member: (I) to prohibit such person from coming within the exterior boundaries of the Pine Ridge Indian Reservation and to enforce such prohibition pursuant to Section 112 of the Oglala Sioux Tribal Code; (II) to prohibit such person from engaging in any business or other occupation within the exterior boundaries of the Pine Ridge Indian Reservation; and (III) to prohibit such person from going upon any land owned by the Oglala Sioux Tribe for any purposes whatsoever and enforce such prohibition pursuant to Section III of the Oglala Sioux Tribal Code.
10. The effective date of this Ordinance shall be June 1, 1982.

C E R T I F I C A T I O N

I, as undersigned, Secretary of the Oglala Sioux Tribal Council, hereby certify that this resolution was adopted by a vote of: 19 for; 0 against; and 1 not voting, during a Regular Session held on the 28th day of May, 1982.

Eileen H. Iron Cloud  
Eileen H. Iron Cloud  
Secretary  
Oglala Sioux Tribe

ATTEST:

Joe American Horse  
Joe American Horse  
President  
Oglala Sioux Tribe

RECEIVED

JUN 02 1982

Pine Ridge Agency

Section 6.1. Coin-Operated Washers and Dryers--

License in Lieu of Tax--Collection--Penalty. There is hereby imposed an annual license fee of six dollars for each coin operated washer and dryer on tribal territory. Such license fee shall be in lieu of any sales or gross receipts taxes from the operation or ownership of coin operated washers and dryers. Any person who shall violate the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not more than five hundred dollars or imprisoned for a period not exceeding six months or punished by both such fine and imprisonment. The Treasurer shall promulgate the necessary rules and regulations for collection of the license fees as provided for in this section, except as otherwise provided in this Ordinance.

Section 7. Tax on Utility Services. There is hereby

imposed a tax of four percent upon the gross receipts from sales, furnishing, or service of gas, electricity, and water, including the gross receipts from such sales by any municipal corporation furnishing gas, and electricity, to the public in its proprietary capacity, except as otherwise provided in this Ordinance, when sold at retail on tribal territory to consumers or users.

Section 7.1. Tax on Telephone and Teletypewriter

Services--Computation--Coin telephones. There is hereby imposed on amounts paid for local telephone services, toll telephone services and teletypewriter services, a tax of four percent of the amount so paid. The taxes imposed by this section shall be paid by the person paying for the services. If a bill is rendered the taxpayer for local telephone service or toll



telephone service, the amount on which the tax with respect to such services shall be based shall be the sum of all charges for such services included in the bill; except that if a person who renders the bill groups individual items for purposes of rendering the bill and computing the tax, then the amount on which the tax for each such group shall be based shall be the sum of all items within that group, and the tax on the remaining items not included in any such group shall be based on the charge for each item separately. If the tax imposed by this section with respect to toll telephone service is paid by inserting coins in coin-operated telephones, the tax shall be computed to the nearest multiple of five cents, except that, where the tax is midway between multiples of five cents, the next higher multiple shall apply. The tax so paid shall be remitted at the same time as the sales tax imposed by this Ordinance.

Section 8. Tax on Room or Parking Site Rentals To Transient Guests. There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property on tribal territory upon the gross receipts from rentals of rooms or parking sites by lodging establishments or campgrounds received from transient guests. Lodging establishment shall mean any building, structure, property or premise kept, used, maintained, advertised, or held out to the public to be a

place where sites are available for the placing of tents, campers, trailers, mobile homes, or other mobile accommodations in two or more rental units to transient guests. Transient guest means any person who resides in a lodging establishment or campground less than twenty-eight consecutive days.

Section 9. Tax on Amusements and Athletic Events--

Records of Income from Amusement Devices. There is hereby imposed a tax of four percent upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this Ordinance, and upon the gross receipts derived from the operation of pinball machines and other mechanical devices for amusement for which a charge is made for the operation thereof, mechanical phonographs, shooting galleries, bowling alleys, pool and billiard tables. In case the operator is the lessee of the devices referred to in the last preceding sentence, such lessee shall be deemed the owner thereof for the purposes of this Section. The operator of the machines above described shall keep a record of the gross income derived from each of said machines and shall report the same to the Department of Revenue at the same time other sales tax reports are due pursuant to regulations prescribed by the Treasurer, or as otherwise provided in this Ordinance.

Section 10. Constitutional and Statutory Exemptions

From Taxation. There are hereby specifically exempted from the

provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from sales of tangible personal property not subject to taxation by the Tribe under the Constitution or laws of the United States.

- Section 11. Exemption of Sales to Public Agencies, Relief Agencies and Indian Tribes. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from sales to the United States, to any Indian Tribe or any agency thereof, to the State of South Dakota, to public or municipal corporations in the State of South Dakota, to any relief agency, which shall mean a nonprofit charitable organization which devotes its resources exclusively to the relief of the poor and distressed or underprivileged, and has been recognized as an exempt organization under section 501(c)(3) of the Internal Revenue Code.

Section 11.1. Exemption of Sale of Water by Political Subdivisions and Water User Districts. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from the sale of water by any Indian Tribes or agencies thereof, political subdivisions of the State of South Dakota and all public corporations organized under chapter 46-14 of the laws of such State.

Section 12. Exemption of Sales Otherwise Taxed. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the sale of gasoline, motor fuel, and use fuel subject to tax under any Use Fuel Tax Ordinance of the Tribe and cigarettes already taxed or exempt under the laws of the Tribe.

Section 12.1. Exemption of Goods and Services Furnished to Meet Warranty Obligation Without Charge. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from furnishing goods or services to the purchaser or his successor in interest of tangible personal property to fulfill a warranty obligation of the manufacturer to the extent that such goods or services are not charged to such purchaser or his successor in interest.

Section 13. Exemption of Transportation Services. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from the sale, furnishing, or service of transportation.

Section 14. Exemption of Receipts Used for Civic and Non-Profit Associations and Purposes. There are hereby specifically exempted from the provisions of this Ordinance and from the



computation of the amount of tax imposed by it, the gross receipts from the sales of tickets or admissions to the grounds and grandstands attractions of tribal, state, county, district, regional and local fairs and pow wows and except for the state fair of the State of South Dakota and the pow wow of the Tribe, without regard to the number of days such fairs and attractions may be conducted, and community operated celebrations or shows sponsored by chambers of commerce or similar nonprofit corporations or associations; and the gross receipts from educational, religious, benevolent, fraternal, or charitable activities, where the entire amount of such receipts after deducting all costs directly related to the conduct of such activities is expended for educational, religious, benevolent, fraternal or charitable purposes, and which receipts are not the result of engaging for more than five consecutive days in a business or occupation otherwise taxable and provided that all organizations claiming this exemption shall pay this tax on all goods and services otherwise subject hereto and used in the conduct of such activities.

Section 15. Exemption of Sales to Religious Educational Institutions and Hospitals--Purchases for Members or Employees Taxable--Motor Vehicle Registration Fee--Quarterly Report by Exempt Institutions. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from

sales of tangible personal property and the gross receipts from sales, furnishing, or service of gas, electricity, water, and communication service to and for use by religious educational institutions and nonprofit, charitable hospitals when purchases are made by authorized officials, payment made from the institution funds, and title to the property retained in the name of such institution.

This exemption will not extend to sales to or purchases of tangible personal property for the personal use of officials, members or employees of such institutions or to sales to or purchases of tangible personal property used in the operation of a taxable retail business.

The exemption provided in this section shall not in any manner relieve such institution from the payment of the additional and further license fee, if any, imposed on the registration of motor vehicles.

All such institutions claiming exemption hereunder shall at the end of each quarter of each calendar year file with the Treasurer a list of all purchases on which exemption was claimed, fully itemized, showing name and address of vendors, description of property purchased, purchase price and brief explanation of use or intended use.

Section 151. Exemption of Prescription Drugs and Medicines for Human Use. There are hereby specifically exempted

from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, all drugs and medicines to the extent used by humans, when such drugs or medicines are prescribed by prescription, dispensed, or administered by a physician or other licensed person or dispensed by a pharmacist.

Section 16. Exemption of Seed Used for Agricultural Purposes. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the sale of seed legumes, seed grasses, and seed grains, when twenty-five pounds or more are sold in a single sale to be used exclusively for agricultural purposes.

Section 16.1. Exemption of Cattle Semen Used for Agricultural Purposes. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the sale of cattle semen for the artificial insemination of domestic animals whenever the vendee has made the purchase exclusively for agricultural purposes.

Section 17. Exemption of Commercial Fertilizer Used for Agricultural Purposes. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the sale of commercial fertilizers, either liquid or solid, when

five hundred pounds or more are sold in a single sale to be used exclusively for agricultural purposes.

Section 17.1. Exemption of Pesticides Used for Agricultural Purposes. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the sale of insecticides, herbicides, pesticides, rodenticides and fumigants to be used exclusively by the purchaser for agricultural purposes.

Section 18. Exemption of Exchange of Agricultural Products. There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, gross receipts from the exchange of processed agricultural products for unprocessed agricultural products, of a kind required for such processing when such exchange is between the producer and processor and, provided such processed articles are for consumption by the producer's family, household, or employees.

Section 19. Exemption of Livestock and Poultry Sales Other Than Ultimate Retail Use. No gross receipts from sales of livestock or live poultry, when such sales are a part of a series of transactions incident to producing a finished product intended to be offered for an ultimate retail sale, shall be taxable under this Ordinance except that an ultimate retail



sale interrupting the series of transactions with an intended final use or consumption shall be taxable.

Section 20. Exemption of Fuel Used for Agricultural or Railroad Purposes. Motor fuel, including kerosene, tractor fuel, liquefied, petroleum gas, diesel fuels and distillate, when used for agricultural or railroad purposes is hereby exempt from excise taxes imposed under this Ordinance.

For the purposes of this section the term agricultural purposes shall not include the lighting or heating of a farm residence or residences.

For the purposes of this section the term railroad purposes shall include only locomotives or track motor cars being operated on railroad tracks in road service on tribal territory.

Section 21. Exemptions Applied to Taxable Services.

The exemptions from sales tax relative to sales of tangible personal property shall apply to services included in sections 4 and 5 hereof.

Section 22. Tax Additional To Other Occupation and Privilege Taxes. The taxes imposed under this Ordinance shall be in addition to all other occupation or privilege taxes imposed by the Tribe or by any state, municipal corporation or political subdivision of any state unless otherwise specifically exempted by this Ordinance.

Section 23. Addition of Tax to Price of Sale or

Service--Absorption of Price by Retailer Not to be Advertised.

Retailers may add the tax imposed under this Ordinance, as provided by law and where no provision is made, the average equivalent may be added. Any person whose services are taxed in sections 4 or 5 hereof may add the tax under said sections, or their average equivalent thereof, to his price or charge. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly that the tax or any part thereof imposed by this Ordinance will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it, or any part thereof, will be refunded. \_ \_ .

Section 24. Schedule for Collection of Tax From

Consumer. The following schedule is hereby adopted as the basis for collection of the tax imposed by this Ordinance from the public where the same is applicable.

\$ .01 to \$ .12	None
.13 to .37	\$ .01
.38 to .62	.02
.63 to .87	.03
.88 to 1.12	.04
1.13 to 1.37	.05
1.38 to 1.62	.06
1.63 to 1.87	.07
1.88 to 2.12	.08

and on each additional dollar or fraction thereof an increment in tax according to this schedule.

The rate prescribed herein shall be applicable to all excise, registration or use taxes whose rate is fixed to or determined by the rate prescribed in sections 2 to 8 hereof, inclusive, except for the purpose of determining the license fee for the first or original registration of a motor vehicle, house car, house trailer or trailer coach under a Tribble Ordinance and upon the gross receipts reported from the operation of all vending machines, including but not limited to pinball machines, phonographs, and all other mechanical devices for amusement, the rate of tax shall be three percent, except on aircraft manufactured and exclusively used for agricultural spraying, dusting, crop seeding, fertilizing or defoliating purposes, the rate of tax shall be two percent provided, however, that registration of aircraft identifies its specific use.

Section 25. Application for Retailer Permit--Contents and Execution. Every retailer or person engaging in a business on tribal territory whose receipts are subject to sales tax shall file with the Treasurer an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the Treasurer and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and

and such other information as the Treasurer may require. The application shall be signed by the owner, if a natural person; in the case of an association or partnership, by a member or partner thereof; or in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. The applicant must have a permit for each place of business.

Section 26. Issuance of Retailer Permit--Limited to Person and Place Designated--Display in Place of Business--Effective Until Canceled or Revoked. The Treasurer shall grant and issue to each applicant a permit for each place of business on tribal territory. A permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued. Permits issued shall be valid and effective without further payment of fees until canceled or revoked.

Section 27. Refusal of Permit to Delinquent Taxpayer--Bond to Secure Payment of Tax. The Treasurer may, at his discretion, refuse to issue a permit to any person who is delinquent in payment of occupation taxes levied by the Tribe. He may also, in his discretion, require an applicant to furnish a bond to the Tribe, or other adequate security, as security for payment of any sales tax that may become due, or require a



bond or security as a condition precedent to remaining in business as a retailer.

Section 28. Quarterly Return and Remittance Required of Retailers--Extension of Time for Filing. On or before the fifteenth day of the month following each quarter of the year, every person who is the holder of a sales tax permit, or is a retailer whose receipts are subject to sales tax in this state during such quarter, shall make a return and remittance to the Treasurer on forms prescribed and furnished by such Treasurer. The Treasurer may grant an extension of not more than fifteen days for filing a return and remittance.

Section 29. Returns Filed on Other Than Quarterly Basis. The Treasurer, at his discretion, may require some or all returns and remittances to be filed on a monthly, semiannual or annual basis, in which event the return and remittance is due the fifteenth day of the month following the reporting period.

Section 30. Deduction Allowed for Sales Refunds. Refunds made by a retailer during the reporting period shall be allowed as a deduction in case the retailer included the receipts, for which a refund is made, in the net taxable sales or has previously paid the sales tax.

Section 31. Credit for Taxes Paid on Worthless Accounts--Tax Paid if Account Collected. Taxes paid on gross receipts represented by accounts found to be worthless and actually charge

off for income tax purposes, may be credited upon a subsequent payment of the tax herein provided; if such accounts are thereafter collected by the retailer, a tax shall be paid upon the account so collected.

Section 32. Receipts Not Issued for Taxes Remitted.

The Treasurer shall not be required to issue receipts for sales tax remitted to him.

Section 33. Correction of Incorrect Return by Treasurer-

Notice of Person Filing Return--Appeal. If the Treasurer has reason to believe, and does believe, that a return is incorrect, after notice to such person and hearing thereon, he shall correct such return to his best judgment and information, which return so corrected shall be prima facie correct. Such person having filed an incorrect return shall be notified by ordinary mail of the Treasurer's determination from which he may appeal within ten days.

Section 34. Determination of Amount of Tax in Absence of Return--Notice of Person Failing to Make Return--Appeal.

In case any person subject to tax fails to make a return as required, the Treasurer, after notice to such person and hearing thereon, shall determine the amount of such tax according to his best judgment and information, which amount so fixed shall be prima facie correct and such person having failed to make the return shall be notified by ordinary mail of the determination, from which he may appeal within ten days.

Section 35. Revocation of Retailer's License for Failure to File Return or Pay Tax--Continuation in Business as Engaging in Business Without License. Every person who is the holder of a sales tax license and who has failed to file a return, or who has filed a return and has failed to pay the tax due the Tribe under this law on or before the fifteenth of the second month following the quarter, or any other reporting period authorized, shall no longer continue as a retailer and his sales tax license is hereby revoked and canceled. Any person who shall continue in a taxable business after his license has been revoked or canceled, as herein provided, shall be guilty of engaging as a retailer without a sales tax license.

Section 36. Appeal From Treasurer to Tribal Court--Notice of Appeal--Hearing de novo. An appeal from the decision of the Treasurer may be taken by a taxpayer to the Tribal Court. Notice of appeal must be filed within thirty days after notice of the decision of the Treasurer. All appeals shall be heard by the court de novo.

Section 37. Reinstatement of Revoked Retailer's License--fee. The license of a retailer which has been canceled or revoked as provided in section 34 hereof shall not be reinstated by the Treasurer until all the sales tax due the Tribe and a ten dollar reinstatement fee has been paid.

Section 38. Jeopardy Assessment of Sales Tax--Lien and Distress Warrant--Bond to Pay Tax. If the Treasurer believes that the assessment or collection of taxes will be jeopardized by delay, he may immediately make an assessment of the estimated tax and penalty, and demand payment thereof from the taxpayer. If such payment is not made, a lien may be filed and a distress warrant issued. The Treasurer shall be permitted to accept a bond from the taxpayer to satisfy collection until the amount of tax legally due shall be determined and paid.

Section 39. Civil Action for Tax and Penalty--Injunction Against Engaging in Business Without Sales Tax License; Consent to Jurisdiction; Termination of Lease.

39.1. In any case of failure to pay the tax or per when due, the amount of such tax or penalty may be recovered in action of debt in the Tribal Court or any other court of competent jurisdiction. The remedy of injunction is applicable where a person fails to hold a sales tax license or when the license has been cancelled or revoked by the Treasurer.

39.2. Consent to Jurisdiction. As a condition to the granting of any license or permit under this Ordinance, the person obtaining such license or permit shall consent to the jurisdiction of the Tribal Court to enforce this Ordinance.

39.3. Termination of Lease. The Tribal Council is hereby authorized to terminate upon fifteen days notice any lease or other agreement between the Tribe and any person who fails to pay the tax, fees, or penalties provided for herein, when due.



Section 40. Lien of Tax and Penalty--Notice of Lien Filed with Register of Deeds. Any tax or penalty due the Tribe from a taxpayer shall be a lien in favor of the Tribe upon all property and rights to property, whether real or personal, belonging to the taxpayer. In order to preserve the lien against subsequent mortgages, purchasers, or judgment creditors for value and without notice of the lien, on any property, the Treasurer may file with the register of deeds in the area in which the property is located, a notice of said lien in such form as he shall elect.

Section 41. Tax Lien Index Book--Contents--Endorsement and Recording of Notice. The register of deeds shall prepare and keep in his office a tax lien index book which will provide:

1. Taxpayers alphabetically arranged;
2. Tribe as claimant;
3. Time notice of lien was received;
4. Date of notice;
5. Amount of lien;
6. When satisfied.

The register of deeds shall endorse on each notice of lien the day, hour and minute when received, and shall forthwith index said notice in said book and record the lien in the manner provided for recording real estate mortgages.

Citation  
 U S 59-5-116  
 U.C.A. 1953 § 59-5-116

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TEXT

UTAH CODE, 1953

TITLE 59. REVENUE AND TAXATION

CHAPTER 5. SEVERANCE TAX ON OIL, GAS, AND MINING

PART 1. OIL AND GAS SEVERANCE TAX

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 Current through End of 1997 1st Sp. Sess.

59-5-116 Disposition of certain taxes collected on Ute Indian land.

(1) Except as provided in Subsection (2), commencing July 1, 1996, there shall be deposited into the Uintah Basin Revitalization Fund established in Section 9-10-102:

(a) 33% of taxes imposed and collected under Section 59-5-102 from all wells existing on or before June 30, 1995, producing from oil and gas or other hydrocarbon substances attributable to interests:

(i) held in trust by the United States for the Tribe and its members; and

(ii) until December 31, 1999, on lands identified in Pub. L. No. 440 62 Stat. 72 (1948); and

(b) 80% of taxes imposed and collected under Section 59-5-102 from new wells beginning production on or after July 1, 1995, producing from oil and gas or other hydrocarbon substances attributable to interests:

(i) held in trust by the United States for the Tribe and its members; and

(ii) until December 31, 1999, on lands identified in Pub. L. No. 440 62 Stat. 72 (1948).

(2) (a) The maximum amount deposited in the Revitalization Fund may not exceed \$2,000,000 in a given fiscal year.

(b) Any amounts in excess of the maximum shall be deposited into the General Fund.

CREDIT

History: C. 1953, 59-5-116, enacted by L. 1995, ch. 341, § 12.

NOTES, REFERENCES, AND ANNOTATIONS

NOTES, REFERENCES, AND ANNOTATIONS

Compiler's Notes. -- A former § 59-5-116 was repealed in 1988. See note under § 59-5-117.

Effective Dates. -- Laws 1995, ch. 341, § 15 makes the act effective on July 1, 1995.

U.C.A. 1953 § 59-5-116

UT ST § 59-5-116

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MEMORANDUM OF UNDERSTANDINGPREAMBLE

For many years important, unresolved issues have existed between the State of Utah, the Counties of Duchesne and Uintah and the Ute Indian Tribe of the Uintah and Ouray Reservation. The results of this unsettled state of affairs have included mistrust and prolonged and expensive litigation.

The State, Tribe and counties, as governments, have a strong interest in an improved relationship with each other and all parties hereto share contiguous physical areas. Tribal members are citizens of both the Tribe, their respective counties and the State. It is apparent that the parties cannot ignore each other and that it is in the interest of all concerned to work together to settle differences and promote mutual governmental respect and advancement.

The parties to this understanding are committed to the proposition that negotiations constitute a preferred method of resolving longstanding differences and that cooperative efforts have the potential of bringing about a new era of understanding and progress.

STATEMENT OF PURPOSE

The purpose of this understanding is to establish procedures for negotiating matters which are of mutual concern to the parties hereto, to list some of the issues that will be discussed during the initial stages of the negotiations and to set forth a way of cooperatively pursuing one matter that has already been discussed and agreed upon by the parties. It is the objective of the parties hereto that issues be resolved on the basis of mutual consent and

agreement of the State, local and Tribal governments hereby ;  
thereby achieving maximum harmony, facilitating cooperative effort  
in the orderly administration of governmental functions and  
improving the delivery of services to both Indian and non-Indian  
citizens.

#### AGREEMENT

With the foregoing principles and purposes in mind, the  
parties agree as follows:

1. A State-Tribal Discussion Group is hereby formed for the  
purpose of exchanging information and discussing interests and  
concerns of the parties in an effort to reach mutually acceptable  
solutions.

- (a) The Discussion Group shall be composed of seventeen  
persons, seven representatives of the combined  
interests of the State and Counties, seven  
representatives of the Tribe, two representatives  
of industry in the Uintah Basin and one  
representative of the Bureau of Indian Affairs.  
The participating entities shall be free to  
designate substitute representatives or include  
persons with special expertise at any time.
- (b) Meetings of the Discussion Group shall be scheduled  
at the times and places agreed to between the  
parties and either side may take the initiative in  
requesting the scheduling of a meeting.
- (c) Whenever possible, the parties agree to advise each  
other at least five days in advance of each  
scheduled meeting of subjects that they would like  
to discuss. Such notification will allow the other  
parties to properly prepare themselves and bring to  
the meeting persons with knowledge of the  
particular subject matter.
- (d) No official minutes of the meetings will be kept.  
Each side shall be at liberty to record, take notes  
of or, in whatever manner they choose, keep track  
of what is said and done at the meetings.

2. The Discussion Group may, from time to time, refer



matters to working groups consisting of persons with special training or responsibilities designated by the parties for the purpose of studying issues and making recommendations. Where appropriate, outside persons or organizations may be invited to be part of any such working group where special technical competence is required or where the point of view of some outside interest might be helpful in resolving a particular issue.

3. Agreements reached as a result of negotiations by the Discussion Group shall be reduced to writing and signed by the designated representatives of the respective governmental parties. Tribal and County Commission ratification, administrative approval, or Congressional or State Legislative approval necessary for the effectiveness of any such agreements will be cooperatively sought by the governmental parties.

4. It is the mutual intent and understanding of the parties that they will pursue dispute resolution through the bargaining process provided for herein and initiate litigation only as a last resort or where necessary to clarify fundamental rights of the parties or those whom they represent.

5. Issues identified by the parties that will be the initial focus of their negotiations include the following:

- (a) The return to the Tribe and the counties of origin of a portion of the tax revenue collected by the State from oil and gas production on Tribal lands; the possible creation of a special district or other entity pursuant to State law to administer the expenditure of such funds; and the broader subject of dual State/Tribal taxation of economic activity on Tribal lands.
- (b) Easements and rights of way for roads and utilities located therein on Tribal lands and Tribal claims

to streets located in municipal areas

- (c) Hunting and fishing issues.
- (d) Title to certain river bed land and other disputed areas.
- (e) Implementation of the agreement set forth in paragraph 6 hereof.

Other issues may be added hereafter by any party. It is the hope of the parties that initial successes and cooperation will establish the bargaining process as the preferred method of problem-solving ensuring healthy, ongoing government-to-government relationships.

6. At the time of the 1948 transfer to the Tribe of the surface of the lands identified as the "Hill Creek Extension," the United States retained the subsurface rights. Mineral leases have been entered into and royalties are being received therefrom. Pursuant to the Federal Mineral Lease Act (30 U.S.C. § 191) fifty percent of such royalties are being paid to the State of Utah. In addition, pursuant to Public Law 103-93, the Federal Government has committed portions of its royalty share for use in acquiring State school lands. The Tribe intends to request a transfer of the Hill Creek Extension subsurface rights from the United States and, subject to receiving input from the counties involved, the State of Utah is willing to support that request as being in the best interest of the Tribe if, but only if, any such transfer preserves the entitlement of the State of Utah to the fifty percent royalty share that it is presently receiving and does not interfere with the State school lands exchange provided for in Public Law 103-93. The Tribe recognizes the legitimacy of the State's desire to

continue to receive the royalty income that it is presently receiving from this source and the Tribe agrees to condition its request for the subsurface rights upon the preservation of that interest. As a result, the parties have agreed and they hereby reduce to writing their agreement to work together in an effort to obtain the subsurface rights in question for the Tribe, subject to valid, existing rights of third parties, subject to the existing royalty right of the State and without interference with the operation of Public Law 103-93. The parties recognize and formally acknowledge that additional, important objectives in connection with the effort to obtain the subsurface rights will be to (a) increase oil and gas exploration and production on said lands, thereby enhancing royalty revenue, and (b) not to increase the combined taxes of the State, Tribe and counties on mining, oil and gas exploration, production and other related service activities beyond those taxes that would have applied had the change in ownership of the subsurface rights not occurred.

IN WITNESS WHEREOF, the parties commit their good faith and best efforts to the accomplishment of the purposes set forth herein this \_\_\_\_ day of December, 1994.

STATE OF UTAH

by 

MICHAEL O. LEAVITT  
Governor

UINTAH COUNTY

by 

H. Glen McKee  
Commission Chair

DUCHESNE COUNTY

by 

B. CURTIS DASTRUP  
Commission Chair

UTE INDIAN TRIBE OF THE  
UINTAH AND OURAY AGENCY

by 

STEWART PIKE, Chair  
Business Committee

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UT ADC R865-13G

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extent possible, the solid hydrocarbon exemption should be claimed by the person refining or distilling the exempt product.

B. If the resulting blended motor fuel is exported from Utah or sold to a tax-exempt government agency, the exemption claimed as a result of the export or government sales must be reduced by the amount of exemption claimed for the motor fuel produced from solid hydrocarbons in Utah.

C. In order for this adjustment to be made in cases where the export or exempt sale is made by someone other than the refiner or blender, the invoice covering the sale of the fuel must designate the amount of exempt product included in the motor fuel sold. This must be shown whether sold to a licensed distributor or to an unlicensed distributor.

1. If the exempt, or partially exempt product is sold to a licensed distributor, the distributor must make the adjustment on the form used to claim credit for the government sale or the export.

2. If sold to an unlicensed distributor, the export form or government sale form submitted to a licensed distributor for a claim must contain a statement disclosing the amount of exempt motor fuel included.

3. If the records are insufficient to disclose the identity of the exempt purchaser on a direct basis, an adjustment shall be made multiplying the exempt product by a percentage factor representing the government and export sales portion of total motor fuel sales for the same period.

R865-13G-10. Exemption For Collective Purchase of Motor Fuels by State and Local Government Agencies Pursuant to Utah Code Ann. Section 59-13-201. A. Definitions: 1. "Sale" means the passing of title from the seller to the buyer for a price (see Utah Code Ann. Section 70A-2-106(1)).

2. "Delivery" means the physical transfer of the goods from seller to buyer, directly or through a carrier. Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery (see Utah Code Ann. Section 70A-2-503(1)).

B. In order for collective purchases to qualify for the 750 gallon exemption, transactions must comply with the conditions of at least one of the four cases below.

1. Multiple government agencies exclusively sharing a tank, which is leased or owned by one or more of those agencies, may be classified as exempt if one of the following conditions are met: a. If title to the fuel passes as it enters the tank, then any deliveries into the tank of 750 gallons or more billed to a single government agency will qualify for exemption. b. If title to the fuel passes as it leaves the tank, then the provisions of B.2. must be met for the exemption to apply.

2. Purchases by a government agency from an automated metering system activated by a card or key qualify for exemption if the purchases are billed in quantities of 750 gallons or more and the time period over which the purchases were made is stated on the invoice. The government agency must have control of, rights to, and be the only agency billed for all fuel metered on each card or key assigned to it in order for the arrangement to be tax exempt.

3. Deliveries to more than one bulk storage facility owned or leased by a government agency qualify for exemption if the total amount of fuel delivered within 48 hours is 750 gallons or more. The location, amount, and date of each delivery must be shown on the invoice. As an example, 500 gallons may be delivered to a school district's shop, and another 500 gallons to its bulk storage facility out of town. The total 1000 gallons is exempt from taxation if the deliveries are made within 48 hours of each other and are billed as a single sale.

4. Bulk deliveries made from a truck with a delivery capacity of less than 750 gallons can qualify for the exemption if the total fuel delivered by the truck to the governmental agency within 48 hours is 750 or more gallons, regardless



of the number of trips taken to deliver the fuel. The invoice must indicate the number and date of deliveries.

C. Sales to an Indian tribe for its exclusive use, acting in its tribal capacity, are exempt from taxation if the requirements of this rule are met. Sales to individual tribal members, to Indian businesses operating on or off tribal territory, or to other nontribal organizations for personal use, retail sales purposes, or distribution to third parties do not qualify for the exemption for sales to Indian tribes.

D. Licensed distributors claim the exemption on qualifying sales to government agencies by taking the deduction on their motor fuel tax return for the month in which the sales occurred. In the case of qualifying collective purchases which span more than one month, the deduction is claimed in the month in which the sale is invoiced. Nonlicensed distributors making qualifying sales to government agencies must obtain credit for the exemption through the return of the licensed distributor supplying them with the fuel for the sales. Each sale claimed as a deduction must be supported with a copy of the sales invoice attached to the return. The sales invoice must be in proper form and must contain sufficient information to substantiate the exemption status of the sale according to this rule.

R865-13G-11. Consistent Basis for Motor Fuel Reporting Pursuant to Utah Code Ann. Section 59-13-204.

A. Definitions:

1. "Gross gallon" means the United States volumetric gallon with a liquid capacity of 231 cubic inches.
2. "Net gallon" means the gross metered gallon with temperature correction in volume to 60 degrees Fahrenheit.

B. All Utah licensed distributors shall elect to calculate the tax liability on the Utah Motor Fuel Tax Returns on a consistent and strict gross gallon or net gallon basis. The election must be declared in writing and must be sent to the Tax Commission. The declared basis must be the exclusive basis used for 12 consecutive months. Any licensed distributor failing to make an election will default to the gross gallon basis and must then report and pay the excise tax on that basis. Requests for changes in the reporting basis must be submitted in writing and approved by the Tax Commission prior to any change in the reporting basis. Changes in basis may occur only on January 1 and must remain in effect 12 consecutive months.

C. If the election is made to purchase under the net gallon basis, all invoices, bills of lading, and motor fuel tax returns must include both the gross and net gallon amounts. Conversion from gross to net must conform to the ASTM-API-IP Petroleum Measurement Tables.

D. All transactions such as purchases, sales, or deductions, reported on the Motor Fuel Tax Return must be reported on a consistent and exclusive basis. The taxpayer shall not alternate the two methods on any return or during any 12-month period.

E. This rule shall take effect January 1, 1992.

R865-13G-13. Refund of Motor Fuel Taxes Paid Pursuant to Utah Code Ann. Section 59-13-201.

A. Governmental entities entitled to a refund for motor fuel taxes paid shall submit a completed Application for Government Motor Fuel and Special Fuel Tax Refund, form TC- 114, to the commission.

B. A government entity shall retain the following records for each purchase of motor fuel for which a refund of taxes paid is claimed:

1. name of the government entity making the purchase; 2. license plate number of vehicle for which the motor fuel is purchased; 3. invoice date; 4. invoice number; 5. supplier; 6. Vendor location; 7. fuel type purchased; 8. number of gallons purchased; and 9. amount of state motor fuel tax paid. C. Original records supporting the refund claim must be maintained by the governmental entity for three years following the year of refund.

August 21, 1997

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WA ADC 308-93-160  
 WAC 308-93-160  
 Wash. Admin. Code s 308-93-160

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**WASHINGTON ADMINISTRATIVE CODE**  
**TITLE 308. LICENSING, DEPARTMENT OF**  
**(FORMERLY: MOTOR VEHICLES, DEPT. OF AND LICENSES, DEPT. OF)**  
**CHAPTER 308-93. VESSEL REGISTRATION AND CERTIFICATES OF TITLE**  
 Current through October 22, 1997

**308-93-160. Excise tax exemptions--Indians.**

(1) For the purposes of this rule, the following words and terms have the following meanings:

(a) "Indian reservation" means all lands, notwithstanding the issuance of any patent, within the exterior boundaries set aside by the United States for the exclusive use and occupancy of Indian tribes by treaty, law or executive order and which are areas currently recognized as "Indian reservations" by the United States Department of the Interior.

The following Washington reservations are the only "Indian reservations" currently recognized as such by the United States Department of the Interior: Chehalis, Colville, Hob, Kalispell, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Ozette, Port Gamble, Port Madison, Puyallup, Quileute, Quinault, Shoalwater, Skokomish, Spokane, Squaxin Island, Swinomish, Tulalip, and Yakima.

(b) "Indian tribe" means any organized Indian nation, tribe, band, or community recognized as an "Indian tribe" by the United States Department of the Interior.

(c) "Indian" means persons duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation.

(2) Vessels owned by an Indian tribe occupying a recognized Washington Indian reservation are exempt from payment of the excise tax imposed by chapter 82.49 RCW.

(3) Vessels owned by Indians having their principal residence within the recognized Washington Indian reservation, for the tribe in which they are duly registered on the tribal rolls, are exempt from payment of the excise tax imposed by chapter 82.49 RCW.

(4) A properly completed affidavit of exemption on a form supplied by the department must be submitted with each vessel's registration application as a condition precedent to exemption from excise tax. The department may require such other proof of qualification for exemption as it deems necessary.

Statutory Authority: RCW 88.02.070 and 88.02.100. 84-13-086 (Order TL-RG-2), § 308-93-160, filed 6/21/84.  
 Statutory Authority: 1983 c 7 § 20 and 1983 2nd ex.s. c 3 § 46. 83-23-076 (Order 736-DOL), § 308-93-160, filed 11/18/83.

WA ADC 308-93-160  
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**WASHINGTON ADMINISTRATIVE CODE**  
**TITLE 308. LICENSING, DEPARTMENT OF**  
**(FORMERLY: MOTOR VEHICLES, DEPT. OF AND LICENSES, DEPT. OF)**  
**CHAPTER 308-96A. VEHICLE LICENSES**  
 Current through October 22, 1997

**308-96A-400. Excise tax exemption--Indians.**

(1) For purposes of this rule, the following words and terms have the following meanings:

(a) "Indian reservation" means all lands, notwithstanding the issuance of any patent, within the exterior boundaries set aside by the United States for the exclusive use and occupancy of Indian tribes by treaty, law or executive order and which are areas currently recognized as "Indian reservations" by the United States Department of the Interior.

The following Washington reservations are the only "Indian reservations" currently recognized as such by the United States Department of the Interior: Chehalis, Clallam (Jamestown Council), Clallam (Port Gamble Council), Colville, Hoh, Kalispell, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Puyallup, Quileute, Quinault, Sauk-Suiattle, Shoalwater, Skagit, Skokomish, Spokane, Squaxin, Stillaguamish, Suquamish, Swinomish, Tulalip, and Yakima.

(b) "Indian tribe" means any organized Indian nation, tribe, band, or community recognized as an "Indian tribe" by the United States Department of the Interior.

(c) "Indian" means persons duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation.

(2) Motor vehicles owned by Indian tribes located on recognized Washington Indian reservations are exempt from payment of the motor vehicle excise tax imposed by chapter 82.44 RCW. Mobile homes, travel trailers and campers owned by Indian tribes located on recognized Washington Indian reservations are exempt from payment of the mobile home, travel trailer and camper excise tax imposed by chapter 82.50 RCW.

(3) Any vehicle owned or leased by the governing body of an Indian tribe and used exclusively in its or their service may be exempt from the payment of licensing fees, and may be issued special "I" series license plates, provided, that the Indian tribe itself does not license or register any tribal government service vehicle under tribal law.

(4) Motor vehicles owned by Indians having their principal residence within the recognized Washington Indian reservation, for the tribe in which they are duly registered on the tribal rolls, are exempt from payment of the motor vehicle excise tax imposed by chapter 82.44 RCW. Mobile homes, travel trailers and campers owned by Indians having their principal residence within the recognized Indian reservation, for the tribe in which they are duly registered on the tribal rolls, are exempt from payment of the mobile home, travel trailer and camper excise tax imposed by chapter 82.50 RCW.

(5) A properly completed affidavit of exemption on a form supplied by the department must be submitted with each motor vehicle, mobile home, travel trailer or camper license application as a condition precedent to exemption from excise tax. The department may require such other proof of qualification for exemption as it deems necessary.

Statutory Authority: RCW 46.16.600, 46.16.276 and 46.01.110. 87-12-023 (Order TL/RG-34), § 308-96A-400, filed 5/28/87. Statutory Authority: RCW 82.44.020 and 82.44.060. 83-08-052 (Order 714-DOL), § 308-96A-400, filed 4/1/83.

Reviser's note: Chapter 308-96 WAC entitled, "Vehicle licenses," was repealed by Order MV-328, filed 7/24/75. See title digest disposition of chapter.

WA ADC 308-96A-400

**WASHINGTON ADMINISTRATIVE CODE**  
**TITLE 458. REVENUE, DEPARTMENT OF**  
**CHAPTER 458-20. EXCISE TAX RULES**  
 Current through October 22, 1997

458-20-192. Indians—Indian reservations.

**Definitions**

The term "Indian reservation," as used herein, means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the exclusive use and occupancy of Indian tribes by treaty, law, or executive order and which are areas currently recognized as "Indian reservations" by the United States Department of the Interior.

The following Washington reservations are the only "Indian reservations" currently recognized as such by the United States Department of Interior: Chehalis, Colville, Hoh, Kalispell, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Ozette, Port Gamble, Port Madison, Puyallup, Quileute, Quinalt, Shoalwater, Skokomish, Spokane, Squaxin Island, Swinomish, Tulalip, and Yakima.

The term "Indian tribe," as used herein, means any organized Indian nation, tribe, band, or community recognized as an "Indian tribe" by the United States Department of the Interior.

The term "Indian," as used herein, means a person duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation.

Note: For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term "Indian tribe" includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term "Indian" includes only a person duly registered on the tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs.

Under the revenue laws of the state of Washington, the tax liability of Indians and of persons conducting business with Indians is as follows:

**Business and Occupation Tax**

Indians and Indian tribes are not taxable with respect to business conducted by them within an Indian reservation.

No deduction is allowed to others by reason of business conducted with Indians or Indian tribes within an Indian reservation.

**Retail Sales Tax**

Indians and Indian tribes are not subject to the sales tax upon sales to them of tangible personal property made, or otherwise taxable services rendered, within an Indian reservation.

Sales of tangible personal property to Indians or Indian tribes by off-reservation persons are subject to the retail sales tax except where the seller makes actual delivery of the property sold to a point within an Indian reservation.

Sales of taxable services to Indians or Indian tribes are subject to the retail sales tax except where the services are rendered within an Indian reservation.

Sales to persons other than Indians are subject to the retail sales tax irrespective of where delivery or rendition of services takes place. Thus, Indian and Indian tribal retailers are required to collect and remit to the state the retail



sales tax upon each taxable sale made by them within an Indian reservation to persons other than Indians.

In order to substantiate the tax-exempt status of a retail sale made within an Indian reservation to an Indian purchaser, unless the purchaser is personally known to the retailer as an enrolled Indian, the retailer shall require presentation of a tribal membership card identifying the purchaser as duly registered on the tribal rolls of an Indian tribe under such lawful criteria as the tribal organization has established. A record shall be retained by the retailer of all tax-exempt sales to support the sales tax deduction on returns filed with the department, identifying the dollar amount of the sale and indicating the name of the purchaser, tribal affiliation of the purchaser, the Indian reservation to which or within which delivery or rendition of services was made, and the date of sale.

#### Use Tax

Indians and Indian tribes are not subject to the use tax upon the use of tangible personal property within an Indian reservation. However, Indians and Indian tribes will become liable for the use tax when any such property is placed into actual use outside the Indian reservation, irrespective of the fact that the first use of the property may have been within the reservation.

**Special application of retail sales tax and use tax with respect to sales of motor vehicles or trailers to Indians and Indian tribes.** When motor vehicles or trailers sold to Indians or Indian tribes are licensed by the state of Washington at the time of sale, or at any time thereafter, a presumption is raised that such motor vehicles or trailers are for use on the highways of the state of Washington outside the reservation. When motor vehicles or trailers are licensed prior to delivery, dealers are required to collect the retail sales tax in every instance when valid plates remain on the vehicle or trailer, regardless of delivery point. County auditors must collect the use tax when Indians or Indian tribes apply for a license or transfer of registration unless the applicant can show that retail sales tax or use tax has previously been paid on the sale or use of the vehicle or trailer by the applicant.

#### Cigarette Tax

Sales of cigarettes to non-Indians by Indians or Indian tribes are subject to the cigarette tax, since the tax is levied upon the non-Indian purchaser and the vendor is obligated to make precollection of the tax. Therefore, Indian or tribal vendors making, or intending to make, sales to non-Indian customers must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales. However, Indians and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors for resale to qualified purchasers. For purposes of this rule, "qualified purchaser" means (1) an Indian purchasing for resale within the reservation to other Indians, and (2) an Indian purchasing solely for his or her use other than for resale.

Delivery or sale and delivery by any person of unstamped cigarettes to Indians or tribal vendors for sale to qualified purchasers may be made only in such quantity as is approved in advance by the department of revenue. Approval for delivery will be based upon evidence of a valid purchase order of a quantity reasonably related to the probable demand of qualified purchasers in the trade territory of the vendor. Evidence submitted may also consist of verified record of previous sales to qualified purchasers, the probable demand as indicated by average cigarette consumption for the number of qualified purchasers within a reasonable distance of the vendor's place of business, records indicating the percentage of such trade that has historically been realized by the vendor, or such other statistical evidence submitted in support of the proposed transaction. In the absence of such evidence the department may restrict total deliveries of unstamped cigarettes to any reservation or to any Indian or tribal vendor thereon to a quantity reasonably equal to the national average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year by the Tobacco Tax Institute, multiplied by the resident enrolled membership of the affected tribe. Any delivery, or attempted delivery, of unstamped cigarettes to an Indian or tribal vendor without advance approval by the department will result in the treatment of those cigarettes as contraband and subject to seizure and in addition the person making or attempting such delivery will be held liable for payment of the cigarette tax and penalties. Approval for sale or delivery to Indian or tribal vendors of unstamped cigarettes will be denied where the department finds that such Indian or tribal vendors are or have been making sales in violation of this rule.

Delivery of unstamped cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to the Indian reservation. Delivery of unstamped cigarettes at the distributor's dock or

WA ADC 458-20-192

Page 5

place of business or any other off-reservation location is prohibited.

Revised November 14, 1980.

Statutory Authority: RCW 82.32.300, 80-17-026 (Order ET 80-3), § 458-20-192, filed 11/14/80; Order ET 76-4, § 458-20-192, filed 11/12/76; Order ET 74-5, § 458-20-192, filed 12/16/74; Order ET 70-3, § 458-20-192 (Rule 192), filed 5/29/70, effective 7/1/70.

WA ADC 458-20-192  
END OF DOCUMENT

WASHINGTON ADMINISTRATIVE CODE  
 TITLE 314. LIQUOR CONTROL BOARD  
 CHAPTER 314-37 LIQUOR VENDORS

Current through October 22, 1997

**314-37-010 Liquor sales in Indian country—Appointment of tribal liquor vendors—Qualifications.**

(1) The Washington state liquor control board deems it necessary and advisable to adopt this rule for the following reasons:

(a) The decision of the United States Supreme Court in the case of *Rice v. Rehner* (filed July 1, 1983) has established that the state of Washington has licensing jurisdiction over tribal liquor sales in Indian country and that those sales, when made in conformity with federal law, are subject to both tribal and state liquor regulatory requirements.

(b) It is contrary to state law (see chapter 66.44 RCW) for purchasers of Indian liquor to remove that liquor from the reservation and into the state of Washington in those instances where the tribal liquor sellers are not authorized by the board to sell liquor.

(2) Accordingly, pursuant to RCW 66.08.050(2), the Washington state liquor control board will appoint qualifying Indian tribes, which have entered into negotiated business agreements with the board, as liquor vendors which will authorize those vendor tribes to sell liquor by the bottle to such persons, firms or corporations as may be sold liquor from a state liquor store. All such appointments will be subject to the following conditions:

(a) The tribe must enter into a business agreement with the Washington state liquor control board for the purchase and sale of liquor which will insure that the state's control over liquor traffic will be maintained while taking into consideration the unique nature of a tribal liquor vendor operation.

(b) The tribe must purchase all of its spirituous liquor for resale in Indian country from the board at a negotiated price: Provided, That a quota of spirituous liquor will be sold by the board each year to the vendor tribe without the payment of state taxes, which quota shall be negotiated between the board and the qualified tribes and approved by the department of revenue.

(c) The tribe must have in force a tribal ordinance governing liquor sales, which ordinance must have been certified by the Secretary of the Interior and published in the Federal Register as required by 18 U.S.C. § 1161.

(d) The tribe must make all liquor sales in Indian country in conformity with both state and federal law.

(3) Should a tribe which has been appointed as a liquor vendor pursuant to this section fail to comply with all the above enumerated conditions, which shall be construed as continuing requirements to maintain the status of liquor vendor, the appointment of that tribe as a liquor vendor may be revoked by the board.

(4) A tribe, whether or not it has status as an Indian liquor vendor, which desires to sell beer and wine purchased from a licensed wholesaler must obtain state licenses for the sale of beer and wine and must abide by all state laws and rules applicable to sale of beer and wine by state licensees. Tribes selling beer and wine shall collect and remit to the state department of revenue the retail sales tax imposed by RCW 82.08.020 on retail sales of beer and wine to nontribal members.

(5) "Indian country" as used herein shall have the meaning ascribed to it in Title 18 U.S.C. § 1151 as qualified by Title 18 U.S.C. § 1154 as of July 1, 1983.

Statutory Authority: RCW 66.08.030 and 66.08.050(2), 83-24-021 (Order 131, Resolution No. 140), § 314-37-010, filed 11/30/83; 83-04-017 (Order 118, Resolution No. 127), § 314-37-010, filed 1/26/83.

**WISCONSIN ADMINISTRATIVE CODE  
 DEPARTMENT OF REVENUE  
 CHAPTER TAX 9. CIGARETTE TAX  
 Current through Reg. No. 504 (December 1997)**

**Tax 9.06 Cigarette tax refunds to Indian tribes. (ss. 139.323 and 139.325, Stats.)**

(1) Scope. This section applies to sales of cigarettes to and by Indians and Indian retailers on the reservations of tribes who on behalf of their resident enrolled members have entered into agreements under s. 139.325, Stats., with the department for refunds of taxes on stamped cigarettes.

(2) Law. (a) Section 139.323, Stats., directs the department to refund to Indian tribal councils 70% of the cigarette taxes collected under s. 139.31 (1), Stats., in respect to "...sales on reservations or trust lands of an Indian tribe to the tribal council of the tribe having jurisdiction over the reservation or trust land on which the sale is made if all the following conditions are fulfilled:

- (1) The tribal council has filed a claim for the refund with the department.
- (2) The tribal council has approved the retailer.
- (3) The land on which the sale occurred was designated a reservation or trust land on or before January 1, 1983.
- (4) The cigarettes were not delivered by the retailer to the buyer by means of a common carrier, a contract carrier or the U.S. postal service.
- (5) The retailer has not sold the cigarettes to another retailer or to a jobber."

(b) Section 139.325, Stats., allows the department to "... enter into agreements with Indian tribes to provide for the refunding of the cigarette tax imposed under s. 139.31 (1) on cigarettes sold on reservations to enrolled members of the tribe residing on the tribal reservation."

(3) Sales to Indians. (a) Except as provided in s. Tax 9.09 (2) and (4), Wisconsin cigarette distributors shall sell only stamped cigarettes to federally recognized Indian tribes within Wisconsin, or to persons authorized by the Indian tribe to purchase and sell cigarettes.

(b) The Indian tribal council may authorize retailers on its reservations or trust land to purchase and sell cigarettes on which the tribal government may be entitled to a tax refund by providing the department and the cigarette distributor a certified letter stating that the retailer has tribal authorization to purchase and sell cigarettes on the reservation.

(c) The Wisconsin cigarette distributor shall retain, for a period of 2 years from the date of sale, records substantiating sales to federally recognized Indian tribes or their authorized retailers.

(d) The Wisconsin cigarette distributor shall include with its monthly cigarette tax returns a list of all sales of cigarettes to federally recognized Indian tribes or their authorized retailers on a separate form prescribed by the department.

(4) Refunds. (a) Upon receipt of a proper claim for refund, the department shall reimburse the Indian tribal council 70% of the amount of tax paid under s. 139.31, Stats., on all cigarettes purchased by the Indian tribal council or person authorized to purchase and sell cigarettes by the tribal council of the reservation where the purchaser's business is located.

(b) Claims shall be filed upon forms prescribed and furnished by the department.



(c) Claims may not be filed more than twice per month.

(d) 1. The Wisconsin cigarette distributor shall, upon request, furnish each purchaser with the original invoice prepared at the time of delivery, and the purchaser shall send the original invoice to the department when making a claim for refund. In this paragraph, "original invoice" means the top copy and not a duplicate original or carbon copy of the original invoice.

2. The original invoice shall be printed or rubber stamped with the words "original invoice" and shall in addition contain the following information:

- a. Date of sale.
- b. Name and address of seller.
- c. Name and address of purchaser.
- d. Number of cigarettes purchased.
- e. Amount of Wisconsin cigarette tax paid as a separate item.

3. Double-faced carbon paper shall be used between the original paper or product approved in advance by the department as affording protection equivalent to double-faced carbon paper.

4. A separate original invoice shall be used for each sale and delivery and shall be legible.

5. If an original invoice has been lost or destroyed, a duplicate original invoice shall be used to support a claim for refund and accompanied by an affidavit by the purchaser that the original invoice has been lost or destroyed. The distributor when issuing the duplicate original invoice, shall indicate on the face of the invoice that it is a duplicate original invoice. The duplicate invoice shall contain the same information as on the original invoice.

(e) On the filing of a claim, the department shall determine the amount of refund due. The department may investigate the correctness of the facts stated in a claim and may require a claimant to submit records to substantiate the claim. When the department has approved a claim, it shall pay the claimant the reimbursement provided in this subsection, out of the monies collected under s. 139.31 (1), Stats.

(f) An Indian tribe that has entered into an agreement with the department under s. 139.325, Stats., shall file its claim for refund of the remaining 30% of the precollected tax on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation on forms prescribed by the department.

(g) The penalties provided in s. 139.44, Stats., for filing a false or fraudulent claim apply to all refund claimants.

(h) The right of any tribal council to a refund under s. 139.323, Stats., is not assignable, and the application for a refund shall be made by the same tribal council who purchased or authorized the purchase of the cigarettes, and by no other person, and the proceeds or amount of the refund as determined by the department shall be paid to the tribal council whose name appears on the invoice and to no other person.

(i) Refunds under ss. 139.323 and 139.325, Stats., and this section shall be of tax only and may not include interest.

History: Cr. Register, July, 1981, No. 307, eff. 8-1-81; emerg. r. and recr., eff. 10-1-83; r. and recr. Register, March, 1984, No. 339, eff. 4-1-84; am. (2), (3), (4) (a), (c), (d) 1. and (i), Register, August, 1996, No. 488, eff. 9-1-96.

WI ADC s Tax 9.08  
END OF DOCUMENT

AGREEMENT RELATING TO THE REFUND OF PRECOLLECTED  
EXCISE TAXES ON CIGARETTES

THIS AGREEMENT, dated July 28, 1966, by and between the Department of Revenue of the State of Wisconsin (hereinafter referred to as the "State") and the Oneida Tribe of the Oneida Reservation (hereinafter referred to as the "Oneida Tribe"), an Indian tribe recognized and existing under a Constitution and Bylaws approved by the Secretary of Interior of the United States of America on December 21, 1936.

WHEREAS, the excise taxes on cigarettes are collected before the cigarettes are delivered to the Oneida Reservation; and

WHEREAS, the Indian residents of the Oneida Indians residing on the Oneida Reservation are not subject to the taxation laws of the State of Wisconsin on transactions occurring on the reservation; and

WHEREAS, the tribal council and the retailers approved by the tribal council wish to avoid the extensive record keeping requirements necessary for the sale of unstamped cigarettes on the reservation; and

WHEREAS, sec. 139.323, Wis. Stats., provides for refunding 70% of the taxes paid upon submission of a claim (Form CT-001), covering the purchase of cigarettes for sale on a designated Indian reservation or trust land, and

WHEREAS, s. 139.325 authorizes the State to enter into an agreement with the tribal council to provide for refunding of the cigarette tax imposed under s. 139.31(1) on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation.

NOW, THEREFORE, the parties agree that a refund of the excise taxes will be made and to achieve that end, the parties agree to the following:

1. The tribal council shall be reimbursed and repaid seventy percent of the amount of tax paid, upon making and filing a claim with the department on all cigarettes purchased by an Indian tribal council or person authorized to sell cigarettes by the tribal council on the reservation where the purchasers business is located, upon which has paid the tax required under s. 139.31.
2. The equivalent of 30% of the precollected excise tax on cigarettes will be computed by multiplying the annual Wisconsin per capita consumption of cigarettes as published by the Tobacco Institute in this annual publication of "The Tax Burden on Tobacco" times the total population of the reservation times 30% of the current tax rate on each cigarette.
  - a. The Tribal Council will file a claim with the State on or before the 15th day of January, April, July, and October of each year for the preceding quarter on a form provided by the State.

- b. The State will process the claim for refund and issue a warrant payable to the Chairman and Treasurer of the Tribal Council within thirty days of the receipt of the claim form.
  - c. The annual Wisconsin per capita consumption of cigarettes figure is based on a July 1 to June 30 fiscal year and the revised figure for each year is not available until late in the calendar year. Therefore, the refund to be made in October of each year will be computed using the prior year per capita consumption figure.
3. This Agreement shall be continued in effect until subsequently terminated in writing by either party upon thirty (30) days notice to the other party.

IN WITNESS WHEREOF, the State and the Oneida Tribe have caused this Agreement to be executed and delivered by their duly authorized officers.

--- The Department of Revenue of the  
State of Wisconsin

By

James A. Case  
Secretary of Revenue

Date Signed: 8/25/88

The Tribal Council

By

Harold Rowley  
Chairperson of the Tribal Council

Date Signed: 7-28-88

By

Amel Spillner  
Secretary of the Tribal Council

Date Signed: July 27, 88



# State of Wisconsin • DEPARTMENT OF REVENUE

INCOME, SALES, INHERITANCE AND EXCISE TAX DIVISION • 4801 UNIVERSITY AVENUE • MADISON, WISCONSIN • (608) 266-6791 • (608) 266-1221

ADDRESS MAIL TO:  
INHERITANCE & EXCISE TAX BUREAU  
POST OFFICE BOX 8608  
MADISON, WISCONSIN 53708

July 21, 1988

Purcell Powless, Tribal Chairperson  
Oneida Tribe of Indians of Wisconsin  
P. O. Box 365  
Oneida, WI 54155-0365

Dear Purcell Powless:

Your tribe is currently receiving cigarette tax refund of 70% of the tax paid on all cigarettes purchased and 30% of the tax paid on cigarettes sold on your reservation to enrolled members residing on the reservation. To enable your tribe to continue to receive the cigarette tax refunds, you are requested to sign the enclosed agreement.

If you elect to sign the agreement, please return it to this office immediately to allow the Secretary of Revenue or her designee to act upon the agreement. A copy of the executed agreement and/or a letter will be returned to you within 10 days after receipt of the signed agreement.

Sincerely,

*C. Lee Cheaney*  
C. Lee Cheaney, Director  
Inheritance & Excise Tax Bureau  
(608) 266-2797

CLC:RZ:sjs  
Enclosure

LTR/E042008A



AGREEMENT RELATING TO THE REFUND OF PRECOLLECTED  
EXCISE TAXES ON CIGARETTES

THIS AGREEMENT, dated August 10, 1988, by and between the Department of Revenue of the State of Wisconsin (hereinafter referred to as the "State") and the Wisconsin Winnebago of the Wisconsin Winnebago Reservation (hereinafter referred to as the "Wisconsin Winnebago Tribe", an Indian Tribe recognized and existing under a Constitution and Bylaws approved by the Secretary of Interior of the United States of America on September 6, 1967.

WHEREAS, the excise taxes on cigarettes are collected before the cigarettes are delivered to the Wisconsin Winnebago Reservation; and

WHEREAS, the Indian residents of the Wisconsin Winnebago Indians residing on the Wisconsin Winnebago Reservation are not subject to the taxation laws of the State of Wisconsin on transactions occurring on the reservation; and

WHEREAS, the tribal council and the retailers approved by the tribal council wish to avoid the extensive record keeping requirements necessary for the sale of unstamped cigarettes on the reservation; and

WHEREAS, sec. 139.323, Wis. Stats., provides for refunding 70% of the taxes paid upon submission of a claim (Form CT-001), covering the purchase of cigarettes for sale on a designated Indian reservation or trust land, and

WHEREAS, s. 139.325 authorizes the State to enter into an agreement with the tribal council to provide for refunding of the cigarette tax imposed under s. 139.31(1) on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation.

NOW, THEREFORE, the parties agree that a refund of the excise taxes will be made and to achieve that end, the parties agree to the following:

1. The tribal council shall be reimbursed and repaid seventy percent of the amount of tax paid, upon making and filing a claim with the department on all cigarettes purchased by an Indian tribal council or person authorized to sell cigarettes by the tribal council on the reservation where the purchasers business is located, upon which has paid the tax required under s. 139.31.
2. The equivalent of 30% of the precollected excise tax on cigarettes will be computed by multiplying the annual Wisconsin per capita consumption of cigarettes as published by the Tobacco Institute in this annual publication of "The Tax Burden on Tobacco" times the total population of the reservation times 30% of the current tax rate on each cigarette.
- a. The Tribal Council will file a claim with the State on or before the 15th day of January, April, July, and October of each year for the preceding quarter on a form provided by the State.

Mail Opening Unit 51

DEC 16 1994

## MEMORANDUM

DATE December 13, 1994

TO Wisconsin Department of Revenue  
ATTN: DEB KLINKE

FROM John Roberts, Tribal Treasurer  
Ho-Chunk Nation

RE: NAME CHANGE ON DOCUMENTS

The Wisconsin Winnebago Nation has recently adopted "The Ho Chunk Nation" as their official name. This memo shall serve the purpose of official notification of this change. We ask that all our Documents be changed to reference our new name. Orders for stationery have been placed, however until we receive the new stationery, you will see the old letterhead coming through your office. We ask that you honor these documents.

I have enclosed a copy of 1) Article XIV - Savings Clause and 2) Article XVI - certificate of adoption. These two sections of the Constitution authorize our request for these changes. Your cooperation in this transition is greatly appreciated. If you have any questions you may contact John Roberts, Tribal Treasurer or Rita Cleveland, Treasury Department Director at (715)284-1660.

ENC. (2)

CC John Hunter, Chief Enterprise Officer  
Rita Cleveland, Treasury Dept. Director  
Tammie Dobson, Deputy Director  
Clint Helland, Enterprise Accountant  
Patty Hanson, Enterprise Bookkeeper

*1 copy to 113425*  
*Bob Z.*  
*Tribal book binder + 2 copies to ...*

- b. The State will process the claim for refund and issue a warrant payable to the Chairman and Treasurer of the Tribal Council within thirty days of the receipt of the claim form.
- c. The annual Wisconsin per capita consumption of cigarettes figure is based on a July 1 to June 30 fiscal year and the revised figure for each year is not available until late in the calendar year. Therefore, the refund to be made in October of each year will be computed using the prior year per capita consumption figure.
- 3. This Agreement shall be continued in effect until subsequently terminated in writing by either party upon thirty (30) days notice to the other party.


IN WITNESS WHEREOF, the State and the Wisconsin Winnebago Tribe have caused this Agreement to be executed and delivered by their duly authorized officers.

The Department of Revenue of the  
State of Wisconsin

By   
Secretary of Revenue

Date Signed: 8/25/88

The Tribal Council

By   
Chairperson of the Tribal Council

Date Signed: 8/10/88

By   
Secretary of the Tribal Council

Date Signed: 8/10/88


**State of Wisconsin • DEPARTMENT OF REVENUE**

INCOME, SALES, INHERITANCE AND EXCISE TAX DIVISION • 4622 UNIVERSITY AVENUE • MADISON, WISCONSIN • (608) 266-3701 • (608) 266-3311

 ADDRESS MAIL TO:  
 INHERITANCE & EXCISE TAX BUREAU  
 POST OFFICE BOX 8807  
 MADISON, WISCONSIN 53708

JUL 11 1988

 Gordon Thundun, Tribal Chairperson  
 Wisconsin Winnebago Business Committee  
 c/o Finance  
 P.O. Box 311  
 Tonaw, WI 54660

Dear Gordon Thundun:

Your tribe is currently receiving cigarette tax refund of 90% of the tax paid on all cigarettes purchased and 30% of the tax paid on cigarettes sold on your reservation to enrolled members residing on the reservation. To enable your tribe to continue to receive the cigarette tax refunds, you are requested to sign the enclosed agreement.

If you elect to sign the agreement, please return it to this office immediately to allow the Secretary of Revenue or her designee to act upon the agreement. A copy of the executed agreement and/or a letter will be returned to you within 10 days after receipt of the signed agreement.

Sincerely,

 C. Lee Cheek, Jr.  
 C. Lee Cheek, Jr., Director  
 Inheritance & Excise Tax Bureau  
 (608) 266-1797

 CLO:RZ:sjs  
 Enclosure

LTR/ED42008A





## State of Wisconsin \ DEPARTMENT OF REVENUE

July 5, 1984

JAN 02 1996

 OFFICES AT  
 4822 UNIVERSITY AVENUE  
 (608) 266-6761  
 (608) 266-1331

 Credit Tobacco Company  
 1023 East 2nd Street  
 Ashland, WI 54806

 ADDRESS MAIL TO  
 INHERITANCE & EXCISE TAX BUREAU  
 POST OFFICE BOX 2968  
 MADISON WISCONSIN 53708

Effective immediately, sales of both tax-paid and tax-free cigarettes to Indian retailers doing business on Bad River Lands are permitted. Distributors doing business with Indian retailers must accurately report both tax-paid and tax-free sales on the appropriate schedules submitted with monthly cigarette reports.

If you have questions on the above contact me at (608)266-2797 or Mr. John Nordlie at (608)266-3213.

Sincerely,

 C. Lee Cheaney, Director  
 Inheritance & Excise Tax Bureau

CLC:dmm

 cc: Bad River Band of Lake Superior  
 Tribe of Chippewa Indians



## State of Wisconsin \ DEPARTMENT OF REVENUE

July 3, 1984

 OFFICES AT  
 4422 UNIVERSITY AVENUE  
 MADISON, WISCONSIN 53706  
 (608) 266-2700  
 (608) 266-1311

TO: Persons Holding Wisconsin Cigarette Distributor Permits  
 FROM: Lee Cheaney, Director  
 SUBJECT: Sales to Cigarette Retailers Doing Business on  
 Bad River Indian Land

 ADDRESS MAIL TO  
 INHERITANCE & EXCISE TAX BUREAU  
 POST OFFICE BOX 9999  
 MADISON, WISCONSIN 53708

Effective immediately, sales of both tax-paid and tax-free cigarettes to Indian retailers doing business on Bad River Lands are permitted. Distributors doing business with Indian retailers must accurately report both tax-paid and tax-free sales on the appropriate schedules submitted with monthly cigarette reports.

If you have questions on the above contact me at (608)266-2797 or Mr. John Nordlie at (608)266-3223.

Sincerely,

C. Lee Cheaney, Director  
 Inheritance & Excise Tax Bureau

CLC:dmm



Telephone:  
715/682-4212  
715/682-9200

Mashkissibi Center

**BAD RIVER BAND OF LAKE SUPERIOR  
TRIBE OF CHIPPEWA INDIANS**  
P.O. Box 39, Odanah, WI 54861

June 29, 1984

Mr. C. Lee Cheaney, Director  
Inheritance and Excise Tax Bureau  
P.O. Box 8905  
Madison, WI 53708

Dear Mr. Cheaney:

On June 28, 1984 the Bad River Tribal Council approved a dual inventory scheme for Bad River cigarette retailers, whereby taxed cigarettes will be sold to non-tribal members and untaxed cigarettes will be sold to eligible tribal purchasers. I have enclosed for your information copies of the Tribe's Procedures statement, application, approval letter, and suggested record form for untaxed sales.

In light of the Tribal Council's action an expeditious notification to cigarette distributors allowing them to recommence untaxed sales to Bad River retailers would be appreciated and is expected.

If you would care to discuss these arrangements please feel free to contact the tribal chairman at the above number.

Sincerely,

  
David J. Siegler  
Tribal Attorney

DJS:bls



Telephone:  
715/682-4212  
715/682-9200

Mashkisiibi Center

**BAD RIVER BAND OF LAKE SUPERIOR  
TRIBE OF CHIPPEWA INDIANS**  
P.O. Box 39, Odanah, WI 54861

PROCEDURES FOR BAD RIVER RETAILERS  
UNDER THE WISCONSIN  
CIGARETTE TAX LAW

A. SCOPE

These procedures apply to all tribal member vendors who intend to sell cigarettes on the Bad River Reservation under the Wisconsin Cigarette tax law, section 139.30 - 139.44, Wis. Stats., and Tax 9.01, 9.08, and 9.09, Wis. Adm. Code.

These procedures do not repeat the provisions of the Wisconsin law. These procedures instead provide a means for retailers functioning under the law to obtain the benefits of the state scheme. Compliance with state law is the responsibility of the retailer.

B. OVERVIEW

Tribal member retailers possessing a tribal council letter of approval may purchase both stamped and unstamped cigarettes, as long as the unstamped cigarettes are sold only to tribal members and as long as records are kept documenting the unstamped sales. Retailers may apply through the Tribe for a tax refund of \$1.50 per carton of stamped cigarettes purchased, by submitting invoices as described below.

C. LETTER OF APPROVAL

Any tribal member who wishes to sell cigarettes on the reservation pursuant to state law may request a letter of approval from the Tribal Council. The request should be in writing, addressed to the Tribal Chairman, and delivered at least seven days before the regular Tribal Council meeting of the month in which the member wishes to commence cigarette sales. The request should be submitted on the attached form or a copy thereof.

The issuance of a letter of approval is within the sound discretion of the Tribal Council.

D. REQUEST FOR REFUND

Refunds of \$1.50 per carton of stamped cigarettes may be requested by submitting the applicable original invoice as defined by Tax 9.08 (4)(d) to the Tribal accounting office. Refund applications will be submitted to the



PAGE 2

state on the first and fifteenth day of each month or the first work day thereafter. To be included in a refund application, an invoice must be received by the accounting department no later than 12:00 noon on the work day preceeding the application day.

E. REFUND RETURNS

Refunds will be distributed to retailers upon their receipt and accounting by the Tribe.

F. RECORD KEEPING

Record keeping as required by Tax 9.09 (6) is the responsibility of the retailer.

G. REFUNDS ON MEMBER SALES

Since untaxed cigarettes will be available for sale to tribal members there will be no need to provide for tax refunds to tribal members.

H. NOTE ON NON-RESIDENT MEMBER SALES

The state law prohibits untaxed sales to any member who is not a resident of the reservation.

Approved by the Bad River Tribal Council June 28, 1984

APPLICATION FOR LETTER OF APPROVAL  
FOR PURPOSE OF SELLING CIGARETTES

1. Name of Applicant \_\_\_\_\_
2. Applicant is (a) sole proprietorship \_\_\_\_\_  
(b) partnership \_\_\_\_\_  
(c) corporation \_\_\_\_\_
3. If 2(a) is checked, is applicant an enrolled member of the  
Bad River Tribe? \_\_\_\_\_  
If yes, give enrollment number: \_\_\_\_\_
4. If 2(b) is checked attach partnership agreement, if written,  
list all other partners, their addresses, whether they are  
members of the Bad River Tribe, and describe percent of  
business owned and controlled by each.
5. If 2(c) is checked attach articles of incorporation, list of  
current board of directors together with their addresses and  
statement as to their membership in Bad River Tribe, names of  
all management personnel together with addresses and state-  
ment as to membership in Bad River Tribe, and names of all  
stockholders together with percentage of shares owned by each,  
addresses, and statement as to membership in the Bad River  
Tribe.
6. Location(s) to which wholesale delivery of cigarettes will be  
made:
  - (a) \_\_\_\_\_  
Name of establishment, if any
  - \_\_\_\_\_
  - Street Address
  - \_\_\_\_\_
  - Mailing Address
  - \_\_\_\_\_
  - City, State, Zip
  - \_\_\_\_\_
  - Phone Number
7. Legal Description:

7. The location is: (a) Indian-owned fee land \_\_\_\_\_  
(b) Indian owned allotted land \_\_\_\_\_  
(c) Leased tribally-owned trust land \_\_\_\_\_  
(d) Other (describe): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. I certify that all of the information contained above is true:

\_\_\_\_\_  
Applicant

\_\_\_\_\_  
Date

BY: \_\_\_\_\_

NOTE: The Tribe may require supplementation of the answers given above.



Telephone:  
715/682-4212  
715/682-4200

Mashkisiibi Center

**BAD RIVER BAND OF LAKE SUPERIOR  
TRIBE OF CHIPPEWA INDIANS**  
P.O. Box 39, Odenah, WI 54861

TO: Inheritance and Excise Tax Bureau  
P.O. Box 8905  
Madison, WI 53708

The following named Indian retailer has been approved by the Bad River  
Tribal Council to sell cigarettes on the Bad River Reservation:

Name of Retailer \_\_\_\_\_

Business Address \_\_\_\_\_

Date of Approval \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1984.

BAD RIVER TRIBAL COUNCIL

By: \_\_\_\_\_





AGREEMENT RELATING TO THE REFUND OF PRECOLLECTED  
EXCISE TAXES ON CIGARETTES

THIS AGREEMENT, dated \_\_\_\_\_, by and between the Department of Revenue of the State of Wisconsin (hereinafter referred to as the "State") and the Lac du Flambeau Band of Lake Superior Chippewa of the Lac du Flambeau Reservation (hereinafter referred to as the "Lac du Flambeau Tribe"), an Indian Tribe recognized and existing under a Constitution and Bylaws approved by the Secretary of Interior of the United States of America on August 15, 1936.

WHEREAS, the excise taxes on cigarettes are collected before the cigarettes are delivered to the Lac du Flambeau Reservation; and

WHEREAS, the Indian residents of the Lac du Flambeau Band of Lake Superior Chippewa Indians residing on the Lac du Flambeau Reservation are not subject to the taxation laws of the State of Wisconsin on transactions occurring on the reservation; and

WHEREAS, the tribal council and the retailers approved by the tribal council wish to avoid the extensive record keeping requirements necessary for the sale of unstamped cigarettes on the reservation; and

WHEREAS, sec. 139.323, Wis. Stats., provides for refunding 70% of the taxes paid upon submission of a claim (Form CT-001), covering the purchase of cigarettes for sale on a designated Indian reservation or trust land, and

WHEREAS, s. 139.325 authorizes the State to enter into an agreement with the tribal council to provide for refunding of the cigarette tax imposed under s. 139.31(1) on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation.

NOW, THEREFORE, the parties agree that a refund of the excise taxes will be made and to achieve that end, the parties agree to the following:

1. The tribal council shall be reimbursed and repaid seventy percent of the amount of tax paid, upon making and filing a claim with the department on all cigarettes purchased by an Indian tribal council or person authorized to sell cigarettes by the tribal council on the reservation where the purchasers business is located, upon which has paid the tax required under s. 139.31.
2. The equivalent of 30% of the precollected excise tax on cigarettes will be computed by multiplying the annual Wisconsin per capita consumption of cigarettes as published by the Tobacco Institute in this annual publication of "The Tax Burden on Tobacco" times the total population of the reservation times 30% of the current tax rate on each cigarette.
  - a. The Tribal Council will file a claim with the State on or before the 15th day of January, April, July, and October of each year for the preceding quarter on a form provided by the State.

- b. The State will process the claim for refund and issue a warrant payable to the Chairman and Treasurer of the Tribal Council within thirty days of the receipt of the claim form.
  - c. The annual Wisconsin per capita consumption of cigarettes figure is based on a July 1 to June 30 fiscal year and the revised figure for each year is not available until late in the calendar year. Therefore, the refund to be made in October of each year will be computed using the prior year per capita consumption figure.
3. This Agreement shall be continued in effect until subsequently terminated in writing by either party upon thirty (30) days notice to the other party.

IN WITNESS WHEREOF, the State and the Lac du Flambeau Tribe have caused this Agreement to be executed and delivered by their duly authorized officers.

The Department of Revenue of the  
State of Wisconsin

By Harold D. Case  
Secretary of Revenue

Date Signed: 8/25/88

The Tribal Council

By Mike W. Albright  
Chairperson of the Tribal Council

Date Signed: 8-1-88

By Victoria A. Lund  
Secretary of the Tribal Council

Date Signed: 7-29-88



# State of Wisconsin • DEPARTMENT OF REVENUE

INCOME, SALES, INHERITANCE AND EXCISE TAX DIVISION • 4822 UNIVERSITY AVENUE • MADISON, WISCONSIN • (608) 266-6701 • (608) 266-1201

ADDRESS MAIL TO:  
INHERITANCE & EXCISE TAX BUREAU  
POST OFFICE BOX 8903  
MADISON, WISCONSIN 53708

July 21, 1988

Mike Allen Sr., Tribal Chairperson  
Lac du Flambeau Band of Lake  
Superior Chippewa  
418 Little Pines Rd.  
P. O. Box 67  
Lac du Flambeau, WI 54538

Dear Mike Allen, Sr.:

Your tribe is currently receiving cigarette tax refund of 70% of the tax paid on all cigarettes purchased and 30% of the tax paid on cigarettes sold on your reservation to enrolled members residing on the reservation. To enable your tribe to continue to receive the cigarette tax refunds, you are requested to sign the enclosed agreement.

If you elect to sign the agreement, please return it to this office immediately to allow the Secretary of Revenue or her designee to act upon the agreement. A copy of the executed agreement and/or a letter will be returned to you within 10 days after receipt of the signed agreement.

Sincerely,

*C. Lee Cheaney*  
C. Lee Cheaney, Director  
Inheritance & Excise Tax Bureau  
(608) 266-2797

CLC:RZ:sjs  
Enclosure





# State of Wisconsin • DEPARTMENT OF REVENUE

INCOME SALES INHERITANCE AND EXCISE TAX DIVISION • 4822 UNIVERSITY AVENUE • MADISON, WISCONSIN • (608) 266-6701 • (608) 266-1231

ADDRESS MAIL TO:  
INHERITANCE & EXCISE TAX BUREAU  
POST OFFICE BOX 1905  
MADISON, WISCONSIN 53728

July 21, 1988

Bruce Taylor, Tribal Chairperson  
Lac Courte Oreilles Commercial Center  
Route 2, Box 2900  
Manitowish, WI 54845-9508

Dear Bruce Taylor:

Your tribe is currently receiving cigarette tax refunds of 70% of the tax paid on all cigarettes purchased and 30% of the tax paid on cigarettes sold on your reservation to enrolled members residing on the reservation. To enable your tribe to continue to receive the cigarette tax refunds, you are requested to sign the enclosed agreement.

If you elect to sign the agreement, please return it to this office immediately to allow the Secretary of Revenue or her designee to act upon the agreement. A copy of the executed agreement and/or a letter will be returned to you within 10 days after receipt of the signed agreement.

Sincerely,

*C. Lee Chesney*  
C. Lee Chesney, Director  
Inheritance & Excise Tax Bureau  
(608) 266-2797

CLC:RZ:sjs  
Enclosure

LTRE04-10009

AGREEMENT RELATING TO THE REFUND OF PRECOLLECTED  
EXCISE TAXES ON CIGARETTES

THIS AGREEMENT, dated \_\_\_\_\_, by and between the Department of Revenue of the State of Wisconsin (hereinafter referred to as the "State") and the Lac Courte Oreilles of the Lac Courte Oreilles Reservation (hereinafter referred to as the "Lac Courte Oreilles Tribe", an Indian Tribe recognized and existing under a Constitution and Bylaws approved by the Secretary of Interior of the United States of America on November 2, 1966.

WHEREAS, the excise taxes on cigarettes are collected before the cigarettes are delivered to the Lac Courte Oreilles Reservation; and

WHEREAS, the Indian residents of the Lac Courte Oreilles Indians residing on the Lac Courte Oreilles Reservation are not subject to the taxation laws of the State of Wisconsin on transactions occurring on the reservation; and

WHEREAS, the tribal council and the retailers approved by the tribal council wish to avoid the extensive record keeping requirements necessary for the sale of unstamped cigarettes on the reservation; and

WHEREAS, sec. 139.323, Wis. Stats., provides for refunding 70% of the taxes paid upon submission of a claim (Form CT-001), covering the purchase of cigarettes for sale on a designated Indian reservation or trust land, and

WHEREAS, s. 139.325 authorizes the State to enter into an agreement with the tribal council to provide for refunding of the cigarette tax imposed under s. 139.31(1) on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation.

NOW, THEREFORE, the parties agree that a refund of the excise taxes will be made and to achieve that end, the parties agree to the following:

1. The tribal council shall be reimbursed and repaid seventy percent of the amount of tax paid, upon making and filing a claim with the department on all cigarettes purchased by an Indian tribal council or person authorized to sell cigarettes by the tribal council on the reservation where the purchasers business is located, upon which has paid the tax required under s. 139.31.
2. The equivalent of 30% of the precollected excise tax on cigarettes will be computed by multiplying the annual Wisconsin per capita consumption of cigarettes as published by the Tobacco Institute in this annual publication of "The Tax Burden on Tobacco" times the total population of the reservation times 30% of the current tax rate on each cigarette.
  - a. The Tribal Council will file a claim with the State on or before the 15th day of January, April, July, and October of each year for the preceding quarter on a form provided by the State.

- b. The State will process the claim for refund and issue a warrant payable to the Chairman and Treasurer of the Tribal Council within thirty days of the receipt of the claim form.
  - c. The annual Wisconsin per capita consumption of cigarettes figure is based on a July 1 to June 30 fiscal year and the revised figure for each year is not available until late in the calendar year. Therefore, the refund to be made in October of each year will be computed using the prior year per capita consumption figure.
3. This Agreement shall be continued in effect until subsequently terminated in writing by either party upon thirty (30) days notice to the other party.

IN WITNESS WHEREOF, the State and the Lac Courte Oreilles Tribe have caused this Agreement to be executed and delivered by their duly authorized officers.

The Department of Revenue of the  
State of Wisconsin

By *Karen P. Case*  
Secretary of Revenue

Date Signed: 8/25/88

The Tribal Council

By *Dana F. [Signature]*  
Chairperson of the Tribal Council

Date Signed: 7-25-88

By *Robert [Signature]*  
Secretary of the Tribal Council

Date Signed: 7-25-88

AGREEMENT RELATING TO THE REFUND OF PRECOLLECTED  
EXCISE TAXES ON CIGARETTES

THIS AGREEMENT, dated \_\_\_\_\_, by and between the Department of Revenue of the State of Wisconsin (hereinafter referred to as the "State") and the Menominee Tribe of the Menominee Reservation (hereinafter referred to as the "Menominee Tribe"), an Indian Tribe recognized and existing under a Constitution and Bylaws approved by the Secretary of Interior of the United States of America on January 21, 1977.

WHEREAS, the excise taxes on cigarettes are collected before the cigarettes are delivered to the Menominee Reservation; and

WHEREAS, the Indian residents of the Menominee Indians residing on the Menominee Reservation are not subject to the taxation laws of the State of Wisconsin on transactions occurring on the reservation; and

WHEREAS, the tribal council and the retailers approved by the tribal council wish to avoid the extensive record keeping requirements necessary for the sale of unstamped cigarettes on the reservation; and

WHEREAS, sec. 139.323, Wis. Stats., provides for refunding 70% of the taxes paid upon submission of a claim (Form CT-001), covering the purchase of cigarettes for sale on a designated Indian reservation or trust land, and

WHEREAS, s. 139.325 authorizes the State to enter into an agreement with the tribal council to provide for refunding of the cigarette tax imposed under s. 139.31(1) on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation.

NOW, THEREFORE, the parties agree that a refund of the excise taxes will be made and to achieve that end, the parties agree to the following:

1. The tribal council shall be reimbursed and repaid seventy percent of the amount of tax paid, upon making and filing a claim with the department on all cigarettes purchased by an Indian tribal council or person authorized to sell cigarettes by the tribal council on the reservation where the purchasers business is located, upon which has paid the tax required under s. 139.31.
2. The equivalent of 30% of the precollected excise tax on cigarettes will be computed by multiplying the annual Wisconsin per capita consumption of cigarettes as published by the Tobacco Institute in this annual publication of "The Tax Burden on Tobacco" times the total population of the reservation times 30% of the current tax rate on each cigarette.
  - a. The Tribal Council will file a claim with the State on or before the 15th day of January, April, July, and October of each year for the preceding quarter on a form provided by the State.





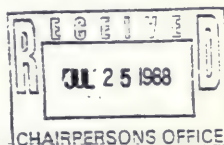
# State of Wisconsin • DEPARTMENT OF REVENUE

INCOME, SALES, INHERITANCE AND EXCISE TAX DIVISION • 4022 UNIVERSITY AVENUE • MADISON, WISCONSIN • (608) 266-6701 • (808) 266-2231

ADDRESS MAIL TO:  
INHERITANCE & EXCISE TAX BUREAU  
POST OFFICE BOX 9805  
MADISON, WISCONSIN 53708

July 21, 1988

Apesanahkwat, Tribal Chairperson  
Menominee Indian Tribe of Wisconsin  
Box 397  
Keshena, WI 54135



Dear Apesanahkwat:

Your tribe is currently receiving cigarette tax refund of 70% of the tax paid on all cigarettes purchased and 30% of the tax paid on cigarettes sold on your reservation to enrolled members residing on the reservation. To enable your tribe to continue to receive the cigarette tax refunds, you are requested to sign the enclosed agreement.

If you elect to sign the agreement, please return it to this office immediately to allow the Secretary of Revenue or her designee to act upon the agreement. A copy of the executed agreement and/or a letter will be returned to you within 10 days after receipt of the signed agreement.

Sincerely,

*C. Lee Cheaney*

C. Lee Cheaney, Director  
Inheritance & Excise Tax Bureau  
(608) 266-2797

CLC:RZ:sjs  
Enclosure

AGREEMENT RELATING TO THE REFUND OF PRECOLLECTED  
EXCISE TAXES ON CIGARETTES

SEP 15 1936

THIS AGREEMENT, dated September 14, by and between the Department of Revenue of the State of Wisconsin (hereinafter referred to as the "State") and the Red Cliff Band of Lake Superior Chippewa of the Red Cliff Reservation (hereinafter referred to as the "Red Cliff Band"), an Indian Tribe recognized and existing under a Constitution and Bylaws approved by the Secretary of Interior of the United States of America on June 1, 1936.

WHEREAS, the excise taxes on cigarettes are collected before the cigarettes are delivered to the Red Cliff Reservation; and

WHEREAS, the Indian residents of the Red Cliff Band of Lake Superior Chippewa Indians residing on the Red Cliff Reservation are not subject to the taxation laws of the State of Wisconsin on transactions occurring on the reservation; and

WHEREAS, the tribal council and the retailers approved by the tribal council wish to avoid the extensive record keeping requirements necessary for the sale of unstamped cigarettes on the reservation; and

WHEREAS, sec. 139.323, Wis. Stats., provides for refunding 70% of the taxes paid upon submission of a claim (Form CT-001), covering the purchase of cigarettes for sale on a designated Indian reservation or trust land, and

WHEREAS, s. 139.325 authorizes the State to enter into an agreement with the tribal council to provide for refunding of the cigarette tax imposed under s. 139.31(1) on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation.

NOW, THEREFORE, the parties agree that a refund of the excise taxes will be made and to achieve that end, the parties agree to the following:

1. The tribal council shall be reimbursed and repaid seventy percent of the amount of tax paid, upon making and filing a claim with the department on all cigarettes purchased by an Indian tribal council or person authorized to sell cigarettes by the tribal council on the reservation where the purchasers business is located, upon which has paid the tax required under s. 139.31.
2. The equivalent of 30% of the precollected excise tax on cigarettes will be computed by multiplying the annual Wisconsin per capita consumption of cigarettes as published by the Tobacco Institute in this annual publication of "The Tax Burden on Tobacco" times the total population of the reservation times 30% of the current tax rate on each cigarette.
  - a. The Tribal Council will file a claim with the State on or before the 15th day of January, April, July, and October of each year for the preceding quarter on a form provided by the State.

- b. The State will process the claim for refund and issue a warrant payable to the Chairman and Treasurer of the Tribal Council within thirty days of the receipt of the claim form.
  - c. The annual Wisconsin per capita consumption of cigarettes figure is based on a July 1 to June 30 fiscal year and the revised figure for each year is not available until late in the calendar year. Therefore, the refund to be made in October of each year will be computed using the prior year per capita consumption figure.
3. This Agreement shall be continued in effect until subsequently terminated in writing by either party upon thirty (30) days notice to the other party.

IN WITNESS WHEREOF, the State and the Red Cliff Band have caused this Agreement to be executed and delivered by their duly authorized officers.

The Department of Revenue of the  
State of Wisconsin

By *Robert A. Case*  
Secretary of Revenue

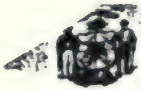
Date Signed: 9/27/88

RED CLIFF BAND OF LAKE SUPERIOR CHIPPEW

By *Patricia R. DePerry*  
Patricia R. DePerry  
Tribal Chairman  
Date Signed: 9-14-88

By *Joan M. Slack*  
Joan Slack  
Tribal Secretary

Date Signed: 9-14-88


**State of Wisconsin • DEPARTMENT OF REVENUE**

INCOME, SALES, INHERITANCE AND EXCISE TAX DIVISION • 4802 UNIVERSITY AVENUE • MADISON, WISCONSIN • (608) 266-6701 • (608) 266-1231

 ADDRESS MAIL TO:  
 INHERITANCE & EXCISE TAX BUREAU  
 POST OFFICE BOX 9806  
 MADISON, WISCONSIN 53708

July 21, 1968

 Patricia LaFoy  
 Richard LaFoy, Tribal Chairperson  
 Red Cliff Tribal Council  
 P. O. Box 529  
 Red Cliff, WI 54854

Dear Richard LaFoy:

Your tribe is currently receiving cigarette tax refund of 70% of the tax paid on all cigarettes purchased and 30% of the tax paid on cigarettes sold on your reservation to enrolled members residing on the reservation. To enable your tribe to continue to receive the cigarette tax refunds, you are requested to sign the enclosed agreement.

If you elect to sign the agreement, please return it to this office immediately to allow the Secretary of Revenue or her designee to act upon the agreement. A copy of the executed agreement and/or a letter will be returned to you within 10 days after receipt of the signed agreement.

Sincerely,

 C. Lee Cheneff, Director  
 Inheritance & Excise Tax Bureau  
 (608) 266-1231

 CLO:PDops  
 Enclosure

LTR/EO42006A



AGREEMENT RELATING TO THE REFUND OF PRECOLLECTED  
EXCISE TAXES ON CIGARETTES

THIS AGREEMENT, dated 9/19/78, by and between the Department of Revenue of the State of Wisconsin (hereinafter referred to as the "State") and the Mole Lake Band of the Sokaogon Chippewa Community of the Mole Lake Reservation (hereinafter referred to as the "Sokaogon Chippewa Tribe", an Indian tribe recognized and existing under a Constitution and Bylaws approved by the Secretary of Interior of the United States of America on April 17, 1947.

WHEREAS, the excise taxes on cigarettes are collected before the cigarettes are delivered to the Mole Lake Reservation; and

WHEREAS, the Indian residents of the Mole Lake Band of the Sokaogon Chippewa Indians residing on the Mole Lake Reservation are not subject to the taxation laws of the State of Wisconsin on transactions occurring on the reservation; and

WHEREAS, the tribal council and the retailers approved by the tribal council wish to avoid the extensive record keeping requirements necessary for the sale of unstamped cigarettes on the reservation; and

WHEREAS, sec. 139.323, Wis. Stats., provides for refunding 70% of the taxes paid upon submission of a claim (Form CT-001), covering the purchase of cigarettes for sale on a designated Indian reservation or trust land, and

WHEREAS, s. 139.325 authorizes the State to enter into an agreement with the tribal council to provide for refunding of the cigarette tax imposed under s. 139.31(1) on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation.

NOW, THEREFORE, the parties agree that a refund of the excise taxes will be made and to achieve that end, the parties agree to the following:

1. The tribal council shall be reimbursed and repaid seventy percent of the amount of tax paid, upon making and filing a claim with the department on all cigarettes purchased by an Indian tribal council or person authorized to sell cigarettes by the tribal council on the reservation where the purchasers business is located, upon which has paid the tax required under s. 139.31.
2. The equivalent of 30% of the precollected excise tax on cigarettes will be computed by multiplying the annual Wisconsin per capita consumption of cigarettes as published by the Tobacco Institute in this annual publication of "The Tax Burden on Tobacco" times the total population of the reservation times 30% of the current tax rate on each cigarette.
  - a. The Tribal Council will file a claim with the State on or before the 15th day of January, April, July, and October of each year for the preceding quarter on a form provided by the State.

- b. The State will process the claim for refund and issue a warrant payable to the Chairman and Treasurer of the Tribal Council within thirty days of the receipt of the claim form.
  - c. The annual Wisconsin per capita consumption of cigarettes figure is based on a July 1 to June 30 fiscal year and the revised figure for each year is not available until late in the calendar year. Therefore, the refund to be made in October of each year will be computed using the prior year per capita consumption figure.
3. This Agreement shall be continued in effect until subsequently terminated in writing by either party upon thirty (30) days notice to the other party.

IN WITNESS WHEREOF, the State and the Sokaogon Chippewa Tribe have caused this Agreement to be executed and delivered by their duly authorized officers.

The Department of Revenue of the  
State of Wisconsin

By Leslie A. Carr  
Secretary of Revenue

Date Signed: 9/27/88

The Tribal Council

By Emmanuel N. Ples Vice Chairman  
Chairperson of the Tribal Council

Date Signed: September 19, 1988

By Debbie Smith  
Secretary of the Tribal Council

Date Signed: 9/19/88



# State of Wisconsin • DEPARTMENT OF REVENUE

INCOME, SALES, INHERITANCE AND EXCISE TAX DIVISION • 4822 UNIVERSITY AVENUE • MADISON, WISCONSIN • (608) 266-6701 • (608) 266-1231

ADDRESS MAIL TO:  
INHERITANCE & EXCISE TAX BUREAU  
POST OFFICE BOX 6808  
MADISON, WISCONSIN 53708

July 21, 1968

Anlyn Ackley, Tribal Chairperson  
Sokongon Chippewa Community of the  
Pine Lake Band  
c/o Tribal Treasurer, Wamondan Co.  
Route 1, Box 605  
Grandor, WI 54520

**SECOND NOTICE**  
7-15-68

Dear Anlyn Ackley:

Your tribe is currently receiving cigarette tax refund of 70% of the tax paid on all cigarettes purchased and 30% of the tax paid on cigarettes sold on your reservation to enrolled members residing on the reservation. To enable your tribe to continue to receive the cigarette tax refunds, you are requested to sign the enclosed agreement.

If you elect to sign the agreement, please return it to this office immediately to either the Secretary of Revenue or her designee to act upon the agreement. A copy of the executed agreement and/or a letter will be returned to you within 10 days after receipt of the signed agreement.

Sincerely,

*C. Lee Cheaney*  
C. Lee Cheaney, Director  
Inheritance & Excise Tax Bureau  
(608) 266-2797

CLC:RZ:sjs  
Enclosure

LTR/E042008A

AGREEMENT RELATING TO THE REFUND OF PRECOLLECTED  
EXCISE TAXES ON CIGARETTES

THIS AGREEMENT, dated July 25, 1988, by and between the Department of Revenue of the State of Wisconsin (hereinafter referred to as the "State") and the St. Croix Tribe of the St. Croix Reservation (hereinafter referred to as the "St. Croix Tribe"), an Indian tribe recognized and existing under a Constitution and Bylaws approved by the Secretary of Interior of the United States of America on October 31, 1983.

WHEREAS, the excise taxes on cigarettes are collected before the cigarettes are delivered to the St. Croix Reservation; and

WHEREAS, the Indian residents of the St. Croix Indians residing on the St. Croix Reservation are not subject to the taxation laws of the State of Wisconsin on transactions occurring on the reservation; and

WHEREAS, the tribal council and the retailers approved by the tribal council wish to avoid the extensive record keeping requirements necessary for the sale of unstamped cigarettes on the reservation; and

WHEREAS, sec. 139.323, Wis. Stats., provides for refunding 70% of the taxes paid upon submission of a claim (Form CT-001), covering the purchase of cigarettes for sale on a designated Indian reservation or trust land, and

WHEREAS, s. 139.325 authorizes the State to enter into an agreement with the tribal council to provide for refunding of the cigarette tax imposed under s. 139.31(1) on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation.

NOW, THEREFORE, the parties agree that a refund of the excise taxes will be made and to achieve that end, the parties agree to the following:

1. The tribal council shall be reimbursed and repaid seventy percent of the amount of tax paid, upon making and filing a claim with the department on all cigarettes purchased by an Indian tribal council or person authorized to sell cigarettes by the tribal council on the reservation where the purchasers business is located, upon which has paid the tax required under s. 139.31.
2. The equivalent of 30% of the precollected excise tax on cigarettes will be computed by multiplying the annual Wisconsin per capita consumption of cigarettes as published by the Tobacco Institute in this annual publication of "The Tax Burden on Tobacco" times the total population of the reservation times 30% of the current tax rate on each cigarette.
- a. The Tribal Council will file a claim with the State on or before the 15th day of January, April, July, and October of each year for the preceding quarter on a form provided by the State.



- c. The State will process the claim for refund and issue a warrant payable to the Chairman and Treasurer of the Tribal Council within thirty days of the receipt of the claim form.
  - c. The annual Wisconsin per capita consumption of cigarettes figure is based on a July 1 to June 30 fiscal year and the revised figure for each year is not available until late in the calendar year. Therefore, the refund to be made in October of each year will be computed using the prior year per capita consumption figure.
3. This Agreement shall be continued in effect until subsequently terminated in writing by either party upon thirty (30) days notice to the other party.

IN WITNESS WHEREOF, the State and the St. Croix Tribe have caused this Agreement to be executed and delivered by their duly authorized officers.

The Department of Revenue of the  
State of Wisconsin

By *Kevin D. Case*  
Secretary of Revenue

Date Signed: 8/25/88

The Tribal Council

By *Lewis Taylor* Lewis Taylor  
Chairperson of the Tribal Council

Date Signed: July 25, 1988

By *Ben Skinaway* Ben Skinaway  
Acting Secretary of the Tribal Council

Date Signed: July 25, 1988



# State of Wisconsin • DEPARTMENT OF REVENUE

INCOME SALES INHERITANCE AND EXCISE TAX DIVISION • 4822 UNIVERSITY AVENUE • MADISON, WISCONSIN • (608) 266-6701 • (608) 266-1231

ADDRESS MAIL TO:  
INHERITANCE & EXCISE TAX BUREAU  
POST OFFICE BOX 8905  
MADISON, WISCONSIN 53708

July 21, 1988

Lewis Taylor, Tribal Chairperson  
St. Croix Tribal Council  
P. O. Box 287  
Montpelier, WI 54645

Dear Lewis Taylor:

Your tribe is currently receiving cigarette tax refund of 70% of the tax paid on all cigarettes purchased and 30% of the tax paid on cigarettes sold on your reservation to enrolled members residing on the reservation. To enable your tribe to continue to receive the cigarette tax refunds, you are requested to sign the enclosed agreement.

If you elect to sign the agreement, please return it to this office immediately to allow the Secretary of Revenue or her designee to act upon the agreement. A copy of the executed agreement and/or a letter will be returned to you within 10 days after receipt of the signed agreement.

Sincerely,

*C. Lee Cheaney*

C. Lee Cheaney, Director  
Inheritance & Excise Tax Bureau  
(608) 266-2797

CLC:RZ:sjs  
Enclosure

LTR/EC42008A

AGREEMENT RELATING TO THE REFUND OF PRECOLLECTED  
EXCISE TAXES ON CIGARETTES

THIS AGREEMENT, dated July 25, 1968, by and between the Department of Revenue of the State of Wisconsin (hereinafter referred to as the "State") and the Forest County Potawatomi Community, Inc. of the Forest County Potawatomi Reservation (hereinafter referred to as the "Potawatomi Tribe"), an Indian tribe recognized and existing under a Constitution and Bylaws approved by the Secretary of Interior of the United States of America on February 6, 1937.

WHEREAS, the excise taxes on cigarettes are collected before the cigarettes are delivered to the Potawatomi Reservation; and

WHEREAS, the Indian residents of the Potawatomi Indians residing on the Potawatomi Reservation are not subject to the taxation laws of the State of Wisconsin on transactions occurring on the reservation; and

WHEREAS, the tribal council and the retailers approved by the tribal council wish to avoid the extensive record keeping requirements necessary for the sale of unstamped cigarettes on the reservation; and

WHEREAS, sec. 139.323, Wis. Stats., provides for refunding 70% of the taxes paid upon submission of a claim (Form CT-001), covering the purchase of cigarettes for sale on a designated Indian reservation or trust land, and

WHEREAS, s. 139.325 authorizes the State to enter into an agreement with the tribal council to provide for refunding of the cigarette tax imposed under s. 139.31(1) on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation.

NOW, THEREFORE, the parties agree that a refund of the excise taxes will be made and to achieve that end, the parties agree to the following:

1. The tribal council shall be reimbursed and repaid seventy percent of the amount of tax paid, upon making and filing a claim with the department on all cigarettes purchased by an Indian tribal council or person authorized to sell cigarettes by the tribal council on the reservation where the purchasers business is located, upon which has paid the tax required under s. 139.31.
2. The equivalent of 30% of the precollected excise tax on cigarettes will be computed by multiplying the annual Wisconsin per capita consumption of cigarettes as published by the Tobacco Institute in this annual publication of "The Tax Burden on Tobacco" times the total population of the reservation times 30% of the current tax rate on each cigarette.
  - a. The Tribal Council will file a claim with the State on or before the 15th day of January, April, July, and October of each year for the preceding quarter on a form provided by the State.

- b. The State will process the claim for refund and issue a warrant payable to the Chairman and Treasurer of the Tribal Council within thirty days of the receipt of the claim form.
  - c. The annual Wisconsin per capita consumption of cigarettes figure is based on a July 1 to June 30 fiscal year and the revised figure for each year is not available until late in the calendar year. Therefore, the refund to be made in October of each year will be computed using the prior year per capita consumption figure.
3. This Agreement shall be continued in effect until subsequently terminated in writing by either party upon thirty (30) days notice to the other party.

IN WITNESS WHEREOF, the State and the Potawatomi Tribe have caused this Agreement to be executed and delivered by their duly authorized officers.

The Department of Revenue of the  
State of Wisconsin

By *Kevin P. Case*  
Secretary of Revenue

Date Signed: 8/25/88

The Tribal Council

By *Harold Shogonee*  
Chairperson of the Tribal Council

Date Signed: 7/25/88

By *Ruth Penning*  
Secretary of the Tribal Council

Date Signed: 7/25/88





# State of Wisconsin • DEPARTMENT OF REVENUE

ACCOMPLISH, SALES, INHERITANCE AND EXCISE TAX DIVISION • 4022 UNIVERSITY AVENUE • MADISON, WISCONSIN • (608) 266-6701 • (608) 266-1231

ADDRESS MAIL TO:  
INHERITANCE & EXCISE TAX BUREAU  
POST OFFICE BOX 8605  
MADISON, WISCONSIN 53708

July 21, 1988

Hartford Shegonee, Tribal Chairperson  
Forest County Potawatomi Community  
P. O. Box 346  
Chandon, WI 54520

Dear Hartford Shegonee:

Your tribe is currently receiving cigarette tax refund of 70% of the tax paid on all cigarettes purchased and 30% of the tax paid on cigarettes sold on your reservation to enrolled members residing on the reservation. To enable your tribe to continue to receive the cigarette tax refunds, you are requested to sign the enclosed agreement.

If you elect to sign the agreement, please return it to this office immediately to allow the Secretary of Revenue or her designee to act upon the agreement. A copy of the executed agreement and/or a letter will be returned to you within 10 days after receipt of the signed agreement.

Sincerely,

*C. Lee Cheaney*  
C. Lee Cheaney, Director  
Inheritance & Excise Tax Bureau  
(608) 266-2797

CLC:RZ:sjs  
Enclosure

LTP/EO42005A

AGREEMENT RELATING TO THE REFUND OF PRECOLLECTED  
EXCISE TAXES ON CIGARETTES

THIS AGREEMENT, dated \_\_\_\_\_, by and between the Department of Revenue of the State of Wisconsin (hereinafter referred to as the "State" and the Stockbridge-Munsee Community of the Stockbridge-Munsee Reservation (hereinafter referred to as the "Stockbridge-Munsee Tribe"), an Indian Tribe recognized and existing under a Constitution and Bylaws approved by the Secretary of Interior of the United States of America on November 18, 1937.

WHEREAS, the excise taxes on cigarettes are collected before the cigarettes are delivered to the Stockbridge-Munsee Reservation; and

WHEREAS, the Indian residents of the Stockbridge-Munsee Indians residing on the Stockbridge-Munsee Reservation are not subject to the taxation laws of the State of Wisconsin on transactions occurring on the reservation; and

WHEREAS, the tribal council and the retailers approved by the tribal council wish to avoid the extensive record keeping requirements necessary for the sale of unstamped cigarettes on the reservation; and

WHEREAS, sec. 139.323, Wis. Stats., provides for refunding 70% of the taxes paid upon submission of a claim (Form CT-001); covering the purchase of cigarettes for sale on a designated Indian reservation or trust land, and

WHEREAS, s. 139.325 authorizes the State to enter into an agreement with the tribal council to provide for refunding of the cigarette tax imposed under s. 139.31(1) on cigarettes sold on the reservation to enrolled members of the tribe residing on the tribal reservation.

NOW, THEREFORE, the parties agree that a refund of the excise taxes will be made and to achieve that end, the parties agree to the following:

1. The tribal council shall be reimbursed and repaid seventy percent of the amount of tax paid, upon making and filing a claim with the department on all cigarettes purchased by an Indian tribal council or person authorized to sell cigarettes by the tribal council on the reservation where the purchasers business is located, upon which has paid the tax required under s. 139.31.
2. The equivalent of 30% of the precollected excise tax on cigarettes will be computed by multiplying the annual Wisconsin per capita consumption of cigarettes as published by the Tobacco Institute in this annual publication of "The Tax Burden on Tobacco" times the total population of the reservation times 30% of the current tax rate on each cigarette.
  - a. The Tribal Council will file a claim with the State on or before the 15th day of January, April, July, and October of each year for the preceding quarter on a form provided by the State.

- b. The State will process the claim for refund and issue a warrant payable to the Chairman and Treasurer of the Tribal Council within thirty days of the receipt of the claim form.
- c. The annual Wisconsin per capita consumption of cigarettes figure is based on a July 1 to June 30 fiscal year and the revised figure for each year is not available until late in the calendar year. Therefore, the refund to be made in October of each year will be computed using the prior year per capita consumption figure.
3. This Agreement shall be continued in effect until subsequently terminated in writing by either party upon thirty (30) days notice to the other party.

IN WITNESS WHEREOF, the State and the Stockbridge-Munsee Tribe have caused this Agreement to be executed and delivered by their duly authorized officers.

The Department of Revenue of the  
State of Wisconsin

By *Harold A. Case*  
Secretary of Revenue

Date Signed: 8/25/88

The Tribal Council

By *[Signature]*  
Chairperson of the Tribal Council

Date Signed: 8-10-88

By *Thomas J. [Signature]*  
Secretary of the Tribal Council

Date Signed: 8/10/88



# State of Wisconsin • DEPARTMENT OF REVENUE

INCOME, SALES, INHERITANCE AND EXCISE TAX DIVISION • 4822 UNIVERSITY AVENUE • MADISON, WISCONSIN • (608) 266-6701 • (608) 266-1231

ADDRESS MAIL TO:  
INHERITANCE & EXCISE TAX BUREAU  
POST OFFICE BOX 6905  
MADISON, WISCONSIN 53708

July 31, 1968

Reginald C. Miller, Tribal Chairperson  
Stockbridge-Munsee Community  
Route 1  
Eowler, WI 54416

Dear Reginald C. Miller:

Your tribe is currently receiving cigarette tax refund of 70% of the tax paid on all cigarettes purchased and 30% of the tax paid on cigarettes sold on your reservation to enrolled members residing on the reservation. To enable your tribe to continue to receive the cigarette tax refunds, you are requested to sign the enclosed agreement.

If you elect to sign the agreement, please return it to this office immediately to allow the Secretary of Revenue or her designee to act upon the agreement. A copy of the executed agreement and/or a letter will be returned to you within 10 days after receipt of the signed agreement.

Sincerely,

*C. Lee Cheaney*  
C. Lee Cheaney, Director  
Inheritance & Excise Tax Bureau  
(608) 266-2797

CLC:RZ:sjs  
Enclosure

LTR/EO4000CA



- Internal conflict within tribes regarding the issue of whether tribes should compact with the state at all.

**Recent Taxation Activity**—None reported.

## R. Wyoming

**Types of Taxes Addressed**—In Wyoming, tax collection agreements have been implemented between the state and tribes regarding (a) cigarette and (b) severance taxes.

**Existing Taxation Practices**—The cigarette and severance tax agreements are described below.

(a) **Cigarette Tax**—In Wyoming, cigarette taxes are precollected at the wholesale level and cigarettes are stamped at that time. However, pursuant to administrative regulations (i.e., Indian Traders, vendors or retailers licensed by the tribe) may obtain untaxed, unstamped cigarettes from wholesalers and remit the tax due on sales to non-Indian customers (*State Board of Equalization regulations, Chapter 6, section (3)*). Under the regulations, payment is achieved in one of two ways. First, tribal retailers may record all exempt sales by taking a statement of exemption from the purchaser indicating the sale is exempt from the tax, and remit tax due only on cigarette sales to non-Indians for the month. Second, the tribal retailer and the Department of Revenue may enter into an agreement whereby the tax on sales to non-Indians is paid on a percentage basis.

The Wind River Tax Commission confirms the existence of an agreement between the state Department of Revenue and the Arapaho Tribe (originally the Northern Arapaho Trust). Under this

agreement, the tribal council pays tax on 26 percent of all cigarettes it receives from wholesalers (the estimated volume of sales to non-Indians and non-exempt Indians on the Wind River Reservation). Initially, the agreement procedure was the result of court stipulation from a 1984 U.S. Supreme Court case, later formalized under the administrative regulations described above.

(b) **Severance Tax**—There have been two different severance tax agreements between the state and the Shoshone and Northern Arapaho Tribes. One, pertaining to the Wind River Reservation Water Project, resulted in a statutory, one-year agreement in which the state reduced its severance tax from 6 percent to 1.5 percent and the tribes agreed to refrain from seeking to enjoin collection of any state or county taxes on reservation oil and gas production. This was done in conjunction with the water allocation issues of the case. This interim agreement, effective from April, 1989 through March, 1990, generated an estimated \$600,000 to \$1,000,000 for distribution to individual tribal members. While the tribes favored the permanent, statutory continuation of this agreement, it is no longer effective.

A second agreement is the outcome of a settlement involving the state Department of Revenue, the Shoshone and Northern Arapaho Tribes, and the Marathon Oil Company. Since 1983, Marathon Oil had been distributing the state severance tax payments into a protest tax account. The ensuing lawsuit was settled in August of 1993, whereby Marathon Oil agreed to continue paying a 1.5 percent state severance tax and all applicable state property taxes as well as a tribal severance tax.

This settlement, approved by the court, constitutes the terms of the current agreement and applies only to this particular lease for the remaining life of the applicable wells. It is not a "blanket" agreement applicable to all leases on the reservation.

**Advantages of Existing Taxation Practices**—Benefits of both the severance and cigarette tax agreements are as follows.

(a) **Cigarette Tax Agreement**—Advantages of the cigarette agreements are as follows:

- Better state-tribal relations;
- Increased number of tourist-related facilities on the reservation;
- Indians are exempt from the cigarette tax when purchased on a reservation;
- Wyoming cigarette retailers are now making in-state cigarette purchases that previously were going to out-of-state wholesalers; and
- An increase from one cigarette retail outlet in 1984 to three Indian Traders operating six retail outlets.

(b) **Severance Tax Agreement**—The 1993 Marathon Oil agreement has apparently met with approval from all parties involved. Specific benefits include:

- Avoidance of further state-tribal conflict;
- Reduction of the overall tax burden to the oil and gas industry;
- Increased cash flow to the tribes. The Wind River Tax Commission, a joint tribal revenue office for the Shoshone and Northern Arapaho Tribes, reports that the current

**FEE LAND OWNERS ASSOCIATION**  
**177 Telegraph Road, Suite 647**  
**Bellingham, WA 98226**

April 16, 1998

The Honorable U S. Senator Ben Nighthorse Campbell: Chairman  
 Honorable Senators of the United States  
 Committee on Indian Affairs  
 SH - 838 Hart Senate Office Building  
 Washington D.C. 20510-6450

Re: Please Support Senate Bill 1691, the American Indian Equal Justice Act

We believe there are valid reasons for adjusting the concept of sovereign immunity as Congress has allowed the tribes to apply it. **Congress has the opportunity, through implementation of the American Indian Equal Justice Act, to make tribal governments accountable for their actions in the same manner as state and federal governments. Such accountability is imperative in order to bring equal justice to all American citizens, wherever they may reside within the United States.**

**Following is testimony by the Fee Land Owner's Association of the Lummi Indian Reservation in Whatcom County, Washington. The Lummi Reservation is home, as of the 1990 census, to about 3,150 residents. Almost exactly half are Indian and half are non-Indian. The vast majority of the non-Indian residents live on fee land within the reservation boundaries.**

- The Lummi participated in a suit establishing that allotments of the land to individual Indians were part of their treaty, using testimony by their elders about what the treaties had meant to them when they signed them.
- Most Fee land owners on the Lummi Reservation purchased their lands from willing Indian land owners who wished to sell.
- Under tribal sovereign immunity, fee land owners have had their rights to use their property freely stripped from them as a matter of routine. **Both Indians' and non-Indians' civil rights are regularly abused** as a result of the concept of sovereign immunity.
- The fee land owners realize that tribal sovereignty is an important concept to Indian tribes, but strongly believe that **sovereign immunity** as it applies to the tribes, **must be adjusted.**
- As Congress has plenary powers over the tribes, and acts as the legal Guardian of the tribes, **abuses resulting from the application of tribal sovereign immunity occur because Congress allows them to occur** and Congress does not care to remedy the problem.
- **If Congress does not wish to modify tribal sovereign immunity, as a guardian Congress should open itself up to suit for illegal actions taken by its wards, the tribes.**
- Our first example of an abuse of sovereign immunity occurred in 1990 when the Lummi tribe agreed to purchase water from the City of Bellingham and make it available to reservation residents on a non-discriminatory basis. Shortly after signing the contract and building pipes using federal funds, the tribe announced it would not make the water available to non-Indians on the same basis as for tribal members. Both the **property rights and the civil rights of reservation residents**

have been violated and, the **people of the City of Bellingham** have been forced to participate in systematic discrimination against their fellow citizens.


- A second example began in the 1970s when the Lummi unilaterally, and illegally, cut off access to a county park. To avoid confrontation, the county turned over its position in the ownership of the park to the Lummi who signed contracts agreeing to make the land available as a park to the people of Washington and the people of Whatcom County "forever." On gaining ownership, the Lummi violated the park contract by refusing to allow equal access, a situation that is now more than 20 years old. By doing this, the tribe put the county in the position of violating its own contracts with the federal and state governments from whom they obtained part of the money to purchase. The rights of citizens to utilize their own property have been violated as have their civil rights as the Lummi have threatened persons trying to use the park with arrest.

The result of the above has been the building of an atmosphere of distrust that permeates all relations with the tribe. The result has been a devastated reservation economy, acrimony between tribal representatives and their non-Indian neighbors, and an inability to reach agreement on even simple issues.

**We ask that you support the American Indian Equal Justice Act, Senate Bill 1691, as a good beginning to restoring equal justice for all Americans.** We support implementing legislation that would adjust the sovereign immunity which only Indian tribal governments and their representatives presently enjoy, to the limits presently required of federal and state governments. **This Act allows all citizens equal due process when they experience abuses of civil rights or property rights from tribal government tyranny.**

We thank you for your time and consideration of this matter.

Sincerely,

  
Richard T. Bremer  
President  
Fee Land Owners Association

## TESTIMONY OF THE LUMMI RESERVATION FEE LAND OWNERS ASSOCIATION

### INTRODUCTION:

FLOA (Fee Land Owner's Association) is an association of owners of fee simple land on the Lummi Reservation in Northwest Washington. The majority of reservation residents of voting age as of the last census are non-Indian, and most non-Indians live on fee land. The total population of the reservation is almost exactly split between Indian and non-Indian.

Through the decades following the treaties with the Indian bands of our region, **the land was allotted to individual Indian families as the Northwest treaties had promised it would be. And as the tribes insisted it should be when they brought the matter to Congress in the 1920s, and then to the Court of Claims (No. F-275).**

The entire Lummi Reservation, with the exception of a couple of acres reserved for a school, was allotted (See United States Court of Claims No. F-275), though not all of the land became fee simple. Some is still held in trust for the descendants of tribal owners.

Some of the land was sold on the open market, after it was patented as fee land by free and independent Indian land owners. With the land came the water rights and other appurtenances associated with the land. **An unintended appurtenance was the undesirable, and never imagined, distinction that fee land owners are just about the only group of Americans that have had portions of our 5th and 14th amendment rights formally suspended by Congressional fiat.** The Constitution states that citizens are not to be deprived of life, liberty, or property, without due process of law and that private property shall not be taken for public use without just compensation. It also forbids states from making or enforcing laws which abridge the "privileges and immunities" of citizens of the United States or from denying any person equal protection under the laws.

**Under tribal sovereign immunity, fee land owners, by the desire of Congress, have had these rights removed. As currently structured, sovereign immunity makes the tribal governments the only governments in the United States that can legally violate the civil rights of members and of non-members, break contracts, or confiscate property without fear of being held accountable except in courts appointed by, and directly controlled on a day to day basis by themselves.**

### IT IS IMPORTANT TO DISTINGUISH BETWEEN TRIBAL SOVEREIGNTY AND SOVEREIGN IMMUNITY:

We can appreciate the tribe's need to regulate its members. Limiting sovereign immunity would not, however, reduce the ability of the tribe to lawfully govern. The limits would simply require the same accountability of tribes that citizens expect of their federal, state, and local governments. We recognize that tribal sovereignty is an important concept to the tribes. However, currently immunities claimed by tribal governments infringe upon on the individual rights of American citizens as laid out in the Declaration of Independence, the Constitution of the United States.

The argument that removing sovereign immunity from the basket of rights Congress grants the tribes destroys the sovereignty of the tribes is nonsensical. **Tribal governments lose no more sovereignty when sovereign immunity is limited than the federal, state or local governments do.** No one would say the United States is no longer a sovereign nation because it has given up some aspects of its own sovereign immunity.

### IT IS IMPORTANT TO MODIFY SOVEREIGN IMMUNITY:

Currently, because of the concept of sovereign immunity, both Indian and non-Indian citizens of Whatcom County are routinely stripped of their recourse to government for injustices done them. You heard, two years ago, a litany of abuse that has come about because Congress continues to grant sovereign immunity to the tribes. You heard of Indians stripped of their rights to vote in tribal elections, of land owners stripped of their fundamental property rights, and of both Indian and non-Indians stripped of their right to justice because they have no access to independent courts. You heard that nothing has changed when you met in Seattle in April. This is



**the fault of Congress. Congress has a clear right to modify sovereign immunity as applied to the tribes.** The Supreme Court has, on numerous occasions, referred to the plenary power of Congress in its dealing with the tribes and, in other cases (U.S. v U. S. Fidelity & Guarantee Co. 1940) has directly referred to the ability of Congress to modify sovereign immunity ("These Indian Nations are exempt from suit without Congressional authorization."). **Therefore, any tyranny occurring as a result of tribal sovereign immunity comes about because Congress allows it to come about.**

**It is notable that tribal governments defended sovereign immunity at the Seattle hearing while tribal members detailed the tyrannies visited upon them by their governments as a result of sovereign immunity.** It is very important that Congress realize how oppressed tribal members are as a result of the immunity doctrine. This is not an Indian/non-Indian issue. This is a struggle between good and evil, right and wrong. Nations desiring to oppress their own citizens fear opening channels that allow citizens to obtain justice.

It is time for Congress to adjust tribal government immunities. It is time to allow the equal justice enjoyed by all Americans in the rest of the nation to be accessed by all citizens, including tribal members, who interact with tribal governments. **Tribal sovereign immunity, as allowed by Congress, must be granted within the framework of the founding documents or the founding documents are meaningless for all Americans.**

#### **ALTERNATIVES TO ADJUSTING TRIBAL SOVEREIGN IMMUNITY:**

A viable alternative exists for Congress if it decides that adjusting sovereign immunity continues to be too much of a political hot potato.

If Congress does not wish to require tribes to be accountable, we suggest that Congress then assume responsibility for tribal government actions taken under the doctrine of sovereign immunity, and allow suits to be brought forward in local courts against the federal government as a guardian of the tribes. **The tribes are dependent wards of the government. Guardians are responsible for the actions of their wards. Therefore Congress could agree to accept liability for tribal actions.** Some would say this is already the case as the Federal Court system can be utilized for this purpose. Unfortunately, the expense of entering into suits through the Federal system is so high as to constitute an impenetrable barrier to justice in most circumstances. However, **Congress could alternatively provide for equal justice through opening the Federal government up to suit in ordinary court in cases involving the tribes.**

Other possible alternatives exist. The key, we believe, is to work towards honest solutions that protect the fundamental and inalienable rights claimed for humans in the Declaration of Independence. **No Senator, no Representative, no matter how "pro-tribe" can honestly be comfortable with the blatant violations of basic human rights occurring almost daily because of sovereign immunity as it relates to Indian country.** There are workable solutions that preserve the rights of all. **As our representatives, Congress has an obligation to find those solutions, not play politics with the inalienable right of the citizens of the United States to have justice available to them.**

When you last held hearings on this subject, you received a large amount of material detailing individual abuses that have come about as a result of sovereign immunity for the tribes. We have documented many similar individual abuses. However, today we present two attachments describing abuses of groups of people, and ask that you consider them in making decisions about sovereign immunity.

**The two attachments document two situations where local governments made contractual agreements with the Lummi Tribe, which were violated. Because of sovereign immunity neither government can do anything about the violations. In each case the local government, because of the action of the Lummi, are currently forced to violate federal and state law because of sovereign immunity. Our point in including these instances is to demonstrate the fact that if governments cannot work with the tribe and enforce very simple agreements, what chance does the ordinary citizen have to achieve justice?**

Thank you for your time and consideration. These are fundamental issues requiring a commitment to justice if solutions are to be found to the problems faced by both tribal members and non-tribal members on our reservations.

**ATTACHMENT ONE: CIVIL RIGHTS IMPACT OF SOVEREIGN IMMUNITY ON THE CITY OF  
BELLINGHAM – CONTRACT WITH TRIBE RESULTS IN CITY SUPPORTING  
DISCRIMINATION**

**SUMMARY:**

In 1990 the Lummi Tribal Sewer and Water District signed an agreement with the City of Bellingham for the supply of about 1,000,000 gallons of water per day. The tribe's representatives agreed the water would be supplied to reservation residents on a non-discriminatory basis. **Almost immediately after the water was made available, the Lummi denied non-Indians equal access to the water. As a result, the City of Bellingham has been put in the position of supporting discrimination.** The tribe's actions in matters like these not only lead to civil rights and property rights violations but also to long term detrimental consequences to tribal members as business people decide they cannot locate jobs on a reservation due to the uncertainty that agreements will be kept.

**TESTIMONY:**

In 1990 the City of Bellingham, Washington, contracted with the Lummi Nation to supply water to the Lummi Tribal Water and Sewer District at the rate of 1000 gallons per minute. An agreement to deliver the water was preceded by long negotiations.

**The reason negotiations were lengthy was a clause the city had inserted into its contract which would have required the district to provide water to residents within the district "on a non-discriminatory basis."**

Finally, after removing that clause, the City and the Lummi signed the document that has turned out to be a major disappointment to the City of Bellingham. As a result of its dealings with the Lummi Tribe, the city has participated in discriminatory actions, based on race/tribal membership, against some reservation residents.

The record is quite clear in the matter. Minutes of the discussion clearly demonstrate that the city was concerned that water should not be withheld from people within the reservation boundary on the basis of, particularly, race.

The Lummi objected to the clause for a variety of reasons. The City Council, which included an attorney, Mark Asmundson, who is now the Mayor of Bellingham, discussed removal of the clause. The tribe's attorney, however, assured the council that the tribal district's own codes required non-discriminatory treatment and that the codes were the result of a Federal Court order, implying that the order would assure fair treatment.

Based on assurances from the tribe's attorney that water would be provided on a non-discriminatory basis the Bellingham City Council approved the building of a line. Federal funding was used to pay for the line. The city then began providing the Lummi Reservation with water.

Numerous conversations with officials in Bellingham, both elected and non-elected, and local news articles, confirm the account above. Under subpoena, in a court, there would be no shortage of testimony to the facts recounted. Absent a court's compelling them to speak, city officials are reluctant to discuss the matter for fear of reprisals of various kinds by the tribe. Consequently, the comments are always, "off the record", though Asmundson has written a letter confirming the above, and former Mayor of Bellingham, Tim Douglas, affirmed the tenor of the above in a radio interview in August of 1995.

**A consensus exists that, despite their assurances, the tribe, almost immediately, violated the spirit of the contract and began to discriminate, passing a resolution, in violation of their own understanding of a federal court order, as expressed in testimony to the Bellingham City Council by their legal representative, stating that "...the Lummi Indian Reservation has no surplus of water for additional non-Indian development and that all water present on the Lummi Reservation is subject to the sole regulatory authority of the LUMMI INDIAN NATION."** Today, it is not possible for most non-Indians to obtain a hook up to the water system under ordinary circumstances. This despite the fact that the tribe uses only a small portion (apparently less than 20%) of the water available to it by contract.

Bellingham's council members and its administration felt betrayed by the failure of the tribe to live up to its agreement, but nothing was done. Sovereign immunity and fear of the tribe has, to date, prevented remedial action.

Now, in fairness, as is contained in testimony from the 1996 hearings, **the Lummi have a different take on the facts in this matter.** They claim that, despite the record, which still exists, no promise was made to provide water on a non-discriminatory basis. **That is precisely the point. In any similar disagreement, the aggrieved party could go to court and ask for an opinion that would then bind the loser. With sovereign immunity in place, the City of Bellingham is placed in the position of participating in an act that is abhorrent to it and, in circumstances pertaining to anyone but the tribe, would be illegal - supporting overt discrimination.**

One has to wonder what would be wrong, in a case like this, in requiring the tribe to have its position judged against that of the city or aggrieved land owners in court. If any other government did what the tribe seems to have done, such a remedy would be available. How can any member of Congress say it should not be made available in this case?

**Most of the points to the above are self-evident. Two require additional commentary.**

**First, if a city the size of Bellingham can be led into an inescapable web as a result of sovereign immunity, what chance does an ordinary citizen have when a tribe wrongs him or her?** Absent adjustments in sovereign immunity, there is simply no chance for the average citizen to obtain justice in any action involving a dispute with a tribe. The citizen is simply at the mercy of the tribe. Sometimes the tribe might show mercy. Sometimes it might not. There is no certainty and certainty is what a system of law requires for if it is to work.

**Second, based on the tribe's action in the water situation, many in the City of Bellingham are today, suspicious of any interaction with the tribe. They believe the city can never again be comfortable coming to an agreement with the tribe.** The belief is the tribe has already shown it may not honor an agreement and will not allow itself to be held accountable if it does not. **This has huge potential for harm to the tribe and to tribal members, as there may be times when the tribe must rely on the city for some service or action.** Because of the tribe's actions in the circumstance outlined above, the city must be circumspect in its future relations with the tribe.

Additionally, the precedent set by the tribe in this action sets an example that tells business people who might want to work with the tribe, "Be careful, protect your assets because you're going to lose them if you don't." **This accounts, in large part, for the fact that the tribe's efforts to establish a viable, on reservation economy have been a near complete failure even with the advantage of Foreign Trade Zone status and other tax advantages which should have led to the tribe's lands being an economic magnet.** There are few, or no, takers when the tribe attempts to attract business to tribal lands.

The Bellingham case is a clear case where sovereign immunity has damaged the tribe, the tribe's members, property owners on the reservation, and citizens of a fairly large city. Civil rights and property rights have been obliterated. **This is a very clear example of a situation in which the proposed adjustments to tribal sovereign immunity contained in Senate Bill 1691 could have brought equal justice and also have resulted in long term economic benefit to the tribe.**



**ATTACHMENT TWO: THE PEOPLE OF WHATCOM COUNTY, THE STATE OF WASHINGTON AND OF THE LUMMI TRIBE LOSE A PARK TO SOVEREIGN IMMUNITY**

**SUMMARY:**

In the 1960s, Whatcom County acquired ownership of Portage Island using grants from federal and state sources and a bond issue paid for by Whatcom County voters. The land was allotted fee land and was to be used as a county park. Shortly after the acquisition, the Lummi cut off all access to the park by both land and sea, patrolling the sea approaches and confronting boaters on the beaches while refusing to allow access by land. To avoid a confrontation, the county negotiated with the tribe an agreement that the tribe would acquire the county's interest in the island on condition that the island be turned into a park. Specific language included that the citizens of the State of Washington would have rights "forever" to use the island as a park. Almost immediately on signing the agreement the Lummi violated the agreement by completely forbidding access to the island. Whatcom County Parks is now in the position of having been in violation of its contractual agreements with the federal and state governments for nearly 20 years because the Lummi have broken their agreement with the county. No recourse is possible due to the sovereign immunity doctrine. The citizens of Whatcom County have lost their right to utilize property they paid for with tax dollars and have been excluded, because of their race/tribal membership, from the property they paid for.

**TESTIMONY:**

By treaty, the entire upland area of the Lummi Reservation in Whatcom County, Washington was allotted to members of the Lummi Tribe. Much of the land was then granted to the allottees in fee simple and, ultimately, sold, as generally happens when free people act freely.

In the mid-1960s, through a program of purchase, Whatcom County obtained ownership of Portage Island, a 1000 acre island just off shore from the reservation proper. The land was obtained using grants from the Bureau of Outdoor Recreation, Washington State's Interagency Committee for Outdoor Recreation, and a Whatcom County bond issue. Access to the island was by boat and by an easement granted by the Lummi and approved by the BIA to the County. The island was to be utilized as a county park by all the citizens of Whatcom County, Indian and non-Indian alike.

In the 1970s, the tribe unilaterally shut off access to the island from all sides, patrolling around the island and confronting recreational boaters. The tribe announced that non-Indians were unwelcome on the island though, of course, the tribe did not own the land.

A convoluted situation evolved in which Interior, through the BIA, supported the Lummi in cutting off access to the property while, at the same time, Interior, through the Historical Conservation and Recreation Service, supported the county. The same attorney represented both agencies at the local level.

Because it desperately wanted to avoid stirring a boiling pot, the county agreed to enter into negotiations with the tribe in the hopes that all parties could benefit. The time frame for negotiations was short but that seemed not to present a problem. The Park and Recreation board believed that a contract with the tribe would result. Eventually, an exchange was negotiated with conditions. The tribe took Whatcom County's ownership position in Portage Island with some specific conditions attached. The tribe agreed to develop Portage Island as a park and, "...that the State of Washington and the citizens of the State of Washington shall have the right to use the island forever for outdoor recreation purposes."

After signing the agreement the tribe immediately closed the island completely to non-Indian recreational users and, in the intervening years, has done nothing to develop the island even as a primitive area or to allow any but tribal members to utilize the island except in a very restricted way: i.e. sometimes, on application to the tribe, boy scouts are allowed temporary access under very controlled and limited conditions).

In 1990, ten years after the signing of the contract, the Whatcom County Park and Recreation Board put forward Resolution No. 25, pointing out that the monies that had been utilized to purchase the island had



been redirected to the tribe as part of the sale and, as no park had been offered, the county was in the position of defaulting on its agreement to utilize the money for park uses. The Park Board asked that legal remedies be explored to bring the tribe into compliance with their contracted word. **What the Park and Recreation Board apparently didn't know was that there are no effective legal remedies when a tribe breaks a contract.**

As is the case with the Bellingham situation discussed in Attachment One, the tribe has an explanation. In testimony given Congress in the '96 hearings they claim poverty as a reason for not developing the park. That does not explain why even kayakers, who need no facilities, are forbidden by the tribe from approaching the island and using it. Were the tribe to open the island up, sufficient volunteer labor could be recruited to build needed facilities. There is simply no question the tribal government simply does not want to fulfill its contracted obligations.

Again, it doesn't really matter what the explanations are, the fact remains that, in any other situation in America, a court case could be filed in local courts for remedy in a situation where there is dispute over something like this matter.

Instead, an entire county is held hostage by a tribe that does not have to even make a pretense of abiding by an agreement. In fact, as the county has pointed out, the actions of the tribe means the county has illegally utilized earmarked money and may be liable for repayment as no park ever came about. The county is also in a tenuous situation as a bond issue was used to help pay for the island. As nothing was achieved with the money, the county may owe taxpayers a rebate with interest.

Again the question must be asked, if governments cannot require a tribe to keep even simple agreements, what possible remedy does an ordinary citizen have?

In this case, as is the case with the Bellingham water, the lesson for ordinary citizens is pretty clear: Sovereign immunity means you must never trust the tribe, never put yourself in a position where the tribe can harm you by breaking a contract, never do business with the tribe without up front payment, never, ever, put business assets on a reservation, never expect negotiations with the tribe to result in enforceable contracts without federal government participation, and, whenever possible, insist that your local government not do business with or cooperate with the tribe because agreements seem to mean nothing. The implementation of Senate Bill 1691 could alleviate these concerns.

Opponents to adjusting sovereign immunity for the tribes are always suggesting, with no particular factual basis that anyone can discover, that adjusting sovereign immunity would lead to a flood of frivolous lawsuits against tribes. We believe the opposite to be the case – that frivolous and expensive to defend lawsuits initiated by the tribes in their courts would be significantly reduced when sovereign immunity is adjusted to allow the equal justice and due process protections given to all other citizens of this country.

And finally, we also believe that the tribes will significantly benefit from the potential new business generated when responsible business owners, who presently avoid doing business with tribes because of currently unlimited sovereign immunity, have the recourses laid out in Senate Bill 1691.

**United States Senate  
Indian Affairs Committee**

**Hearings on Tribal Sovereign Immunity  
March 11 and April 7, 1998**

**Testimony submitted by  
The Friends Committee on National Legislation and  
The American Friends Service Committee**

We are presenting joint testimony from Friends Committee on National Legislation (FCNL), a religious lobbying organization, located in Washington, D.C., representing Quakers in yearly meetings and organizations across the country; and the American Friends Service Committee, (AFSC) a Quaker organization, headquartered in Philadelphia, Pennsylvania, promoting social justice, humanitarian service, and peace worldwide. Both FCNL and AFSC have had significant experience working on American Indian issues with discrete staff and programs. For more than 40 years, FCNL has advocated for tribal self-determination, protection of treaty rights, and fulfillment of the federal government's trust responsibilities to tribes. For the past 50 years, AFSC has done program work on Indian work, currently in six areas in the United States, dealing with youth, cultural defense, treaty rights, environmental education, and other issues.

Drawing upon that collective experience and upon longstanding Friends beliefs, both Quaker organizations have advocated for honorable dealing between the U.S. government and Native American tribes. As such, we are deeply troubled by recent efforts to enact federal legislation to remove tribal government immunity and expose tribal governments to law suits in federal and state courts.

We would take this occasion to present our views on recently introduced legislation dealing with tribal sovereign immunity, specifically S.1691, as well as the broader thrust of which this bill is but a part.

**Sovereign Immunity: A Limited Legal Protection for Governments**

Sovereign immunity is a complex concept. It is a limited legal protection that is essential to the fiscal integrity and functioning of tribal, state, local and federal governments everywhere. Native American tribes are governments. As such, Congress should preserve the existing immunity that protects the treasuries of tribal governments, as sovereigns, from lawsuits as long as sovereign immunity remains an option for any other governmental entity in the U.S.

The hearings on tribal sovereign immunity taking place before this committee have raised several important questions that need to be addressed. What is the purpose of sovereign immunity for any government entity? Should tribal governments be exposed to unlimited

lawsuits and liabilities even if this would disrupt tribal services and deplete tribal treasuries? How would the loss of sovereign immunity affect tribal sovereignty and self-determination? How can tribes improve their court systems to ensure due process for all?

### **Why Not Waive Tribal Sovereign Immunity?**

Tribal sovereign immunity is a limited legal protection, which has been addressed by Congress and the courts in careful, intricate ways. It is not a barrier to most meritorious cases. Sovereign immunity is particularly important to tribal governments because of their limited revenue sources, which would quickly be exhausted were they exposed to unlimited litigation for their governance decisions. This is a serious concern, given the hostile anti-Indian political atmosphere that exists around many reservations today.

Tribal sovereign immunity is already limited in several respects. First, Indian tribes, contractors, and employees are considered to be agents of the federal government when a tribal program operates with federal dollars. Federal laws apply here. Second, like federal and state governments, many tribes voluntarily include limited waivers of immunity in commercial contracts and other business enterprise activities. Third, federal court decisions have limited tribal sovereign immunity by specifying various circumstances in which tribes or tribal officials can be held liable. For example, tribal officials are not immune if their actions go beyond their governmental authority.

### **Sovereign Immunity and Civil Rights**

As organizations with a strong history of advocacy for civil rights, we appreciate the concerns that have led some to view a waiver of tribal sovereign immunity as a way to make tribes accountable for their actions in cases where there is a perceived violation of rights. However, rather than advancing the cause of justice on reservations, we are concerned that such a waiver would tilt the scales in favor of non-Indian plaintiffs at the expense of tribal self-determination.

Undermining the authority of tribal courts while expanding the purview of state and federal courts will do little to further the cause of justice for all people concerned. Tribal courts are central pillars of tribal self-governance. They play an essential role in resolving conflicts on reservations. To circumvent tribal courts is to undermine the sovereign authority of tribes over their lands and legal jurisdictions. There is nothing intrinsically more just about state and federal court systems.

Rather than circumventing tribal courts and exposing tribes to endless and costly litigation, Congress and the administration should be helping tribes to increase the capacity of their court systems so that they will function more efficiently, competently, and fairly in all cases. Like so many other governmental services on Indian reservations, tribal courts have suffered from a lack of resources. The Indian Tribal Justice Act, passed in 1993, was intended to assist tribes in increasing the capacity of their courts. However, the Act has never been fully funded or implemented. Now is the time to start.

Additionally, other creative approaches to judicial reform in Indian country should be explored, in full consultation with tribes. For example, could a cooperative intertribal appellate court be formed, with rotating court appointments for members of the participating tribes? In addition to providing a neutral mode of appeal within tribal court

systems, such a court could improve the judicial capacity of smaller tribes that cannot presently afford to fully fund their own tribal courts.

Finally, we believe that imposing a waiver only on tribal governments is discriminatory. Non-Indian governmental bodies are as culpable as tribal bodies when it comes to producing unjust decisions and policies. When non-Indian governmental bodies have failed to perform adequately, they have become the focus for reform efforts. However, when *tribal* governments fail to meet expectations or when they have made decisions with which non-Indians disagree, lawmakers in Washington all too often propose dismantling tribal government institutions and reducing tribal sovereignty.

### **A Better Approach**

For all of the concerns cited by proponents of legislation to limit tribes' sovereign immunity there exist alternate solutions that would be more respectful of tribal sovereignty and more effective in assuring justice for all people in the long run. We applaud Chairman Campbell (CO) and Vice-Chairman Inouye (HI) on their efforts to examine such alternatives in consultation with tribal leaders. We hope that these conversations will lead to approaches that will be truly positive, mutually agreeable solutions that will serve to enhance the strength and legitimacy of tribal governments in this nation.

On behalf of both of our organizations, we appreciate this opportunity to share our views with the Committee as it deals with one of the major concerns now facing Indian Country.

Edward Stowe

Ed Nakawatase

Legislative Secretary  
Friends Committee on National Legislation

National Representative,  
Native American Affairs  
American Friends Service Committee



*Hoop Valley Tribal Council*

P.O. Box 1348 • Hoopa, California 95546 • 625-4211 • FAX 625-4594

**HOOPA VALLEY TRIBE**Regular meetings on 1st & 3rd  
Thursdays of each Month

**TESTIMONY OF MERV GEORGE, JR., CHAIRMAN  
HOOPA VALLEY TRIBE OF CALIFORNIA  
BEFORE THE U.S. SENATE COMMITTEE ON INDIAN AFFAIRS  
OVERSIGHT FIELD HEARING ON TRIBAL GOVERNMENT SOVEREIGN IMMUNITY  
SEATTLE, WASHINGTON  
APRIL 7, 1998**

**I. INTRODUCTION.**

Good Morning, Mr. Chairman and members of the Committee. I am Merv George, Jr., Chairman of the Hoopa Valley Tribe of California. I appreciate the opportunity to provide testimony on an issue that is critical to our ability to continue to effectively operate as a government - Tribal Government Sovereign Immunity.

First of all, I would like to express the Hoopa Valley Tribe's support for the testimony of the National Congress of American Indians that was submitted during the Committee's oversight hearing held on March 11, 1998. In addition, I would like to thank the NCAI President, the Honorable Chairman Ron Allen of the Jamestown S'Klallam Tribe of Washington, for his untiring dedication and leadership on this matter, as well as others that are so important to our Indian tribes.

Since NCAI has done an excellent job in addressing the general negative effects of enactment of previously proposed Section 120 of the 1998 Senate Interior Appropriations Bill (H.R. 2107) and S. 1691, my testimony focuses on how these proposed measures will hurt tribes on the local and California levels.

**II. HOOPA VALLEY INDIAN RESERVATION.**

The Hoopa Valley Indian Reservation is located in remote Northern California, and is the largest Indian reservation in the State. The Reservation land base comprises approximately 89,000 acres of which approximately 80% is commercial timber land and 20% residential trust and fee status land. The Hoopa Tribal membership is 2200. The Reservation population consists of 3,000 residents, with approximately 1400 tribal members, 800 other Indians and 800 non-Indians.

Hoopa Tribal Government is the primary provider of governmental services on the Reservation. Many services that have been provided on the Reservation in the past by state and county agencies have either been reduced or eliminated due to budget limitations. Presently, the Tribe provides most of the Reservation's law enforcement and fire protection services, child welfare, drug and

alcohol rehabilitation services, ambulance services (including service for surrounding areas outside the Reservation), natural resource management and Reservation road maintenance activities. The Hoopa Tribal Government employs approximately 400 people each year and contains some 40 separate programs.

Our Tribal Council is composed of a Chairman, who represents the Tribe as a whole, and seven Councilmembers who represent each of the traditional areas of the Hoopa Valley. In 1985, the Hoopa Tribe developed the first Tribal Court in California, using exclusively tribal funds for its creation and operation. Today, the Tribal Code contains some 45 Titles that address issues ranging from the operations of the Tribal Court, legislative procedures for law-making and due process assurances, natural and cultural resource protections, land management, water quality, and a number of administrative procedures. Comprehensive tribal business codes are presently being reviewed under the Tribe's Legislative Procedures process and are expected to be enacted in the near future.

Until recently, the Tribe operated the only Tribal Court and law enforcement programs in California. Developing adequate tribal law enforcement, judicial and social services within the State has been extremely difficult. Since California is a P.L. 83-280 State, it was believed until recently -- and some people still assert -- that tribes had no authority to have tribal courts or law enforcement programs. Before the benefits received from gaming operations, with the exception of the Hoopa Valley Tribe, few California Indian Tribes have been able to develop stable governmental infrastructures for their reservations and communities.

### **III. S. 1691 Will Worsen the Disastrous Effects of Public Law 83-280.**

S. 1691 extends the jurisdiction of state courts over civil claims against Indian tribes and repeals provisions of the Indian Civil Rights Act of 1968 that require the consent of an Indian tribe for a State to assume jurisdiction over matters of civil law. In many ways, S. 1691 is like the 1953 Act, known as Public Law 83-280, which gave certain States, including California, jurisdiction over civil causes of action that involve Indians and arise within Indian country. Thus, perhaps the best gauge for determining the effects of S. 1691 is to analyze problems associated with related provisions in P.L. 83-280.

Like S. 1691, P.L. 83-280 originated as an ill conceived, quick-fix attempt by Congress to impose State jurisdiction on Indian tribes. Also, like S. 1691, P.L. 83-280 contained no mechanism to address the real political, social and financial costs of its implementation. Initially, States such as California, seemed overjoyed to be able to impose what they thought of as total jurisdiction over Indian tribes. However, the attitude of state and local representatives soon began to change after the costs of implementing P.L. 83-280 began to fall on the State.

Despite the fact that both Indian and non-Indian fee-status land owners on the Reservation pay county and state taxes, State and local politicians began to reduce services to Indian lands as non-Indian communities began demanding more services and budgets dwindled. Locally-elected District Attorneys began disregarding cases that were not politically popular and ignoring many of the issues raised by Indian tribes and reservation residents. Politically astute county elected representatives would reduce law enforcement, court and other social services on Indian reservations to increase the same services to areas containing larger voter populations. In recent years, County Sheriff's vehicles were required to be parked for four hours each day in order to stay within the appropriated budget for the Department.

After 15 years, Congress acknowledged failures in the P.L. 83-280 policy and amended the Act to require tribal concurrence prior to any further expansion of state jurisdiction over any Indian tribe. Since then, virtually every Indian tribe subject to P.L. 83-280 jurisdiction imposed by a state has explored methods for retroceding such jurisdiction back to the Federal government. Many Indian tribes have successfully achieved retrocession, developed their own policing capabilities and judicial services, and have assumed much of the Federal government's P.L. 83-280 retroceded jurisdiction.

When reviewing the negative effects of P.L. 83-280, we should not overlook the abuses of 280 jurisdiction by States that have attempted to preempt federally-protected rights and powers of Indian tribes. While States and local governments have aggressively worked to reduce and eliminate law enforcement, social and judicial services on Indian Reservations (which was allegedly 280's primary purpose in the first place), States have also been willing to use P.L. 83-280 to their benefit when it suited their priorities. Some examples where P.L. 83-280 has been used by States to inappropriately preempt Indian rights are in the areas of gaming, zoning, hunting and fishing, termination of Indian parental rights, adoptions of Indian children and Indian child adoptions and foster placements.



There is no reason to believe that States will not also attempt to use S. 1691 to achieve their own priorities, of course to the detriment of Indian tribes.

#### IV. EVOLUTION OF HOOPA TRIBAL COURT.

The Hoopa Valley Tribe initiated efforts to establish our Tribal Court in the late 1970's. As California's first tribal court, we had some immediate obstacles to overcome. Some of the more difficult issues included: 1) determining effects, if any, of P.L. 83-280 upon tribal courts; 2) overcoming the Bureau of Indian Affairs' policy of not supporting law enforcement and tribal court services in P.L. 83-280 states; 3) identifying available technical support services; 4) developing the funding base for the Court's operations; 5) creating the body of tribal law that would be enforced by the tribal court; 6) using the tribal court to strengthen the Tribe's ability to provide and enforce constitutional guarantees to individuals within the Tribe's jurisdiction; 7) assuring separation of powers; and 8) using tribal sovereign powers to protect trust assets not being protected by the Federal Government or State of California.

Following our initial fact-finding process, in 1983 a Tribal Court initiative was placed on the Tribe's referendum election for approval by the general membership. Once approved, the Tribe developed the Code and, in 1986, the Court was formally established.

Since that time the Court has exercised jurisdiction in a wide range of cases, nearly all civil cases. The tribal government is often a defendant in these cases. Both tribal members and non-members receive court decisions on the merits of their claims. Appeals are available to the judges of the Hoopa Valley Tribal Court of Appeals, a body established in conjunction with the Northwest Intertribal Court system.

#### V. HOOPA GOVERNMENT-TO-GOVERNMENT AGREEMENTS.

The Tribe and its members have struggled for years to address problems associated with State and county jurisdiction. One of the more difficult problems to overcome arises from differences in "values and principles" that are commonplace within our tribal community, but are foreign to county and state officials. Further, state and local officials sometimes think they do not have the authority to recognize tribal values and principles if such matters are not already incorporated in state and county laws.



To complicate problems further, California has narrow laws that distribute tax funds to incorporated cities to provide their own law enforcement, judicial and social services. Tribes are not eligible for any of the tax funds since they are not subdivisions of the State. As a result, the Tribe, county and state officials would often find themselves powerless to address problems in a meaningful manner, consistent with the unique differences between our communities and cultures. All too often, these differences produce costly and time consuming litigation in both state and federal courts, with most being decided in favor of the tribes.

Over the past decade, the Tribe, county and state officials have dedicated our efforts to developing mutually acceptable government-to-government agreements to address specific areas of concern. Some of the areas covered by such agreements include fishery harvest regulations, law enforcement cross-deputization (for both state and tribal laws), sharing of court facilities, fire protection, highway rights-of-way, utility service placements, road maintenance, Indian child welfare, and protection of tribal and individual trust assets.

As stated earlier, the authority granted to States under P.L. 83-280 has been both used and abused by the State of California. On the one hand, the State would claim that the lack of funding is the reason for not providing services to Indian communities. One the other, the State has used P.L. 83-280 as the justification for trying to override tribal sovereign powers or to improperly intervene into the internal affairs of tribes. However, of all reservations in California, Hoopa is probably the one where the State, County and Tribe have best struck a balance in applying both tribal and state jurisdiction to improve law enforcement services for the Hoopa Reservation and surrounding areas.

In 1995, the Tribe, the Humboldt County Board of Supervisors, and the Humboldt County Sheriff's Department formally entered into a Joint Powers Agreement with respect to providing law enforcement services to the Reservation. The Joint Powers Agreement was designed to respect, support and incorporate the values and principles of the separate sovereign jurisdiction of the County, State and Tribe. Under reciprocal agreements, tribal and county law enforcement officers have been sworn to enforce both tribal and state laws. Partly as a result of the agreement, the County District Attorney has agreed to prosecute cases involving citations and arrests by tribal police officers. Additionally, the County and Hoopa Tribal Court have entered into a joint use agreement to utilize the County Court Facilities building, which was constructed by the County on tribal leased land in 1963, and is used today for the mutual benefit of both governments.

As stated earlier, a key part of the success of the Joint Powers Agreement is that it provides for the application of the values and principles that each government brings into the agreement. The benefit received by the State and County under the Agreement is "subsidized" law enforcement services which could not be provided without support from the Tribe. While no direct funding is provided to the Humboldt County Sheriff's Department, such subsidies come in to form of support from Tribal Police Officers, increased law enforcement equipment and facilities, and coordinating County jurisdiction with that of the Tribe. The Tribe and Hoopa community receive a greater degree of attention to law enforcement services from the Sheriff's Department, County District Attorney and County Supervisors, receive local and more expeditious law enforcement services on the Reservation, and expand our capabilities for protecting federally-protected tribal and individual trust assets.

#### **VI. USE OF TRIBAL SOVEREIGN POWERS TO PROMOTE ECONOMIC DEVELOPMENT.**

As the Committee knows, developing and promoting sound economic development opportunities on Indian Reservations has been difficult. Recent laws, such as Welfare Reform, have brought new focus on the need to develop sound business environments on Indian reservations. While Welfare to Work programs have merit in urban parts of the Country, without business development, transitions from welfare to jobs on Indian reservations simply are not a realistic possibility. We are grateful to the Committee for its continuing efforts to overcome the obstacles that have prevented or hindered Reservation economic development ventures in the past. We are extremely concerned that enactment of such laws as S.1691 will completely undermine progress that has been made in this area.

There has always been a mystery surrounding business development on Indian reservations and what opportunities can be provided to businesses under tribal law. Each year, tribal officials are approached by prospective business developers who are trying to find out what benefits can accrue to businesses, tribes, individuals and surrounding communities if a business were to be established on Indian lands. Unfortunately, almost all of these business prospects soon become mired in legal and political questions, such as the nature of federally-protected trust lands, the Bureau of Indian Affairs land lease and environmental regulations processes, tribal sovereign powers and sovereign immunity, state and county jurisdiction on Indian lands, etc.

The Tribe has recently embarked on a project to define most, if not all, of these complex and confusing questions by initiating a pilot project to define the process for business development within tribal jurisdiction and on Indian reservations. This project will result in the enactment of Tribal Comprehensive Business Codes that define a "road map" for anyone interested in developing businesses on Indian lands and within tribal jurisdiction.

To date, the Tribe has done extensive research in the area of tribal business law, federal trust laws and regulations, and the extent of state jurisdiction over businesses of the Tribe as well as private business operating under the umbrella of tribal sovereign powers. Federal laws, including the Internal Revenue Code, clearly recognize the authority of Indian tribes to enact business codes and to create both tribal and private for-profit and non-profit businesses and corporations. The Tribe has already developed a draft Comprehensive Business Code that addresses many requirements necessary to create sound and legal business opportunities under tribal law.

However, if S. 1691 were enacted into law, nothing will remain intact within the scope of tribal sovereign powers to attract business into Indian Country. On the contrary, it is likely that every business agreement entered into between a tribe and business venture will be subjected to endless challenges and claims in state and federal courts by competitors and others, even if to do nothing more than prevent businesses from relocating to Indian Country. Enactment of S. 1691 will result in a legal stranglehold on every kind of business venture that is designed to address both Welfare Reform and Welfare to Work goals.

## VII. CONCLUSION.

The government-to-government agreements described above clearly demonstrate that there are tremendous advantages to the State, County and Tribe by developing mutually beneficial and respectful agreements. However, as was demonstrated by the application of P.L. 83-280 on Indian reservations across the Country, imposing outside powers on any government without their consent, as is proposed by S. 1691, will make such agreements quite unlikely.

S. 1691, if enacted, would create a sweeping change in the application of Tribal, federal and state jurisdiction on Indian lands, a change more radical than was contemplated by enactment of P.L. 83-280. It is obvious that the broad nature of these proposals will undermine any possibility of smooth implementation and will result in costing the Federal Government, States and

Indian tribes millions of dollars of court related expenses. Contrary to its title of American Indian Equal Justice Act, perhaps the proposed legislation should be re-titled to better describe its expected results, The Lawyer Relief Act of 1998.

The Tribe will be submitting additional testimony addressing the specific problems associated with sovereign immunity matters within the next two weeks.

The Hoopa Valley Tribe opposes enactment of S.1691 for the reasons stated herein and as described in testimony submitted by the national Congress of American Indians.

I would be glad to respond to any questions that you may have. Thank you.



STATEMENT ON SENATE BILL 1691  
The American Equal Justice Act

To: Senator B. N. Cambell

From: John D. Halliday  
Muckleshoot Tribal Member  
20902 97th St E.  
Bonney Lake, Wa 98390

Date: 4/8/98

Regarding: Senate Bill 1691

Dear Sir,

I am John D. Halliday a Muckleshoot Tribal member of Puget Sound, a descendant of the signers of the Treaty of Medicine Creek and Point Elliott in 1854/1855 with the Washington Territorial Governor Isaac Stevens. I am writing this letter to urge peace and productive mutual acceptance of the Indian Tribes with the non-Indians. Sovereignty is the key to our economic progress, and a true government to government relationship with the non-Indians enabling a negotiation of their differences in good faith, (an equal playing field). SB-1691 cripples our governmental power. If this act was really equal justice it would give the tribes a representative in congress and eliminate the states 11th amendment sovereign immunity clause. Gorton is completely wrong when he says "that no where in the treaties does it say the tribes have a right to sovereignty", because the Supreme court confirmed that in our treaties the U. S. guaranteed us the right to "self government" and "sovereignty is the most fundamental element of self government". Already Indians are being taxed without our own representation as political entities in congress, free trade is restricted, the states impose its taxes within our territory disabling our ability to have a viable tax structure of our own, and now Gorton wants to take away our right to choose for ourselves whether or not we will waive our sovereignty.

Senator Gorton is continuously sponsoring anti-Indian legislation. Trying to take away and subvert the Tribal Governments powers and rights to self government Guaranteed in our Treaty. My treaty rights are not up for re-negotiation nor are they for sale. His continuous attacks on tribal government do not allow us to concentrate on the needs of our people. Treaty Law is

supported by the U.S. constitution and the Supreme court as the highest law of the land. The states and the federal government have the sovereign right to choose for themselves when and how much sovereignty they will waive and the tribes should have the same option. The paternalistic governing of the tribes by the U.S. has never worked and will continue to not work as long as there is not mutual respect of tribal governments by the non-Indian governments. But, again with SB-1691 Gorton wants the U.S. to go back on it's word given to us in our treaties, and infringe on our rights as a free and sovereign people. When will you tell the truth?

Basic political theory says that the states give up a portion of their sovereignty in exchange for representation in the national legislature. Tribal people are a very small constituency and voting for state a representative and not a tribal representative is an oxymoron in federalist theory when only a tribal representative would truly represent and protect the tribes interest. The tribes as political entities do not have representation in the national legislature as political entities and therefore should retain an even higher level of sovereignty than the states do. These are the basic premise of democracy and federalism. The states in exchange for a portion of their sovereignty get representation. The tribes protected their sovereignty by treaty. The states have representation as political entities in congress so they have waived their sovereignty under federalist principals. This is not a luxury afforded tribes. The states continue to undermine the tribes ability to collect taxes on the reservation by collecting their own taxes within our territory. The tribes are territorial jurisdictions and in order to effectively administrate their territories without representation in the national legislature they are forced to fall back on the judiciary and their treaties signed with the U.S. to attempt to provide some measure of efficient government and the protection of their constituencies sovereign treaty rights to self government.

Our system is simple, individual Indians are U.S. citizens and pay Federal and Tribal Tax's, but not State Tax because their government services come directly from Tribal government. But tribal governments are not afforded the same tax shelters and preferences as states and local governments. State and local taxes are deductible from your federal income tax but no tribal taxes

are. However, Senator Gorton wants to hold the Indians Tax dollars hostage. He puts forth that the Tribes Treaty rights to Governmental Sovereign Immunity should be waived as a condition to receiving funds for their Government services. Their government immunity would be waived if non-Indians didn't like what Tribal government was doing. This is nothing more than sheer coercion and taxation without representation. No, State would ever accept its representative government to mandate it waive it's Sovereign Immunity in exchange for it's tax dollar. Sovereign power is a tool and protection enjoyed by all the State and Federal Governments including Senator Gorton, but I guess what's good for the white man isn't good for the Indian. Senator Presslor wants to prevent Indians from buying their own land back by requiring that the Tribes agree to collect the State Taxes on them (the Istook amendment). This is absurd. Many non-Indian governments annex territory every day, but I guess for tribes they should not be afforded this freedom. Senator Solomon wants to stop any new businesses from forming on the reservations. Senator Archer wants to tax businesses owned by tribal government. The federal government does not tax the states and certainly should not tax sovereign tribal governments. This amounts to nothing more than the restriction of free trade and economic racism and the oppression of a free sovereign people. The hallmark of American success has been retained local governmental powers and free enterprise. That's the freedom tribal people are fighting for. The biggest fear of the non-Indians is that we will be successful and independent. This opposition goes against the very principals of American success. How do they expect Indians to build when they continue to push us down.

My family has been here long before recorded history. In school I was taught that this continent was discovered. This seems strange to me. Yet it is a doctrine that has been used to subjugate all other races as illegitimate without rights to their property, sociological, political, and cultural organizations. In the Post Colonial Empire Era, it is not difficult to identify where these types of policies are having an impact.

If what American leadership says and does in Congress means nothing: If what we say and hear means nothing; If what we say here means nothing positive for the Indian people than you only make speeches for yourselves and the Indian people go untouched, their politics may be confined to that of daily survival. Indian country is not just a few lawyers in Washington, D.C. Indian

country is made up of villages, towns, and cities occupying 10% of the entire land base and numbering over five hundred Tribal Governments nationwide. Indians as wards of the government are told what we can sell and what we can buy and we have defined for us what is sedition and what is justice.

For John Rawls "Justice is the, First Virtue of Social Institution." For Tribal people, Americas social institutions teach the psychological denial of their existence by the continuous oxymoron use of terminology, such as discovered, explored, or first settled. In this ethnocentricly biased environment Tribal people can learn everything about the law, but find it difficult to experience justice. For America's first nations our social institutions face great challenges.

Young Indian leadership today must ask the question am I an American or am I an Indian? Can I be both? My grandfather served in north Africa, and my uncle was wounded on Normandy Beach, in WWII, fighting for the freedom of this country. Who could say Indians have not given to this country, the land, our blood and tears, or what could be more American? Our veterans have fought and died for this country and yet we are not represented on the flag. Is being a ward of the government truly experiencing democracy?

In international relations academia it is taught that only sovereign nations states can sign treaties. Yet, Americas first Nations have neither the same rights as states nor rights in the United Nations. But because they are separate political entities they are not afforded U.S. constitutional protection. American Indians can no-longer afford to remain in educational, economic and political suspension. Perhaps it is exactly the complexity of Indian issues that is the cause of their ignorance, but is also a call for leadership, scholars, and America to address them.

This reminds me of the story of Socrates. I equate the lesson as the mission of (tribal leadership).

After Socrates was tried for Piety for corrupting the Youth by speaking out against the sophist (the lawyers). Plato comes to him in prison and says, "I have arranged for your escape." Socrates declines the offer.



He says "I cannot flee Athens. Athens is my home. Even if I disagree with the court, I have a responsibility and duty to stay. I taught that any citizens primary responsibility is to participate in government because only through active participation in government can you make government better," and hence democracy.

Like Socrates I cannot flee Athens. It is my responsibility to stay and make government better. I cannot sit idly by while dysfunctional approaches continue to prevail.

Government, both Indian and non-Indian, must be viewed by the governed as their own. If Indians are subject to the decisions of Congress, then they need unbiased representation in the federal government, not as wards, but equal. Where as Madison, the great defender of the U.S. constitution would say "the beauty of democracy will be shown through the open debate of the governed, and through this, truths will be let free."

The States, and the Tribes must think of themselves as us and we neither superior nor inferior, but equal in the true spirit of federalism. Government should act as a powerful vehicle for social, political, and intellectual progress, and recognize a heritage that has sewn both Indian and non-Indian into the fabric of our nation. We must be a role model for the world. We must set aside our personal biases and work together, educate each other and create new definitions for the word progress.

We all must be accountable for how we treat each other and the environment in which our children grow. The Tribes the States, local, and federal governments cannot afford to continually waste public funds on petty court battles. The obvious key here is to do what is best for all the people which must begin with mutual respect.

I quote Chief Joseph "the earth is the mother of all people. When we treat each other as brothers, we shall have no more wars. We shall be a like, with one sky above us and one country around us, and one government for all." Tribal Self Governance if taken seriously will move the tribes and the U.S. into the twenty first century, for a new beginning.

This does not mean we have to assimilate each other. Brothers do not have to be twins. The Indian Wars are over and so to should be its archaic rhetoric and ideology. We must set the past in the past, and accept each other, and just get on with it.

We're both here, Indian & Non-Indian. We all fight under one flag. We must set up government where the Indian Nations become official working members of the polity that govern's themselves. Only when this is achieved will we make progress.

I hope people will call Senators Gorton and Presslor and tell them that America is moving on and its time to stop this Indian, non-Indian factionalism and move on to addressing the needs of our communities.

The vision for Indian country is what it has always been. We must remember in our lives to honor our elders by becoming good ancestors.

Respectfully: \_\_\_\_\_

John D. Halliday M.P.A.

Muckleshoot Tribal Member

Muckleshoot Indian Tribe of the Washington Puget Sound

*Members of the US Senate Indian Affairs Committee,*

*I respectfully submit reasons why as an Osage American, I support tribal sovereignty, and resist efforts by some Americans to compromise the honor of us ALL by breaking treaties and ignoring past laws merely because they are inconvenient for some (isn't that what we are always condemning in the UN in other countries when they violate human rights of various ethnic groups?)*

1. **Patriotism.** I am a proud American, a US Navy veteran. But within that, I am a patriotic citizen of the Osage Indian Nation. Within America, I want to see my Nation take off, and our people have the opportunities and achievements as other Americans, yet not have to give up who we are to do it. We have a history in this land that goes back thousands of years, and all we want is to be able to continue that without always fighting for our well-being and way of life against outsiders. These concepts of dual-citizenship patriotism are "self-evident" if you are Osage or Native. For those who are not, here is a basic definition that explains why we persist in "being different".

(Patriotism) ... It is a love for the homeland, in the form of the desire to improve it and make it as good as it can be. No nation can be improved from the outside. Patriotism is determination to make improvements *from within*, to do it for your self, to accept criticism from without only to make those improvements, and to resist external coercion. The people of every nation want to make their country cleaner, stronger, and a better place for the next generation.

(Charles Sheffield, British theoretical physicist and writer, 1992, in a tribute to R.A. Heinlen.)

2. *The drastic effects of spurious lawsuits on tribes without huge funds:*

**I want to see our people get the same health care and sanitation and public health measures as other Oklahomans and Americans, without having to give up being us. (ie, the choice of 1776). Lawsuits have drastically affected this with my Osage Nation.**

Native Americans on reservations usually have limited sovereignty already, some more, some less. In our Osage case, and for many others, it means that states are happy to tax us, happy to count us in the state census for federal dollars, but when it comes to spending state and federal program money, say that we are not in their jurisdiction. On my reservation, the only one in Oklahoma, in my home town of Pawhuska, the water is not fit to drink because of lead contamination, as we are reminded on the radio. Water wells are ruined because of oil drilling

allowed by the Bureau of Indian Affairs, and so much impediments raised by the bureaucratic Indian Health Service that well-repairs are rarely done. The Indian Health Service clinic that serves my tribe has doctors, who by choice do nothing but write prescriptions and referrals (for which there is less and less funds to actually send people to outside doctors) which is vastly less than the practice of other physicians in this rural community. So needed health care doesn't get done, yet the doctors collect as much salary as doctors who work their hearts out for their patients. The tribe has virtually no say in this because of the entrenched federal Oklahoma Area Indian Health Service bureaucracy, which rewards bureaucratic compliance more than quality.

In 1994, members of the Osage tribe won a [federal] court decision supporting ~~the~~ [their] contention that [in late 1800's] the United States Indian Department had illegally supplanted our constitutionally-based and treaty-affirmed government. [This] ~~We were~~ allowed [us] to re-establish our three-branch constitutional government, and for the first time, based ~~brought~~ the Women, Infant, Child program, elder's meals programs, and commodity food programs into the reservation, which previously was not done by the state. Pre-and peri-natal classes were started, and home-nursing and family support services were started by the tribe over the next 3 years. It should be noted, that in doing this, all of these programs served ALL members of the county-reservation, which resulted in more non-Natives than Natives being served, also for the first time. A tribal health plan study and proposal was under-way to provide comprehensive healthcare to our people by taking over and expanding [the IHS] clinic services and requiring physicians who practice ~~practiced~~ with the same levels of competence as other Oklahoman physicians. Piped water and road projects were started, and a tribal police force was trained and certified who would answer Indian calls, not just pull us over on the road, but claim "no-jurisdiction" at our homes.

Things were going good. Until in 1996, without money to fight the appeal of the court decision, all of the progress was halted when the 1994 decision was over-turned. Now, there is the same dependence on outsiders, and lack of hope that we can do run things ourselves, because some legal-talking bureaucrat is always telling us what we can't do for some reason or another due to conditions that we are forced to accept.

So for us, and the majority of tribes, the stakes aren't casinos and concert amphitheaters. It is our health and well-being and raising families in an environment of hope, with the independence to run our own governments and programs, and not being able to depend on state and federal governments to treat us the way they do other Oklahomans, because they never have. Where is the fairness in that which Senator Gorton asserts to champion?



Public Testimony on S. 1691  
- page 3-

David L. Jarvis\*  
Tuesday, April 7, 1998

**3. Senator Gorton, etc. say we should just have the same representation and opportunities as other Americans, via the political process and courts...**

...but an editorial in the Sunday (4/5/98) Seattle Times lamented that in the Washington state legislature, the minority party had no power to do anything, couldn't even get issues on the agenda. There are about 2 million Native Americans scattered throughout this country, so there are far more Democrats than there are of us. Without an equal governmental standing, where does that leave Natives if even the Democrats can't get effective representation due to the system? Another recent Congressional bill (probably supported by Senator Gorton) seeks to prohibit Native American tribes from lobbying activities, though no such restrictions are sought for other governments. If Natives are not allowed to govern our communities within states, and therefore lose a legally mandated position in the political arena, then we will have no realistic way to advance ourselves in the American system.

The only other communities like that in America are in penitentiaries. Americans decry this in other countries, and call for UN action to restore democracy, eliminate apartheid, etc. What about here, where Senator Gorton and many others seem to be trying to institute apartheid instead? Our tribal governments are not perfect, and do some things we would like to see done better. But show me any governmental body in this country where everyone agrees on it's decisions. Native tribes have only had self-governance at most for about 25 years. Senator Gorton's bill essentially is "throwing out the baby with the bath water." with actions and vulnerabilities which have not, to my knowledge been proposed for any other government in the United States. (Even State legislatures were left intact after the Civil War!)

Thank-you for accepting this public testimony.

- David L. Jarvis  
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Osage Indian American  
Seattle, Washington

- I (and other Native students like me) am here attending medical school so I can go home and provide healthcare to my tribe as good or better than anyone in the local community gets from their non-Indian Health Service doctors. I won't be able to do that if the Osage Nation can't run it's own clinic as some tribes now do, instead of the current IHS management. We can't do it if our governments are crippled by spurious lawsuits. -



# MAKAH TRIBAL COUNCIL

P.O. BOX 115 • NEAH BAY, WA 98357 • 360-645-2201



IN REPLY REFER TO:

STATEMENT OF BENDER JOHNSON JR, CHAIRMAN OF THE MAKAH  
TRIBAL COUNCIL, THE MAKAH NATION, NEAH BAY, WASHINGTON  
To the United States Senate Committee on Indian Affairs  
April 20, 1998

Concerning Senate Bill 1691 – SOVEREIGN IMMUNITY  
Introduced by Senator Slade Gorton

*"Americas Indigenous Tribal Governments are distinct diversified cultures and societies. We have the right to negotiate Government to Government. We have Treaties that guarantee this Right. Senate Bill 1691, (the so-called American Indian Equal Justice Act stands for one-sided Justice). Statements made in this Bill are not conclusive to each individual Tribal Government. As Governments, we have the right to negotiate individually with the US Government, States and other entities. To be surmised as the same is in itself, a violation of Sovereign Immunity".*

Honorable Chairman Campbell, Vice Chairman Inouye and Members of the Committee, it is with solemn concern for the Makah Nation and all of Americas Indigenous Nations that I address you on Senator Gorton's *Bill Rider 1691*.

Sovereign Immunity is Self-Governance with Independence. This is what the United States has pledged for Tribal Governments. In the 90's, we celebrate a new era, Government to Government relations, freed, from 200 years of maternal/oppressive control of the Bureau of Indian Affairs. Now, as we plan and some succeed at self-sufficiency we are being chastised, again, by Senator Slade Gorton and Staff

The 1998 Senate Bill 1691 American Indian Equal Justice Act introduced by Senator Slade Gorton, is a complete decay of Government to Government relations and the progress the US Government has established with Americas Indigenous Tribal Governments.

- In 1993, Congress enacted the *Indian Tribal Justice Act* to assist Tribes in developing their court systems. The two Acts, although ironically similar in name are completely opposite in principle. This Act clearly honors Government to Government relations. It respects the validity of

Treaties, Self-Governance and the independence of Tribes. This Act was never funded. As a member of the Senate Select Committee on Indian Affairs, Senator Slade Gordon should support funding the Indian Tribal Justice Act. Instead, he renounces this Act by proposing *Rider 1691 against Tribal Sovereign Immunity*.

The Makah Tribal Council is willing to meet with and listen to the issues Senator Gorton and his staff has presented in Bill 1691. Statements made in this Bill are not conclusive to all Tribal Governments. Again, Senator Gorton has bypassed established procedure in negotiating Government to Government relations. He is proposing to amend Treaty Rights without negotiating with Tribal Governments.

We appeal to Congress to stand by Government to Government relations by abolishing *Bill Rider 1691 the American Indian Equal Justice Act*.

States are granted Sovereign Immunity however; Sovereign Immunity in Tribal Government is constantly challenged by States, Special Interest Groups and other entities. These challenges have brought about litigation, which has resulted in discriminate detriment to Tribal Governments by way of loss of partial sovereignty and millions of dollars paid out in Attorney fees. This is money and time spent from impoverished Tribes that could have used their assets to support their Tribal Communities. A US Supreme Court decision with one Tribe in a particular geographical area is considered loss of sovereignty to all Tribal Governmental Nations. This is unfair and unjust. The **INDIAN TRIBAL JUSTICE ACT** was enacted to end the injustice in dealing with sovereign Nations.

Americas Indigenous Tribal People have distinct cultures. Our Ancestors have walked this land for thousands of years; they imbue in us to be like eagles, "the harder the wind blows the higher we must soar". The Ancestors are our heritage as well as heritage of all Americans; *love and nurturing for the Children, respect for Elders, care for the misfortunate, love of the land, reverence for nature and the motivation to build a clean and natural environment*. Together, all Americans can work for the future.

Let the World see Congress honor the Treaties they have made with all Nations.

Thank You



**WRITTEN TESTIMONY OF**

**JASON JOSEPH, CHAIRMAN**

**SAUK-SUIATTLE INDIAN TRIBE**

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**BEFORE THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS**

**SENATE BILL 1691 - SOVEREIGN IMMUNITY**

My name is Jason Joseph, I am Chairman of the Sauk-Suiattle Indian Tribe and I hereby submit this written statement to address the subject of Senate Bill 1691, which is mockingly entitled, "the American Indian Equal Justice Act".

This proposed legislation would strip Indian tribes of their sovereign immunity so they could be sued without their consent like any non-governmental entity. This legislation would also extend state court jurisdiction over tribes without tribal consent. If enacted, this legislation will undermine and potentially destroy tribes' abilities to function as tribal governments, financially and politically.

This is a direct attack on our people, the Sauk-Suiattle Indian Tribe (Sah-Ku-Meh-Hu), who is signatory to the Treaty of Point Elliott of 1855, and the treaties entered into by the United States and other tribes. Our treaty was based upon the mutual consent and respect between the Sauk-Suiattle Indian Tribe and the United States government. We never received a reservation after the treaty as the lands set aside for my people were already taken by others. In 1984 we settled on the 13 acres our reservation consists of near our original homelands in the foothills of the North Cascade Mountains.

A quote from the Treaty of Point Elliot, to which we are signatories; the reservations were "set apart, . . . and marked out for their exclusive use;" for the Indians; "nor shall any white man be permitted to reside upon the same without permission of the said tribes of bands, and of the superintendent or agent." Our reservation was set aside for our tribal use, and should be left under our control, jurisdiction and administration.

Indian Nations are well aware of the issues cited in S. 1691 and have been addressing them in numerous constructive ways. We must seek the cooperation of federal and state officials to help us to continue solving these problems through constructive measures. These new mechanisms will rely on the principles of dignity, authority and respect of each of the sovereign governments. The present legislation is both carelessly drawn in the heat of political passions and narrowly designed to serve the interests of just a few individuals while adversely affecting the lives and property of thousands of Indian people.

The most important thing to know about American Indian tribes is that they serve as the governments on Indian lands. Tribal self-government is recognized in the United States Constitution and hundreds of treaties, federal statutes, and Supreme Court cases. Self-government on Indian lands is the fundamental bargain that Indian nations struck with the federal government.



As such, it is deserving of serious consideration by the Congress.

Our Tribe of 200 members is a small tribe and any loss of sovereign immunity protections without our consent, would mean our financial assets and resources would be devastated in any suit from unwarranted and frivolous suits against the Tribe.

Immunity from suit for governments is acknowledged as a time-honored and proper method for protecting the interests of a political community from narrow and sometimes dishonorable attempts by individuals to take for themselves at the expense of the many. This is an attack on the poorest of the poor of the United States. Indian governments have the same responsibility as the United States of America and each of its fifty states to protect the public interest. We need to develop alternative solutions to address these issues based upon mutual consent and mutual respect.

Sovereign immunity - an integral aspect of tribal sovereignty is the ability of a tribe to determine when and under what circumstances it will be subject to court suit. This sovereign immunity holds that a tribe can not be sued unless it has agreed unequivocally to be sued. This waiver must be clear and unambiguous. Congress may also waive a tribe's immunity, but it too must act with clarity. Sovereign immunity possessed by tribes is the same immunity that is possessed by all governments, states and the United States.

- Sovereign immunity is essential for all governments to protect the public assets and scarce financial resources of tribes
- Sovereign immunity is essential to promote Tribal self-determination and self-sufficiency goals through economic development.
- Legally, lawsuits against Indian Tribes are barred by sovereign immunity absent a clear waiver by the Tribe or Congressional abrogation.
- Neither the federal government nor state governments have totally waived sovereign immunity.
- Any waiver should only be given by the tribes. This would be based on their needs and concerns as a government.
- Many Tribes have given limited waivers of immunity in certain cases, such as establishing loans; Indian housing; and for actions of their tribal officers, tribal councils and law enforcement personnel.
- A total waiver of immunity would impose upon the Federal Courts an abundant number of new causes of actions, when the Federal Courts are already overburdened.
- Tribal Courts do handle cases on issues of sovereign immunity, both at the trial level and appeals level, with both law trained and lay judges on the bench.

Sovereignty is the power of American Indian tribes to make their own laws and be governed by those laws. It is the right of tribes to have control over their lands, resources and the people who come onto those reservations. It is the right to enforce and have protected those promises made to Indian tribes by the United States in treaties and executive orders when the United States was appropriating Indian lands. It is the right of tribes to protect their members and all people and the lands and resources that were reserved by tribes. It is the right of tribes to control their own resources and destiny as a separate people and sovereigns.

- Indian Nations are governments with the right to make their own laws and be governed by them
- Indian Nations function as governments - just as the United States deals with states and foreign nations as governments, so it deals with Indian Nations as governments
- Indian Nations provide basic governmental services to their communities such as judicial systems, education, health care and law enforcement
- Tribal governments have existed before the formation of the United States and have been confirmed and re-stated by every President since Richard Nixon.
- Tribes have historic and legal status as governments
- Tribal governance is relevant in today's world and is modern, democratic, fair and deserving of respect as part of the American political system
- American Indians are not considered a racial or ethnic minority. Because of their unique political status, American Indians are citizens of three sovereign governments: their Tribe/Nation, the United States and the state in which they reside.
- There are 558 federally-recognized Indian Tribes (approx. 2.0 million American Indians and Alaska Native Tribal members).

### **JUDICIAL STRUCTURE AND DUE PROCESS**

In 1979 our Tribe along with fourteen other small tribes in Western Washington state formed a consortia to provide judicial services to the member tribes. This was created so that each tribe could regulate its own affairs under its own laws following the U.S. v. Washington case better known as the Boldt decision. The Northwest Intertribal Court System, a circuit court, for the past 19 years has provided fair and equitable judicial services (trial and appeals) to our members and people who reside within the borders of our reservation, under our Tribal Constitution and Laws that are enacted by the Sauk-Suiattle Tribe's legislative body, the Tribal Council. The Tribal Council consists of seven members, elected by the members of the Tribe.

The Sauk-Suiattle Tribal Court can best be compared to a court of general jurisdiction. The court has jurisdiction over criminal cases involving Indians. It has jurisdiction in civil cases, civil infractions for fishing, hunting violations over all people. The judge and prosecutor handle court on the reservation and are not members of the Tribe. The Sauk-Suiattle Tribal Court encourages attorneys and qualified spokespersons to practice before the court. The clerk of the court is a part-time tribal member who lives on the reservation.

In the Sauk-Suiattle Tribal Court, due process is accorded to all parties that use the system. The Sauk-Suiattle Constitution and Tribal Code provide for basic protections and ensure due process. Judges are appointed and can only be removed for cause. Judges can be disqualified from a case, by a party submitting an affidavit of prejudice.

There is an appeal process, where parties may appeal a decision of the tribal trial court to a panel of three judges. Those appellate judges are composed of attorneys in private practice, judges from other tribal courts, judges from the state court or retired state judges. All appeals heard require written opinions which explain the reasons and analysis of their decision and are available to the public. There is currently four volumes of appellate opinions available in the Northwest Regional Tribal Supreme Court, operated by the Northwest Intertribal Court System, under which the

Tribe's appeals are handled.

Jury trials, which is part of the Sauk-Suiattle Tribal Court are allowed for any person at their request. Although jury trials are rare, it is a process that is available.

The Sauk-Suiattle Tribe is not insensitive to, nor unaware of, the needs of non-tribal members or non-Indians on the reservation. The Tribe has put in place mechanisms which ensure due process in tribal forums for tribal and non-tribal members on the Sauk-Suiattle reservation for their personal safety, protection of the resources and private personal properties.

Tribal sovereign immunity does not put anyone at risk who lives within the reservation boundaries. At Sauk-Suiattle, many non-Indians may use the tribal court to resolve their disputes. The non-Indians on the reservation would most likely obtain access to justice for less money and in less time than is available in nearby state courts. Even if a tribal government is immune from unconsented suit in federal court, tribal government officials are not and may be sued to restrain unconstitutional action under the Indian Civil Rights Act of 1968.

### **TORT CLAIMS**

Sections 4 and 5 of S. 1691 create a special Tort Claims Procedure for Indian tribes, allowing tribes to be sued in federal court for money damages for loss of property, personal injury, or death caused by the negligent or wrongful act or omission of an Indian tribe, to the same extent that a private individual or corporation is liable in the state where the act or omission occurred.

The newly proposed Tort Claims Procedure ignores the fact that Congress has already effectively dealt with the problem of tribal government liability for tort damages. In the Indian Self-Determination and Education Assistance Act, Congress requires the Secretaries of Interior and Health & Human Services to obtain liability insurance or equivalent coverage of Indian tribes carrying out self determination contracts (638 contracts); and any policy of insurance so obtained must contain a provision that the insurance carrier will not "raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims . . . within the coverage and policy limits."

In some instances Congress has provided that the Federal Tort Claims Act applies to programs and services that Indian tribes now carry out instead of the federal government. The Indian Self-Determination Act statutory insurance requirement described above, is incorporated in the Sauk-Suiattle Tribe's PL-638 Contracts with the federal government. Virtually all services and programs at Sauk-Suiattle are delivered pursuant to these '638 contracts, hence, there is insurance coverage or Federal Tort Claims Act coverage for whatever claims might arise. In addition, Sauk-Suiattle purchases general liability insurance and waives its immunity to the extent of such coverage and policy limits.

S. 1691 purports an across-the-board waiver that could weaken and destroy tribal governments, totally ignoring the fact that Congress has already provided a careful scheme to provide redress to deserving claimants while protecting the limited resources of tribes.

**RECOMMENDATION**

S. 1691 is clearly inappropriate, and the methods proposed for solving a long standing problem are potentially destructive of Indian rights and the rights of non-Indian citizens, the Bill does demonstrate the need for a diligent and accelerated cooperative effort between Indian and non-Indian governments to solve the problems of jurisdictional confusion and the imbalance between Indian peoples' fights and the rights of non-Indians on and near Indian reservations. Indian leaders in Indian Country, and I as the Chairman, believe we have a workable solution that will preserve the dignity and integrity of Indian, state and federal governments while providing an expeditious method of addressing intergovernmental disputes and problems of citizen rights.

Senator Gorton's efforts to reduce the sovereignty of Indian Tribes by the enactment of a Act by Congress to waive sovereign immunity against law suits threatens the future of Indian tribes. Unilateral U.S. government legislation pending before the U.S. Congress threatens to overturn more than two centuries of developing government-to-government relations between the United States, Indian nations and with State governments.

The Tribal government structure at Sauk-Suiattle (Sah-Ku-Meh-Hu) was determined by the members of the Tribe. The actions by that government are determined by the voting members. At Sauk-Suiattle inclusion into membership is a choice of each person. They choose to live under the traditional values and cultural norms of the Tribe, plus have a constitutional form of government. The strength of our Tribe lies in the people, who want our Tribe to operate in the fashion it now exists.

**I and the Sauk-Suiattle Indian Tribe strongly oppose the enactment of S. 1691 and any legislation to waive our Tribe's sovereign immunity** as this would mean financial devastation and the end of tribal governments. Any waiver must be left to the Tribe to determine.

Thank you for the opportunity to submit written comments on S. 1691 and Tribal sovereign immunity legislation within this two week period following the Hearings on April 7, 1998.

**Attachments:**

Treaty of Point Elliot of 1855  
Letters of support



## TREATY WITH THE DWAMISH, SUQUAMISH, ETC., 1855.

Articles of agreement and convention made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men and delegates of the Dwamish, Suquamish, Sk-tah-l-mish, Sam-ah-mish, Smah-kamish, Skope-ah-mish, Sk-kan-mish, Snoqualmoo, Skai-wah-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stokuck-wha-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-menu, Noo-wha-ha, Nook-wa-chah-mish, Mee-see-quah-gulich, Cho-bah-ah-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

Article 1. The said tribes and bands of Indians hereby cede, relinquish and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence around the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

Article 2. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side of Whomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island call Shais-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

Article 3. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulallip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. Provided, however, That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

Article 4. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Article 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Article 6. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand

dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years seven thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Article 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

Article 8. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Article 9. The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, of if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Article 10. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Article 11. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

Article 12. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

Article 13. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

Article 14. The United States further agrees to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick,

and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

Article 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States. In testimony whereof, the said Isaac I. Stevens, Governor and Superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year herein written.

Isaac I. Stevens, Governor and Superintendent. [L.S.]

Seattle, Chief of the Dwamish and Suquamish tribes, his X mark [L.S.]

Goliath, Chief of the Skagit and other allied tribes, his X mark.

Snah-talc, or Bonapart, Sub-chief of Snohomish, his X mark.

He-uch-ka-nam, or George Bonaparte, Sub-chief of Snohomish, his X mark.  
Wats-ka-lah-tchie, or John Hobesthoo, Sub-chief of Snohomish, his X mark.  
St'hau-ai, Sub-chief of Snoqualmoo, his X mark.

Do-queh-oo-satl, Snoqualmoo tribe, his X mark.  
Ts'huanhtl, Dwa-mish, Sub-chief, his X mark.

S'kwai'swi, Skagit tribe sub-chief, his X mark.

Whai-lan-hu, or Davy Crocket, Sub-chief of Lummi tribe, his X mark.  
Kwull-et-hu, Lummi tribe, his X mark.  
S'deh-ap'kan, or General Warren, Skagit tribe, his X mark.  
Patchkanam, or Dome, Skagit tribe, his X mark.  
Dahcl-de-min, Sub-chief of Sah-ku-meh-hu, his X mark.

Mis-lo-tche, or Wah-hehl-tchoo Sub-chief of Suquamish, his X mark.  
Too-leh-plan, Suquamish tribe his X mark.  
We-ai-pah, Skaiwhamish tribe his X mark.

Hwn-lah-lakq, or Thomas Jefferson, Lummi tribe his X mark.  
Kit-hahl-ten, Lummi tribe his X mark.  
Noo-heh-oos, Snoqualmoo tribe his X mark.

Pat-ka-nam, Chief of the Snoqualmoo, Snohomish and other tribes his X mark.

Kwallattum, or General Pierce, Sub-chief of the Skagit tribe, his X mark.  
Squash-um, or the Smoke Sub-chief of the Snoqualmoo, his X mark.

Tse-nah-talc, or Joseph Bonaparte, Sub-chief of Snohomish, his X mark.  
Smeh-mai-hu, Sub-chief of Skai-wha-mish, his X mark.  
Lugs-ken, Sub-chief of Skai-wha-mish, his X mark.

John Kanam, Snoqualmoo Sub-chief, his X mark.  
Kwuss-ka-nam, or George Snate-lum, Sen., Skagit tribe his X mark.  
Seh-lek-qu, Sub-chief Lummi tribe, his X mark.

She-ah-delt-hu, Sub-chief of Lummi tribe his X mark.

Kleh-kent-soot, Skagit tribe, his X mark.  
Chul-whil-tan, Sub-chief of Suquamish tribe, his X mark.  
Sats-Kanam, Squin-ah-nush tribe, his X mark.  
Sd'zek-du-num, Me-sek-wi-guilse sub-chief, his X mark.

Sloo-noksh-tan, or Jim, Suquamish tribe, his X mark.  
Ha-seh-doo-an, or Keo-kuck Dwamish tribe, his X mark.  
S'ah'an'hu, or Hallam, Snohomish tribe, his X mark.

Cht-simpt, Lummi tribe, his X mark.

Kut-ta-kanam, or John, Lummi tribe, his X mark.  
Hweh-uk, Snoqualmoo tribes his X mark.

Chow-lts-hoot, Chief of the Lummi and other tribes, his X mark.

S'hootst-hoot, Sub-chief of Snohomish, his X mark.

See-alla-pa-han, or the Priest, Sub-chief of Sk-tah-le-jum, his X mark.

Ws'ski-oos, or Jackson Sub-chief of Snohomish his X mark.  
Slat-eah-ka-nam, Sub-chief of Snoqualmoo, his X mark.  
S'heht-soolt, or Peter Sub-chief of Snohomish, his X mark.

Klemsh-ka-nam, Snoqualmoo, X mark.  
Hel-mits, or George Snatelum, Skagit sub-chief, his X mark.  
S'h'-cheh-oos, or General Washington, Sub-chief of Lummi tribe, his X mark.  
Kwult-seh, Sub-chief of Lummi, his X mark.

Sohn-heh-oos, Skagit tribe, his X mark.  
Ske-eh-tum, Skagit tribe, his X mark.

Sd-zo-mahtl, Kik-ial-lus band, his X mark.  
Now-a-chais, Sub-chief of Swamish, his X mark.

Moo-whah-lad-hu, or Jack, Suquamish tribe his X mark.  
Hoo-vilt-meh, Sub-chief of Suquamish, his X mark.  
She-hope, or General Pierce, Skagit tribe his X mark.  
Tse-sum-ten, Lummi tribe his X mark.

Ch-lah-ben, Moo-quachamish band, his X mark.  
Peh-nus, Skai-whamish his X mark.

Sub-Seattle  
→

Yin-ka-dam, Snoqualmoo tribe  
his X mark.  
Shoot-kanam, Snoqualmoo tribe  
his X mark.  
Meh-mahi, Skaiwhamish band,  
his X mark.  
John Taylor, Snohomish tribe  
his X mark.  
T'kwa-ma-han, Skagit tribe,  
his X mark.  
D'ro-lole-gvam-hu, Skagit  
tribe, his X mark.

Pat-sen, Skagit tribe, his X  
mark.  
Ch-lok-suts, Lummi sub-chief,  
his X mark.

Executed in the presence of us-  
M.T. Simmons, Indian agent.  
Benj. F. Shaw, Interpreter.  
H.A. Goldsborough.  
John H. Scranton.  
S.S. Ford, jr.  
Ellis Barnes.  
S.M. Collins.  
E.S. Fowler.  
Rob't Davis.

Twooi-as-kut, Skaiwhamish  
tribe, his X mark.  
Swe-a-kanam, Snoqualmoo  
tribe, his X mark.  
Charley, Skagit tribe,  
his X mark.  
Hatch-kwentum, Skagit tribe  
his X mark.  
Sto-dum-kan, Swinomish  
band, his X mark.  
Steh-shail, William,  
Skaiwhamish band, his  
X mark.  
Pat-teh-us, Moo-wah-ah  
sub-chief, his X mark.

luch-al-kanam, Snoqualmoo  
tribe, his X mark.  
Sad-zis-keh, Snoqualmoo,  
his mark.  
Sampson, Skagit tribe  
his X mark.  
Yo-i-kum, Skagit tribe,  
his X mark.  
Se-lole, Swinomish band,  
his X mark.  
Kel-kahl-tsoot, Swinomish  
tribe, his X mark.  
S'hoolk-ka-nam, Lummi  
sub-chief, his X mark.

C.H. Mason, Secretary of Washington Territory.  
Chas. M. Hitchcock  
George Gibbs.  
Henry D. Cock.  
Orrington Cushman  
R.S. Bailey.  
Lafayette Balch.  
J.H. Hall.



April 15, 1998

Honorable Congressman Ben Nighthorse Campbell:

RE: Senate Hearing Committee on Proposed S 1691.

We, the undersigned officially enrolled members of the Sauk Suiattle Indian Tribe, support the position of our elected Tribal leadership in opposition to the proposed Senate Bill 1691 sponsored by Senator Slade Gorton. Our Tribal Government must have full authority to function appropriately to continue to fulfill its responsibility to us who make up its membership. The proposed Senate Bill will remove the heart of our Tribe's ability to continue to perform its duties in the best interests of our tribal orientated life.

We believe and support, by choice of membership, the view that the Sauk Suiattle Indian Tribe creates the proper source of government that is compatible to our tribal beliefs, customs, and traditions. We believe that our rights as tribal citizens are protected and enforced through the systems created by our Tribal Government within the context of our tribal existence.

Despite obstacles created by lack of adequate funding to operate at full capacity, our overall governmental systems afford us the protection and opportunities to fully exercise our rights as a people. For example, our tribal court system provides us with the proper forum to air any grievance we may have within our lives in our community. Resolution of those grievances are addressed in our tribal judicial system and a solution achieved in an equitable and manner appropriate to our tribal lives. Our tribal law enforcement program serves to protect our safety and wellbeing within our tribal community. Our administrative organization and programs carry out the overall tribal vision and goals. It further provides the technical systems and resources to administer programs designed to respond to the basic needs or services identified by us that are specific to the prevalent conditions that exist in our tribal community.

We believe that the Sauk Suiattle Indian Tribe's governmental system affords us with individual or collective opportunities that otherwise would not exist and further guarantees that our rights, as the original inhabitants of this great country called the United States, are represented in the greater political forum. Our ancestors believed and agreed with the commitment that the United States made with us through the Point Elliott Treaty of 1855.

The Point Elliott Treaty assured us of certain reserved and inalienable rights guaranteed to us because of our special relationship with the United States Government. Those reserved and inalienable rights must continue to be upheld today by the United States in demonstration of its capacity to honor its agreements. As a Tribal government we have a special relationship with the United States that sets us apart from all other groups, including States. Our Tribal

Governments exist as a part of and within the United States governmental system because of our Treaty relationship. Nevertheless, we are a governmental entity, worthy of having treaty relations, and must be afforded all the authorities of a government including the right to apply "sovereign immunity" as a tool to protect what growth and progress we realize.

A further point that demonstrates our beliefs regarding our relationship with the United States, our Sauk Suiattle Constitution and By-Laws asserts our commitment to the United States in the larger concept of political allegiance. The Sauk Suiattle people firmly stood by its allegiance with the United States and demonstrated their commitment by voluntarily serving in the armed services throughout history, with some of our members giving up their lives in support of the overall freedoms of the people of the United States. It was, in part, with the belief that the United States would continue to stand by its commitment to our people in honor of our affirmed Point Elliott Treaty of 1855 that they offered their time and lives.

**Proposed Senate Bill 1691 should not be approved. If approved, it will have a devastating affect on our lives.**

Respectfully,

Prima A. J. 4-13-40

Nancy A. DeCoster 398

Katherine Misanes 4/3/98

Katherine Joseph 4-13-90

Rachel Volin 4-13-98

*[Handwritten signature]*

Karen Misan 4/13/98

Lana E. Hail 413-98

John C. Erick 4-14-98

Evelyn Matony 4-14-98

Alma Howard 4-14-98

Helen Roberts 4-15-98

April 16, 1998

As an American citizen, I urge you to defeat S. 1691. It is an anti-Indian bill, which would unjustly destroy the governments of tribes that have existed for thousands of years. The unilateral waiver of American Indian tribal sovereign immunity would unjustly damage tribal governments and hurt the American Indian people. This biased bill should not be dignified with hearings in the United States Senate.

Senator Slade Gorton has always based his vendetta on tribes on anecdotal testimony and misleading information. This bill is no exception.

This bill promotes many misconceptions, such as the notion that the tribes should be treated the same as private individuals or organizations. The tribes are governments. This bill represents Senator Gordon's desire to extinguish hundreds of years of Federal Indian Policy and protects the sovereign status of tribal government. It is another effort to break the contract that the United States has with the Indian tribes.

There are many flaws in this legislation. Even the basic findings in the bill are simply not true. Tribal governments are not 'the only remaining governments in the United States that maintain and assert the full scope of immunity from lawsuits'. Governments must maintain financial viability in order to carry out the many functions expected of them. State and Federal governments do not consent to be sued in terms as broad as this legislation prescribes, and they do not generally consent to be sued in another government's court. This bill has none of the safeguards that any government must have in order to survive.

Non-Indians who live within the boundaries of Indian reservation are there by choice. As such, they must be subject to tribal jurisdiction in many respects. It is time for us, a nation of people who claim to live by the laws of justice to stop violating these principles when it comes to the tribes. We have taken most of their land and resources. We have treated them shamefully throughout our history. Such discrimination must stop. It is time for us to respect the rights of the Indian people, to support their self-determination and respect their judicial system. This bill violates all of those principles and we adamantly oppose it.

We urge you, instead, to acknowledge the advancements that have been made in tribal government and in tribal court systems over the past two or three decades, to support tribal sovereignty and to stand up for true justice. Denounce Senate Bill 1691 for the travesty that it is. Let us, once and for all, live up to the doctrines of justice we hold so dear.

Sincerely,

A handwritten signature in black ink, reading "Paula K. Lurf". The signature is fluid and cursive, with the first name "Paula" being more prominent and the last name "Lurf" written in a simpler, more direct style.

Paula K. Lurf

## KINGSTON TAX SERVICE

April 14, 1998

P.O. Box 517 • Kingston, WA 98346 • (360) 297-2413  
Fax (360) 297-4218Senate Committee on Indian Affairs  
RE: Senate Bill 1691

Senators,

I am a former employee of the Sauk-Suiattle Indian Tribe. I served the Tribe for over 2 years as General Manager. In that time I learned much about Tribal sovereignty, and the status of Indian tribes in the United States.

While the situation of the Sauk-Suiattle Indian Tribe is unique in some ways from other tribes, it is not unusual. The Indian nations pre-date the United States by thousands of years. Their sovereignty was well established before the first European settlements in this hemisphere.

Indian nations, either through coercion or military defeat, have been forced to cede land to the government of the United States over the last 222 years, but not one has ceded its sovereignty. The writers of the Constitution of the United States recognized the sovereign status of the Indian nations.

Since the writing of the Constitution, the United States government has attempted to wrest the sovereign status of Indian nations from them on many occasions. Many of those attempts have been subtle, but most have been heavy handed and blatantly brutal.

Senate Bill 1691 is one of the more blatant attacks on the Indian nations in this century. The bill attempts to overturn the Constitution of the United States. It is patently racist and is reminiscent of the policies of the United States when its stated policy was the extermination of the Native American. In the past, Congress has limited the ability of the Indian Nations to govern within their own borders, but passage of S.B. 1691 will bring on a long and expensive conflict which the government cannot win.

S. B. 1691 is not only un-constitutional, it is misguided. Indian Nations do exist and will continue to exist. Indian nations have rights which supersede the wishes of hostile politicians who are attempting to score points with their constituents who have repeatedly lost court battles over the interpretation of treaties in the last 35 years.

I urge that S.B. 1691 not be passed. It is not a good bill, and will cost the taxpayers millions of dollars to defend, only to lose.

Respectfully,



Timothy G Winsor



**TESTIMONY OF  
STEVEN MARSHALL  
ATTORNEY, PERKINS COIE LLP  
REPRESENTING THE PUGET SOUND SHELLFISH GROWERS  
  
BEFORE THE COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE  
  
CONCERNING S.1691 THE AMERICAN INDIAN EQUAL JUSTICE ACT  
  
PRESENTED ON  
APRIL 7, 1998  
TUKWILA, WASHINGTON**

Thank you for the opportunity to submit written testimony on the issue of tribal sovereign immunity from lawsuits and the need to limit tribal immunity the same way the federal and state governments are limited. My name is Steven Marshall, and I have represented the Puget Sound Shellfish Growers in a lawsuit started in 1989 by several tribes in Washington State. I have been a lawyer with the Perkins Coie LLP law firm for 25 years.

**I. INTRODUCTION**

Absolute sovereign immunity was based on the medieval idea that the king can do no wrong. No one could sue the sovereign.

America was founded on a different idea. In the Declaration of Independence, we said the king was wrong and a new country was necessary. When Thomas Jefferson wrote the Declaration of Independence he included a long list of actions of the king that were wrong and unjust.

Americans do not accept the idea that the government can do no wrong. Our Constitution limits the power of government through separation of powers and checks and balances and by limited federal powers. We reserved to ourselves as citizens the power to further limit government. The government is our servant: we are not servants of a sovereign.

Except for tribes, there is no absolute sovereign immunity left in America. American citizens can sue the federal or state government for tort injuries, for breach of contract, for taking of private property without compensation, for violations of civil rights and a long list of other wrongs. The list grows as new injustices appear.

Ironically, long ago Congress specifically limited its sovereign immunity so tribes could sue the federal government for compensation for wrongs.

There is no question that Congress has the power to limit absolute tribal sovereign immunity or to abolish it completely. Congress has total power over tribes and could abolish the entire tribal system tomorrow. Tribes have always been subject to the full power of Congress. Congress does not allow tribes to print money, conduct foreign policy, raise standing armies, negotiate treaties with foreign governments or try U.S. citizens for crimes committed on reservation land.

Congress has the power to act. No expert disagrees.

The only issue for Congress is whether tribes should be like kings or whether their immunity from lawsuits should be limited like the federal or state government.

It is time for Congress to decide what will be the just limits to tribal claims of sovereign immunity and to make needed reforms. In an increasingly complex world, we can no longer leave it up to tribes voluntarily to decide. Tribes are not kings. Tribes can do wrong. The question is: what is a fair limit to sovereign immunity when tribes commit a wrong or an unjust act? There are two responses.

First, the least we can say is that the fair limit for the United States government should also be fair for the tribes. Congress should enact a law that gives tribes no greater sovereign immunity than the federal government itself has. And under our federal-state system, no tribe should have greater sovereign immunity than the state in which it is located. This is what Senator Gorton's bill would do.

Second, Congress needs to ensure that the proposed bill goes far enough. It may not be enough to allow tribes sovereign immunity equal to the United States. Instead, the test should be: If tribal sovereign immunity leads to injustice, it should be limited. Unfortunately, the list of injustice is growing, particularly as tribes get into new commercial businesses.

Regrettably, we must add another example of the injustice caused by unlimited tribal sovereign immunity. My law firm and I represent the Puget Sound Shellfish Growers, an organization of mostly family-owned businesses that farm shellfish on tidelands they own or lease around Puget Sound. Many of these families have been farming shellfish for several generations on land bought from Washington State after statehood in 1887. Under the Constitution, each state was admitted to the union as an equal to every other state. Among other things, this meant each state had title to its tidelands and could sell its tidelands to shellfish growers and others.

For the last ten years, the Puget Sound Shellfish Growers have been defending themselves against a lawsuit that could ruin them financially. Several Puget Sound tribes filed this lawsuit in 1989, alleging that the state could not sell clear title to tidelands because the tribes had a treaty right to take half the shellfish. The treaties were signed in the 1850s, and Washington became a state in 1887.

The tribes waited over 100 years to sue. In any other lawsuit, the statute of limitations or the equitable doctrine of laches would require the judge to throw out the tribes' lawsuit. But tribes are not subject to normal statutes of limitation, and the U.S. Supreme Court has yet to throw out a tribal claim on the basis of laches.

What does this have to do with tribal sovereign immunity? Well, if a tribe can wait 100 years to sue, wait until witnesses die and documents disappear, then that is not justice. But if tideland owners could have sued the tribes to get a ruling on their rights at the outset, they would not be facing the injustice they now face.

The Ninth Circuit has ruled that the tribes can take half of the natural background shellfish from Washington State's tidelands. The Ninth Circuit also said that the shellfish growers have the burden to prove only a few background shellfish would have been there if they had not spent decades improving the tidelands. In other words, the growers have to prove something that is now virtually impossible to prove. The growers could have proved it easily 100 years ago when witnesses were still alive, but not now.

What is next? If tribes can take half the shellfish from tidelands as they existed over 100 years ago, can tribes sue citizens to remove buildings, highways, docks, port improvements and other facilities? Can the tribes undo the development of tens of thousands of acres affecting hundreds of thousands of people? We do not know. But we do know that citizens cannot sue tribes now to get an answer to that question. As with tribal hunting claims on private land, we will have to wait until the tribes sue us, because citizens cannot sue tribes.

The fact is that justice today with tribes is a one-way street. They can sue other U.S. citizens, but citizens cannot sue them. As citizens, we cannot continue to allow tribes greater sovereign immunity than we allow the U.S. government.

## II. DISCUSSION

Absolute sovereign immunity is a medieval relic based on the fiction that the king can do no wrong. Thoughtful commentators and judges believe it is incompatible with American principles of government. Reacting to accounts of injustice, the courts and Congress have significantly limited the doctrine of absolute

sovereign immunity at the foreign, federal and state levels. However, while neither the federal government nor foreign powers have absolute sovereign immunity, Congress has allowed Indian tribes to continue to claim absolute sovereign immunity. Tribes are the exception, not the rule. Congress should limit absolute tribal immunity to be no greater than the immunity of the federal or state government.

**A. Absolutely Sovereign Immunity Is Contrary to American Principles of Government.**

The doctrine of absolute sovereign immunity is "mistaken and unjust."<sup>1</sup> In the United States, the state exists for the benefit of its subjects; its duty is to protect its citizens.<sup>2</sup> Absolute sovereign immunity, in contrast, protects the state from its citizens. The doctrine is contrary to the fundamental American principle that the government is accountable to the people.<sup>3</sup> U.S. Supreme Court Justice Stevens called it "thoroughly discredited"<sup>4</sup>

The doctrine originated in medieval England, where each lord established a court in which his vassals could settle disputes. Because he owned the court, a lord could not be sued by a vassal in this court without the lord's consent.<sup>5</sup> The lord was only subject to suit in the king's court, who theoretically was not subject to suit in any court. The unfairness of the doctrine was clear even in medieval England. Other methods of securing judicial review of the king's actions soon developed<sup>6</sup> and both the king and his officers remained legally and morally subject to the law.<sup>7</sup> Around the sixteenth century, however, another concept of sovereign immunity emerged, based on the fiction that "the king can do no wrong."<sup>8</sup>

It is a historical accident that the doctrine was allowed to develop in the United States. In the Declaration of Independence in 1776, Americans listed the wrongs committed by the king and proclaimed our independence from any sovereign.<sup>9</sup> As the U.S. Supreme Court has stated, the fiction that the king could do no wrong "was rejected by the colonists when they declared their independence from the Crown."<sup>10</sup> Despite the incompatibility of the sovereign immunity doctrine with the Declaration of Independence, the doctrine found its way into case decisions, without congressional oversight. As the next section shows, it has taken Congress time to limit this doctrine and to remove the injustices associated with it. As one scholar put it, "It is a magnificent historical irony that America, a republic whose independence was declared in a document indicting the sovereign for treasonous acts, should adopt without serious examination the doctrine of sovereign immunity."<sup>11</sup>



## **B. Congress Has the Power to Pass Legislation to Limit Tribal Sovereign Immunity.**

Congress has substantially limited the sovereign immunity of both the federal government and foreign governments. Congress has the power to limit or abolish absolute tribal sovereign immunity.

### **1. Congress Has Limited the Federal Government's Sovereign Immunity.**

In 1887, Congress passed the Tucker Act. It allows citizens to sue the United States in the Court of Federal Claims on any claim against the United States founded on the Constitution, or any act of Congress or any regulation of an executive department, or on any express or implied contract with the United States, or for damages in lawsuits that were not for tort injuries.<sup>12</sup>

In 1946, Congress passed the Federal Tort Claims Act. It allows citizens to sue the United States for injuries caused by the negligent or wrongful acts of employees of the government while operating within the scope of their employment.<sup>13</sup>

The Administrative Procedure Act also partially abolished the federal government's sovereign immunity for anyone suffering "legal wrong because of agency action."<sup>14</sup> This statute is limited to actions for specific relief, such as an injunction, declaratory judgment or mandatory relief.<sup>15</sup>

In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,<sup>16</sup> the U.S. Supreme Court limited the sovereign immunity of the United States when it authorized a federal lawsuit for monetary damages against individual federal officers alleged to have violated the civil rights of citizens under the Fourth Amendment and other constitutional rights.<sup>17</sup>

### **2. Congress Has Limited the Sovereign Immunity of Foreign Governments.**

Asserting their own power, the courts had significantly limited the absolute sovereignty of foreign governments prior to 1976, holding, for example, that immunity does not protect foreign-government-owned corporations unless they are performing strictly public functions.<sup>18</sup> In 1976, Congress passed the Foreign Sovereign Immunities Act,<sup>19</sup> which lists seven exceptions to the general principle of foreign immunity. The list is so comprehensive that courts have said foreign sovereign immunity is now the exception rather than the rule.<sup>20</sup>

Congress correctly predicted that our international relations would not suffer if it abrogated the absolute sovereign immunity of foreign governments. Yet Congress continues to allow absolute sovereign immunity for Indian tribes. At the minimum, Congress can and should equalize its treatment of tribes with that of foreign nations.

### **3. Congress Has the Power to Limit Absolute Tribal Immunity.**

Indian tribes are not full sovereigns and have never been recognized as such by the federal government.<sup>21</sup> They are quasi-sovereign domestic dependent entities, subject to the full power of Congress. Indian reservations are not independent territories; they are part of the territory of the United States.<sup>22</sup> Tribes exist under the territorial sovereignty of the United States, and they cannot act in a way that conflicts with the interests of the United States -- the superior sovereign.<sup>23</sup> As a result, tribes cannot do many things: Tribes cannot print money, raise standing armies or conduct foreign policy.<sup>24</sup> Tribes cannot try non-Indian citizens of the United States for criminal actions that take place on Indian reservations.<sup>25</sup>

Congress has what is called plenary power over tribes. As an ultimate power, it means Congress could, if it wished, abolish the entire tribal system tomorrow. As part of its total power on tribal status, Congress has unquestioned power to limit or abolish absolute tribal immunity from lawsuits.

### **C. Congress Should Limit the Sovereign Immunity of Indian Tribes.**

#### **1. Tribes Should Not Have Sovereign Immunity From the Consequences of Injuries They Cause to Citizens.**

Victims of injuries caused by tribal members are victimized again by the doctrine of absolute sovereign immunity. Through no fault of their own, injury victims cannot sue the tribes for injuries caused by tribal activities or employees.<sup>26</sup> Unlike parties who have made a decision to do business with a tribe, injury victims have not assumed the risk of dealing with an entity immune to legal action.<sup>27</sup> A rule which allows a tribe to injure innocent citizens without having to be accountable for the legal consequences is not just.<sup>28</sup>

#### **2. Tribes Should Not Be Able to Create Hidden Traps for Citizens by Claiming Sovereign Immunity.**

Most citizens are not aware that when they deal with a tribal business that tribes can and will claim sovereign immunity from lawsuits.<sup>29</sup> Citizens often do not even know they are dealing with a business owned by a tribe.<sup>30</sup> Absolute sovereign

immunity gives tribal businesses an unfair concealed advantage over customers, business partners, lenders, insurers and nontribal employees.

Even where tribes do waive their sovereign immunity in business contracts, the waivers are often worded to make them ineffective or unenforceable. Courts often rule in favor of tribes to strictly construe a tribe's waiver of sovereign immunity,<sup>31</sup> courts say that there is a strong presumption against such waivers.<sup>32</sup> Thus, contracts with businesses owned by tribes often become traps for the unwary, who in good faith believe the tribe has waived immunity.

Just last week in a lawsuit in Seattle, the Muckleshoot Indian Tribe claimed that it did not waive all of its sovereign immunity in a casino contract. Capital Gaming Management sued the Muckleshoot Indian Tribe claiming that the Tribe's termination of Capital's contract to manage a Muckleshoot casino was a breach of that contract. Capital is seeking a declaratory judgment on specific performance of the contract from the Tribe, the value of the services Capital has already provided (quantum meruit) and damages for defamation and other torts. The Tribe now says the waiver of sovereign immunity contained in the casino contract does not cover those areas. The Tribe essentially told the court that its waiver of sovereign immunity was not worth much. In papers filed with the court on March 27, 1998, the Tribe made the following legal argument:

See also McClendon v. United States, 885 F.2d 627, 630 (9th Cir. 1989) ("a tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts"); Jicarilla Apache Tribe v. Hodel, 821 F.2d 537, 539 (10th Cir. 1987). See also United States v. Testan, 424 U.S. 392, 399, 96 S. Ct. 948, 953 (1976) ("the terms of [the sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit").

A striking example of this rule of law is found in the numerous cases holding that a tribe's initiation of litigation "does not constitute a consent to counterclaims asserted by the defendants in those actions." McClendon, 885 F.2d at 630. See also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 893, 106 S. Ct. 2305, 2314 (1986); Squaxin Island Tribe v. Washington, 781 F.2d 715, 723 (9th Cir. 1986) (tribe's initiation of suit for injunctive relief did not constitute a waiver

of sovereign immunity with respect to the state's counterclaim for taxes allegedly due; Chemehuevi, 757 F.2d at 1053.

Unless changed by Congress, courts will not find a waiver of sovereign immunity except in exceptional circumstances. Even if a tribe sues a citizen in court, sovereign immunity will not allow that same citizen to countersue for damages.<sup>33</sup> Even when a tribe appears to waive sovereign immunity in, a "sue or be sued" clause in a tribal corporate charter, that does not constitute a waiver of immunity.<sup>34</sup>

### **3. Tribal Claims That They Cannot Afford to Be Sued Should Be Ignored.**

Tribes say they are too poor to pay for injuries they cause others--they say they need to protect tribal revenues. For many years small towns and cities have made the same argument about their revenues, yet absolute municipal sovereign immunity has been limited for decades.<sup>35</sup>

Charities also used to have complete immunity for injuries they caused on the grounds they could not afford lawsuits. The theory was that to impose liability on a charity would discourage donations and divert trust funds for purposes outside a donor's intent. Today, courts and legislatures reject these arguments. Even in the few states that retain some aspects of charitable immunity, such immunity is not absolute.<sup>36</sup> The elimination of charitable sovereign immunity has not eliminated charities. Instead, charities have become as careful, prudent and fair as any other organization in their business dealings and interactions with the public. Americans believe that even charities must be made accountable for harm they cause others no matter how worthy the charity is.

If the law does not hold tribes accountable for their actions, they have no incentive to operate in a safe manner or engage in fair business dealings.

## **III. CONCLUSION**

The doctrine of sovereign immunity is contrary to the American principles of government and justice. There is no legitimate reason for Congress to preserve the absolute sovereign immunity of Indian tribes. Congress has abrogated the absolute sovereign immunity of both the federal government and foreign governments. Congress should limit absolute tribal sovereign immunity the same way it and to the same legal extent limits the immunity of the federal government and foreign governments.



<sup>1</sup> Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 213, 359 P.2d 457, 458 (1961).

<sup>2</sup> See Jake Holdreith, State Sovereign Immunity Against Private Citizens, the Commerce Clause Power, and the Supreme Court, 74 Iowa L. Rev. 593, 608 (1989) (discussing Hume's and Locke's position that the government exists for the benefit of the citizens). Also, 18 state constitutions declare, using various language, that the purpose of the government is to protect citizens. See id. at n.125 (listing state constitutional provisions).

<sup>3</sup> See Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1484-92 (1987) (immunity doctrine is at odds with the idea of the sovereignty of the people and the principle that the government is accountable for wrongs it commits).

<sup>4</sup> United States v. Nordic Village, Inc., 503 U.S. 30, 42, 112 S. Ct. 1011, 1019, 117 L. Ed. 2d 181 (1992) (Stevens, J., dissenting).

<sup>5</sup> Jeremy Travis, Rethinking Sovereign Immunity after Bivens, 57 N.Y.U. L. Rev. 597, 604 (1982); Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 2 (1963).

<sup>6</sup> Travis, supra, at 604; Jaffe, supra, at 3.

<sup>7</sup> Travis, supra, at 607.

<sup>8</sup> Muskopf, 55 Cal. 2d at 214, 359 P.2d at 458 n.1.

<sup>9</sup> Ironically, the Declaration of Independence said the king was wrong for, among other things, failing to protect citizens from tribal warfare and injuries. The Declaration of Independence para. 29 (U.S. 1776).

<sup>10</sup> Nevada v. Hall, 440 U.S. 410, 415, 99 S. Ct. 1182, 1185, 59 L. Ed. 2d 416 (1979).

<sup>11</sup> Travis, supra, at 607.

<sup>12</sup> 28 U.S.C.A. § 1491(a)(1) (Supp. 1998).

<sup>13</sup> 28 U.S.C.A. § 1346(b) (1976).

<sup>14</sup> 5 U.S.C.A. § 702 (1996).

<sup>15</sup> La Compania Ocho, Inc. v. United States Forest Serv., 874 F. Supp. 1242, 1248 (D.N.M. 1995).

<sup>16</sup> 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

<sup>17</sup> See La Compania Ocho, 874 F. Supp. at 1245 (listing cases extending Bivens actions to equal protection, cruel and unusual punishment, and free association claims).

<sup>18</sup> Joseph W. Dellapenna, Suing Foreign Governments and Their Corporations 5 (1988).

<sup>19</sup> 28 U.S.C.A. §§ 1602 et seq. (1976).

<sup>20</sup> McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 348 (8th Cir. 1985).

<sup>21</sup> Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574, 5 L. Ed 681 (1823).

<sup>22</sup> Oliphant v. Suquamish Indian Tribe, 535 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978).

<sup>23</sup> Id. at 209, 98 S. Ct. at 1011.

<sup>24</sup> Id.

<sup>25</sup> Id. at 210, 98 S. Ct. at 1021.

<sup>26</sup> See Brian C. Lake, The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone, 1996 Colum. Bus. L. Rev. 87, 88 (1996).

<sup>27</sup> Id.

<sup>28</sup> Id. at 105.

<sup>29</sup> Id. at 104.

<sup>30</sup> Id. at 99.

<sup>31</sup> See Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982).

<sup>32</sup> See Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1989) (court refused to imply a waiver of sovereign immunity from an arbitration clause in a contract that subjected the parties to the jurisdiction of the American Arbitration Association).

<sup>33</sup> Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1053 (9th Cir. 1985), rev'd in part on other grounds, 474 U.S. 9 (1985).

<sup>34</sup> Ramey Constr. Co., 673 F.2d at 319-20.

<sup>35</sup> See James Perkowitz-Solheim et al., McQuillan's Municipal Corporations § 53.02.10, at 132 (rev. 3d ed. 1993).

<sup>36</sup> See W. Page Keeton et al., Prosser and Keaton on the Law of Torts § 133, at 1070 (5th ed. 1984).



**Confederated Tribes of the Colville Reservation**

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**TESTIMONY OF JOSEPH A. PAKOOTAS  
CHAIRMAN  
OF THE  
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION**

**BEFORE THE  
SENATE COMMITTEE ON INDIAN AFFAIRS**

**REGARDING SENATE BILL 1691  
TRIBAL SOVEREIGN IMMUNITY**

**APRIL 7, 1998  
PRESENTED IN  
WASHINGTON STATE**

Mr. Chairman, and members of the Committee, I am pleased to submit this testimony on behalf of the Confederated Tribes of the Colville Reservation (Colville Tribes). This testimony is submitted in opposition to S. 1691. In the view of the Colville Tribes, this bill seeks to remedy a problem that does not exist; denies the sovereign rights of tribes; and unfairly singles out tribes among sovereign governments for special and discriminatory treatment. This testimony will concentrate on the impact of sovereign immunity in the areas of property and civil rights protection. I will concentrate on the practical effects of sovereign immunity on the Colville Reservation. However, I would like to comment briefly on some additional matters that the Colville Tribes believes will assist the Committee in evaluating the merits of this bill.

#### **Tribes are not unique in the application of sovereign immunity**

To argue, as some have, that tribes are the last governments to possess sovereign immunity is simply false. All governments - state, local, federal and tribal - possess and rely on sovereign immunity in appropriate situations. Just last month the United States Supreme Court affirmed the absolute immunity of local and municipal governmental officials.<sup>1</sup> States have commonly relied on their immunity from suit found in the eleventh amendment when avoiding the federal duty to compact with tribes under the Indian Gaming Regulatory Act. And, most recently, the Ninth Circuit Court of Appeals affirmed the sovereign immunity of state officials in tribal court.<sup>2</sup> Thus, for Congress to continue to respect and support the sovereign immunity of tribes is to accept and treat tribes in the same way every other government is accepted and treated. This result is simply a matter of fairness.

It is not an accident that all governments rely on the legal concept of sovereign immunity.

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<sup>1</sup>Boganet et. Al v. Scott-Harris, No. 96-1560 (March 3, 1998)

<sup>2</sup>State of Montana v. Gilham, 133 F.2d 1133 (9th Cir. 1988)



It is a necessary protection of self government, not just for tribes but for all governments. A tribal government, like all governments, has a broad responsibility to those it governs. Tribes must provide services that allow their members to survive. It is also required as the primary government on a reservation to provide services to non-Indians who either pass through the reservation or who live on the reservation. These services include in various parts of the Colville Reservation fire, police and emergency medical services. No government, much less tribal governments which are often the most vulnerable, can withstand the onslaught of claims that might make it impossible for governments to carry out their broader duties to their citizens. As a result, tribes act to accommodate the needs of their citizens and the duties of government in the same way as other governments act through the judicious and knowing waiver of immunity in appropriate cases with appropriate protections for the safety of the government.

To state, as does Senator Gorton, that his bill is not about sovereignty, but about some notion of fairness, is disingenuous. This bill is all about sovereignty and whether the United States will continue to recognize tribes as governments and address issues that affect tribes and other sovereigns on a government to government basis consistent with the laws passed and policy articulated by this Congress since 1968 with the passage of the Indian Self Determination and Education Act. Senate bill 1691 is a throw back to the termination era. Termination did not work then and it cannot and will not work now.

**A waiver of sovereign immunity is not necessary  
to address torts that take place in Indian country.**

A central goal of S. 1691 is to ensure that non-Indians who are injured or otherwise have a tort claim against a tribe have recourse against the tribe in federal and state courts. This provision addresses a problem that does not exist. Congress has already provided protection by extending the Federal Torts Claims Act to tribal employees working under a federal 638 contract who cause such harm.<sup>3</sup> Thus, for the majority of accidents that may occur involving a tribal

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<sup>3</sup>The Federal Torts Claims Act applies only when the tribal actor is working under a federal contract. However, under the policy of self determination and the contracting by tribes of federal activity, this act has broad applicability.

employee, the person harmed has the same rights and remedies as a person who had been injured by a federal employee.

The effectiveness of the Federal Torts Claims Act is evidenced in the very anecdotal example raised so often by Senator Gorton. Senator Gorton asserts that a person injured on the Yakama Reservation by a Yakama law enforcement officer was left without a remedy and that was why this broad waiver of sovereign immunity was needed. Just the opposite is true. The person injured made a claim under the Federal Torts Claims Act. The claim was resolved and the injured party was compensated. Indeed, under the Federal Torts Claims Act, it is the tribe, not the person who asserts an injury, that is disadvantaged. Often it takes an inordinate amount of time for the appropriate federal bureau and official to determine whether the act will apply. During that period the tribe must defend its employee.

Where the Federal Torts Claims Act might not apply, tribes have purchased insurance. Thus, tribes have accepted the responsibility to provide relief to those who might be injured by a tribal action or employee. The Colville Tribes regularly spends in excess of \$900,000 every year on insurance. It has provided a waiver of its sovereign immunity to the limits of the insurance coverage. On the Colville Reservation, and we expect on most Indian reservations, there is existing protection for those who might be injured by a tortuous act of a tribal employee. There is no need for a change in the law or a blanket waiver of sovereign immunity.

Finally, I would like to mention how the Colville Tribes protects its own employees from injury and harm. The Colville Tribes has adopted a self insured workmen's compensation program. The Colville program is administered by the Tribes but incorporates State standards of compensation. Tribal employees receive the same protection as do other employees. Other tribes voluntarily participate in state programs. The point is simple and direct. If one takes the time to look closely at how tribes actually operate, the need for a blanket waiver evaporates. Indeed, tribes are often models to be emulated in how to protect government interests and still provide protection to the public.

#### **Contracting is not affected by tribal sovereign immunity**

It simply escapes the Colville Tribes why a Congressional waiver of sovereign immunity is

needed in the context of contracting with a tribe. First, no one is required to contract with a tribe. In the business world, each party will evaluate the benefits from a proposed transaction. To the extent that a party feels that a waiver in the particular transaction is needed, it will be negotiated or the deal will not be made. With the Colville Tribes this happens virtually every day and involves hundreds of thousands, even millions of dollars each year. The Colville Tribes has borrowed over ten million dollars to build a saw mill to provide needed jobs to Tribal members and revenues to the Tribes for governmental services. Its has constructed and operates three Tribal stores that serve the needs of the rural Reservation (both Indian and non-Indian). Contracts to construct Tribal buildings, provide Tribal services and employ needed Tribal consultants and professionals occur daily. None is impeded by the fact the Colville Tribes has sovereign immunity. In addition, the Colville Tribes contracts with various federal agencies without problem or delay. The Colville Tribes was the first tribe to independently carry out the construction and operation of a fish hatchery funded by the Bonneville Power Administration. Again, this seven million dollar project proceeded in spite of the immunity of the Tribes.

The reason that sovereign immunity is not an issue and certainly need not be addressed in federal legislation is that it may and is waived to the extent needed to consummate the particular transaction. However, any waiver is specific to a particular project or contract. It is tailored to the needs of the Tribe and to the other party involved. This ensures that the needs of all of the parties are met and that the overall needs of the Tribes are not inadvertently and adversely affected.

A blanket waiver of immunity will undermine a system of contracting that has developed in Indian country. It will disrupt the balance now struck in these negotiations. The parties to contract transactions that take place with a tribe today are sophisticated and knowledgeable. Each party enters the transaction with open eyes and the ability to defend its interest. In short, the contracting arrangement now in place in Indian county is not broken. It does not need to be fixed.

#### **Fairness and due process exist in Indian country**

Senator Gorton's bill has as a fundamental premiss that non-Indians will not be able to find

justice in a tribal justice system or from a tribe. The bill implies that fairness and due process do not exist with tribes and in tribal courts and as a result these matters need to be addressed in federal and state courts. Not only is this a false premiss, it is offensive. It reflects the failure to look at tribes and to see what they actually are doing. The Colville Tribes can only respond from the point of view of its experience. However, we believe, indeed know, that our experience is not unique.

The Colville Tribes has established a Tribal Court system with both trial and appellate divisions. To ensure that the Tribal Court will be free from political influence in its decision making, the members of the Colville Tribes by constitutional amendment separated the court system into a separate branch of government. This action was done in part to remove the slightest appearance of bias from the court. It was not done in response to any actual interference between the Tribal Courts and governing Business Council. Its purpose was it make non-members who would use the Court more comfortable. It is not uncommon to see private attorneys and non-Indians actively participating in the Tribal Court. Our court is administrated by law trained judges. The court system on the Colville Reservation mirrors courts found in any jurisdiction. Of course, when matters involve only Tribal members or particularly sensitive internal matters (enrollment for example), particular attention is paid to the traditions or the Colville people.

The Colville Tribes has to deal with non-Indians every day. To insure that everyone who comes into contact with or could be affected by Colville Tribal governmental actions is fairly treated, the Colville Tribes has adopted a Civil Rights Ordinance. That law is codified in the Tribal Law and Order Code at Chapter 1-5. The Civil Rights Act provides that no law will prohibit the free exercise of religion, speech, press and the right of the people to freely assemble. The Act guards against unreasonable search and seizure, double jeopardy and self-incrimination. It protects private property from taking without just compensation. And importantly, of particular importance for this hearing, the Act provides:

[that the Colville Tribes shall not] deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.



To be sure that its Civil Rights Act could be enforced easily and readily by any person (member or not), the Tribes waived its sovereign immunity with respect to any action brought under the Civil Rights Act against a Tribal officer or employee for the purpose of securing declaratory or injunctive relief. The Tribes went further and allowed recovery for damages where the Tribes carries an enforceable policy of liability insurance that covers the alleged wrongful action.

The protective steps taken by the Colville Tribes is not unique in Indian country. It reflects the growing sophistication of tribal governments. Tribal governments live within their wider communities that include non-Indian interests. Tribes have and continue to craft tribal laws that address the needs and rights of those with whom they have contact. The Colville Tribes asserts authority to control land use on the reservation. This is discussed below. However, in asserting its land use jurisdiction, it enforces a land use plan that is applied to all on the Reservation without discrimination. Moreover, persons who feel aggrieved by an action with respect to land use have a right to appeal to the Tribal land use review board. That board, by Tribal law, must have at least two non-Indian members. This action reflects the concern of the Tribes that all residents of the reservation not only receive a fair hearing, but feel a part of the decision making process. An aggrieved party can appeal an adverse decision from the hearing board to Tribal Court. The Court decision is final and binding on the Tribes as well as a private developer.

The bill now under consideration deprives tribes of the right to find their own solutions to how they will live with and accommodate residents of the reservation. It fails to recognize that tribes have already taken steps to insure fairness and due process to all who live on or have contact with tribes. Tribes are not islands in the wilderness depriving those who come within the reservation boundaries of fairness and due process. They are governments that have carefully crafted laws and rules that insure that all who come within the jurisdiction of the tribe will be treated fairly and without discrimination.

People who complain about tribes and couch those complaints in the guise of due process do not really complain about process. There is plenty of "process". They do not like the fact they do not always win. Tribal law will not allow them to build or develop in a way where natural

resources are damaged; wildlife destroyed; cultural resources stolen or molested; and treaty and other federal rights ignored. Their complaint would be as strong against any government that sought to rein in their unfettered private development desires. But, what is clear is that the problem is not one of the lack of due process or fairness.

Today, even without the passage of tribal laws, there is no lack of remedies that a non-Indian would have where a person believes a tribe is acting improperly. The law is clear that federal court now - without new legislation - will review assertions that a tribe lacks jurisdiction over a party or claim. All that is required is that tribal remedies be exhausted prior to initiating the federal court action.<sup>4</sup> In those cases where an affected party feels that a tribal official is acting outside his or her authority, immunity may not be a bar in a federal court action against the tribal official even though it remains a bar to an action against the tribe itself.<sup>5</sup> Whether the remedies have been crafted by a tribe or are present as a result of existing law, there simply is no credible argument that members or non-members of a tribe, Indians or non-Indians, lack due process in dealing with tribes.

**The right and duty to regulate property use on Indian reservations  
is an integral aspect of tribal sovereignty.**

We have been asked to address the issue of property rights on an Indian reservation. More specifically we suppose that the inquiry is directed at the rights of non-Indian property owners. The issue is not one of a lack of process or fairness. Nor is it a matter of a lack of remedies. As set out above whether the available process be tribal or mandated by existing federal law and judicial decisions, there are ample opportunities for a person who feels aggrieved to regress that grievance. Nor is the problem one of depriving a new land owner of the right to the use of his or her land for lawful purposes to which the land was being put when it was purchased. The problem comes when a new owner of land on an Indian reservation wishes to change the use of the land, without regard to how the change of use will affect tribal resources

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<sup>4</sup>National Farmers Union Insurance v. Lodge Grass School District 471 U.S. 845, (1985)

<sup>5</sup>Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).

and rights. It is in this case that a tribe must have the right to govern and regulate, and it is the case where non-Indians become the most exercised.

To address this issue one must go back in time to when the reservations were reserved and for what reason. Tribes as governments and their reservations predate the State of Washington. Indeed, the reservations and the cession of lands by the tribes that were part of the treaty process that established the reservations were the necessary precursors to the lawful creation of the State. These reservations were intended to be and remain the homeland of tribes. The tribes gave up much in return for the their reservations. It was on these reservations that tribes and Indian people were to make their lives. Certainly non-Indians purchasing lands on an Indian reservation knew where they were purchasing. Indeed, the Colville Reservation with an area of over 1.3 million acres is bounded on three sides by major rivers. A reservation the size of Rhode Island and bounded on three sides by water is hard to miss. Non-Indian land purchasers knew they were entering an Indian reservation. They cannot later cry foul when a tribe attempts to apply non-discriminatory rules to protect tribal resources.

Over 1.1 million acres of the Colville Reservation are owned in trust for the Tribes or its members. In addition, the Tribes and its members own additional lands in fee. The amount of fee lands that are owned by non-Indians is relatively small. But unregulated actions on those lands can cause severe harm to Tribal interests. Often, as is the case on the Colville Reservation which is located in a rural part of the state, if the tribe does not regulate there is no regulation at all. Neighboring counties do not have the resources, the time or the inclination to regulate small pockets of fee lands sprinkled throughout the Colville Reservation.

The Colville Tribes regulates land use in order to preserve the nature of its Reservation as a homeland for its members. Non-Indians who purchase property and later wish to change the use of that property to a use that is incompatible with the greater purposes of the Reservation are and must be regulated (as are members who wish to take similar actions). For the members of the Colville Tribe, the Reservation is a primary place to obtain fish and wildlife for food and religious use; to gather necessary medicinal and subsistence plants; and to engage in religious spirit quests. It is these activities that are guarded and guaranteed through federal law, executive orders and finally by Tribal regulation.

The regulation of fee and trust lands is necessary to ensure that the resources that remain on trust lands are not further eroded and lost by actions that take place on fee lands owned by non-Indians. Fish, wildlife and water are resources that came with the reservations and were reserved by tribes.<sup>6</sup> A tribe's right and desire to regulate land use to control these vital resources is no different from any government's attempts to ensure that the public benefit from public lands is not lost through activity on private lands.

The easiest way to understand both the need for tribal regulation of non-Indian land use activities and the process used is with an example. A non-Indian resident of the Colville Reservation sought to change the existing use of his property to a small subdivision.<sup>7</sup> This property is located in the midst of the Colville Tribal game reserve. It is within this reserve that the Tribal elk and deer herds survive. Tribal members depend on these animals to provide subsistence. The change in land use would severely affect the survival of these animals. Subdivisions and other radical land use activities are not allowed in this sensitive area. However, the Tribes does provide a process where a land owner may seek a variance for a sought after land use. It is through this process that the Tribes can determine whether the proposed use is compatible with broader public interests and, more importantly, determine what conditions could be applied to the land to minimize the impacts of the sought-after use. In this particular example, the land owner refused to even apply for a land use permit or a development permit. Thus, both he and the Tribes were deprived of the opportunity to effectively address the problem. Unfortunately, those who complain the loudest about tribal land use decisions are often those who refuse to even approach the tribe and who would be as resentful of any governmental attempt to regulate their land use.

The Colville Tribes, when it makes land use decisions, has a duty not only to its members but to a large number of non-Indian visitors to the Reservation, who come each year to enjoy the unspoiled beauty that remains on the Colville Reservation. Indeed, the Colville Tribes has entered

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<sup>6</sup>See, Winters v. United States, 207 U.S. 564 (1908); and Walton v. United States, 647 F.2d 42 (9th Cir. 1981)

<sup>7</sup>The Tribes did not seek to curtail the current use of the property. The land was used as a home for the non-Indian resident.



into cooperative agreements with both federal and state agencies that not only result in the protection of Tribal resources, but allow non-Indian visitors to enjoy aspects of the Colville Reservation. Agreements with the Washington State Department of Fish and Wildlife both protect large game needed for the subsistence of Tribal members and open areas of the Reservation to non-Indian hunting and fishing. These areas are owned by the Tribes in trust and would be closed to non-Indians but for the efforts of the Tribes and the agreement with the State.

The cooperative agreement with the Washington State Fish and Wildlife Department is an example of the correct way for tribes and other governments to address these issues. A blanket waiver of immunity is not only unnecessary but counter productive. Issues of jurisdiction are best addressed through government to government negotiations between tribes and the affected state or local authority. On the Colville Reservation these government to government efforts have resulted in agreements to cross deputize county and local law enforcement officers for better protection of all persons who come to the Reservation. The State and Tribes have reached agreement on the collection of child support from Tribal employees (again both Indian and non-Indian employees). The Child Support Agreement involved a limited waiver of Tribal sovereign immunity.

### Conclusion

The experience of the Colville Tribes is representative of how tribes have accepted their responsibilities as governments to ensure fairness to all who come within the jurisdiction of tribes or do business with Tribes. The Colville experience, we believe, is not unique in Indian country. Our success in developing intergovernmental agreements with state and local governments serves as a template for how tribes and other governments can solve complicated interjurisdictional disputes. Our experience also serves to establish that the bill now under consideration is neither needed nor appropriate. It would not advance or better protect the rights of any party. Its only accomplishment would be to undermine tribal governments and make to all the more difficult for tribes to adequately protect their members and provide for the advancement and survival of tribal governments into the next century. The trust duty of the United States should not be abandoned through the support of this bill where there is no credible evidence that tribes have failed to

provide the protections needed. Rather, this Committee and the Congress should consider steps that will support and enhance tribal government, not tear it down.

Thank you for the opportunity to provide this testimony.



*Nez Perce*

TRIBAL EXECUTIVE COMMITTEE

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**TESTIMONY OF SAMUEL N. PENNEY, CHAIRMAN,**

**NEZ PERCE TRIBAL EXECUTIVE COMMITTEE**

**To the Senate Committee on Indian Affairs  
on the  
Field Hearing in Seattle, Washington  
April 7, 1998**

I am Samuel N. Penney, Chairman of the Nez Perce Tribal Executive Committee. I would like to go on record in strong opposition to S. 1691, sponsored by Senator Gorton. This proposed legislation would overturn hundreds of years of Indian policy and precedent recognizing the need for Tribes to retain their inherent right to sovereignty and self government.

**Background on Nez Perce Tribal Treaties**

The Nez Perce Tribe has entered into three treaties and one agreement with the United States government. The first treaty, the Treaty of 1855, reduced the Nez Perce tribal homelands to a reservation less than half the size of its original thirteen million acres. When gold was discovered in the mountains near Weippe, mass trespassing and theft of millions of dollars worth of gold from the Nez Perce people occurred. Instead of protecting the Tribe from such encroachment, the United States coerced tribal leaders to sign another treaty that had the effect of reducing the reservation to a mere 750,000 acres, less than ten percent of their original land base. The third treaty dealt with an ongoing problem of timber theft on the remaining tribal reserves and the final agreement between the Nez Perce Tribe and the United States effectively decimated the Nez Perce homelands by opening the reservation to non-Indian settlement.

**Nez Perce Tribal Opposition to S. 1691**

Now, Senator Gorton is proposing in S. 1691 to impose on the Nez Perce Tribe, and every other Tribe in the nation, yet another blow to their basic existence. This effort is a shameful repeat of prior indignities suffered by Tribes at the hands of the

federal government. When will Tribes ever be able to enjoy the inherent peace and freedom of its own government? When will Tribes ever be able to stop fighting against certain legislators that continue to want more and more? "American Indian Equal Justice" is certainly not the words that describe the history of broken promises, nor does it properly describe Senator Gorton's attacks on Indian people. Rather, the title of this proposed legislation should be "Let's Take the Heart from the Indian Tribes."

The Nez Perce Tribe has had many business dealings with non-Indian entities, which unlike the unilateral 1863 and 1893 treaties, were fair and honest dealings between two equal parties. In these dealings the Nez Perce Tribal Executive Committee (NPTEC), the governing body of the Nez Perce Tribe has waived its immunity from suit, so that both parties would be on equal footing if necessary to enforce the terms of the contract. This practice is also taken by local, State and federal governments as they conduct their business. Even though tribal, State and federal governments enjoy sovereign immunity, they voluntarily waive that protection when necessary to further the goals of the government.

There have been many instances in the past where the federal government and the State of Idaho have asserted their immunity from suit (and prevailed) in order to protect their assets and continue to provide public services to their communities. In addition, the Senate recently passed legislation letting stand the Seminole v. State of Florida decision allowing States to frustrate the compacting process set forth in the Indian Regulatory Gaming Act by asserting their eleventh immunity from suit. It is inequitable for the Senate to take such action to protect State governments from suit by Indian Tribes, but to propose opening tribal governments to virtually unlimited litigation; especially when the Senate itself is shielded from lawsuits arising from the performance of their duties as public servants.

Although Tribes and tribal members are constantly accused of not paying any state or federal taxes, the truth of the matter is that taxes are paid regularly. For example, tribal members pay federal income tax, and state income tax if working off-reservation. Every purchase that tribal members make at the local grocery store or retail business off reservation entails payment of sales, use or excise tax. Most of our tribal members travel to Lewiston, Idaho and sometimes Spokane, Washington to shop for their family needs. Tribal members pay the same fees as other Idaho citizens to obtain driver's licenses and vehicle registration.

#### **FEDERAL COURT JURISDICTION**

Section 4 of the bill would vest the federal district courts with jurisdiction in "any civil action or claim which arises under the Constitution, laws or treaties of the United States." This would circumvent existing court decisions that have recognized and upheld the inherent sovereign right of tribes to be self-governing. This line of cases has required parties to exhaust the remedies available to them in tribal courts.



Such decisions recognize that tribal courts are judicial forums that are binding. There is nothing whatsoever wrong with Tribes who are willing and able to dispense fair and impartial justice in their own jurisdictions.

Federal courts have consistently recognized and upheld the sovereign immunity of Indian Tribes and have recognized them as governments. Despite many Congressional actions that have resulted in waivers of that immunity for certain purposes (Indian Regulatory Gaming Act, 25 USC \a7 2710; the Clean Water Act, 33 USC \a7 1365 and the Hazardous Materials Transportation Act, 49 USC \a7 1801, to name a few), the basic concept of a necessary right to assert sovereign immunity and therefore protect tribal assets and basic tribal existence, remains - - and should continue to remain intact.

### **COLLECTION OF STATE TAXES**

The broad implications of S. 1691 in its effort to place Tribes under the authority of state governments for the collection of state taxes on non-Indian purchases, should cause the Senate to oppose the proposal. The Nez Perce Tribe has entered into several agreements with the State of Idaho for purposes ranging from employment on the reservation to the conduct of gaming on the reservation. The Tribe is currently working with the Idaho Tax Commission to identify creative ways to deal with the various tax issues. Further encroachment on tribal government's ability to enter into such agreements is unnecessary.

### **TUCKER ACT PROVISIONS AND TORT CLAIMS PROCEDURES**

Although Gorton's bill proposes to place Indian Tribes under the same provisions as the federal government under the Tucker Act, the parallel limitations on liability are not available to Indian Tribes under the bill. In fact, among other broadly worded provisions, the bill would subject the tribes to the same tort liability as that of a private individual or corporations and there is no restriction on claims against pensions. This has the potential of exposing the pensions of hard working tribal employees to unlimited legal claims.

In similar fashion, Senator Gorton has crafted his bill to omit limitations on liability enjoyed by the federal government under the Federal Tort Claims Act in like provisions for Indian Tribes. Pursuit of administrative remedies prior to litigation is not required, nor does the bill similarly protect tribal employees as federal employees are protected. So, while Senator Gorton is purporting to bring Indian Tribes under the same requirements as the federal government, his intent is to go way beyond that of the Federal Tort Claims Act and the Tucker Act, to leave Tribes open to seemingly unlimited attempts to get at governmental assets.

### STATE COURT JURISDICTION

Senator Gorton's bill would also allow tort or contract suits against Indian Tribes to be filed in State courts. Not only is the bill dissimilar to the Federal Tort Claims Act and the Tucker Act (which allow such suits to be removed to federal courts), but most importantly, it overturns more than one hundred years of legal and Congressional recognition and support of Indian Tribal courts having jurisdiction over such civil claims. Just as States would oppose the Tribe taking over its jurisdiction over civil matters, the Nez Perce Tribe is vehemently opposed to any provision that would require tribal courts to turn over its inherent duties and responsibilities to a state court without the Tribe's consent. Such a proposal is not only unnecessary, but is absolutely unacceptable!

Just as tribal members are required to comply with the laws of the jurisdiction in which we visit, the same should be true with individuals who visit the reservation. Gorton's suggested remedy of making one jurisdiction subject to another is not the proper response. Rather Congress should allow tribal courts and tribal governments to continue to operate and expand to better serve the needs of its people.

The Nez Perce Tribe is simply trying to provide government services to a growing number of people with a shrinking pool of federal financial assistance. The assets that the Tribe utilizes to provide services such as, educational assistance, home repairs, assistance with energy bills, job training, health care, social services, elder assistance, and more, must be protected in order for the Nez Perce Tribe to do an effective job at governing. Placing pensions and other funds at risk of suit would create a never ending stress on the ability of tribal governments to fulfill its responsibilities. Our concern should be shared by the federal government, which has a responsibility to protect and preserve the government-to-government relationship. This ill-conceived and unnecessary bill is a very blatant attempt to overturn long-standing judicial and legislative recognition of the rights and responsibilities of tribal governments.

Again, the Nez Perce Tribe strongly opposes S. 1691, and urges legislators to affirm the special relationship between Indian Tribes and the federal government. We sincerely implore you to see this bill for what it is, another misguided effort to place barriers in the road of Tribes moving toward self-determination; a blatant attempt to strip tribe's of their sovereignty; and a direct assault on the very existence of Indian tribes. Vote no on S. 1691.

Thank you for the opportunity for the Nez Perce Tribe to comment.

The Honorable U.S. Senator Ben Nighthorse Campbell: Chairman  
 Honorable Senators of the United States  
 Committee on Indian Affairs  
 SH - 838 Hart Senate Office Building  
 Washington D.C. 20510-6450

April 15, 1998

**In testimony before the Senate Committee on Indian Affairs on September 17, 1996, strong arguments for the devastating impact of sovereign immunity on individuals and tribes were put forward by both Professor Joseph Kalt of the Harvard Project on American Indian Economic Development, and by the Mississippi Band of Choctaw Indians.**

This testimony is important to your consideration of Senate Bill 1691 - The American Indian Equal Justice Act - because complete control of an individual's pocketbook gives government intimate control over the entire life of the person. It's easy to strip civil rights from a person who depends on you for their every economic need. It's equally easy to assure their silence on the violation. That's one of the reasons the Founders were so vehement about protecting individual property rights.

#### THE PRESENT SITUATION ON THE RESERVATIONS

In his opening remarks for the hearing on Economic Development On Indian Reservations, the Chairman of the Committee on Indian Affairs at that time, Senator McCain, laid out the present economic conditions on reservations. He said, "Indian reservations are among the poorest areas in North America. Many reservations lack the bare necessities of modern life that most of us take for granted, like running water, indoor plumbing, electricity, or telephones."

**It is politically incorrect, but never-the-less true, to say that the situation Senator McCain describes exists after the expenditure of an astonishing amount of money on the reservations, money supposedly spent to solve the problems the Senator points to.** Huge sums are spent each year on education, economic development, housing, and other services for the tribes. It would seem that someone, sometime, would ask, "What in the world is going on

here?" If the situation described followed similar expenditures by any other division of government other than those charged with caring for Indian affairs, a bi-partisan call for criminal charges would ring through the halls of Congress.

#### AN INDICATION OF HOW BAD THINGS ARE:

**The success of the Mississippi Band of Choctaw Indians was touted, in testimony by nearly everyone speaking at the hearing, as the highpoint of economic progress on reservations in America. NO ONE SEEMS TO HAVE NOTICED THAT, utilizing the figures given in testimony, the average manufacturing wage for the five manufacturing entities reported on by the Choctaw was \$11,328. In 1995 in Mississippi, using figures provided by the Mississippi Employment Security Commission, the average manufacturing wage in Mississippi was \$23,301. The overall average wage for the firms reported on by the Choctaw was \$14,982. The overall average wage in Mississippi for 1995 was \$20,750. Someone, other than the workers in these plants, seems to be making a lot of money. (Note: by adding in tribal government and some unexplained figures, the Choctaw average moved up to \$15,560 per year. The implication would be that government on the reservation pays well, as is the case in the non-Indian population as well).**

**The question that needs to be asked is: If the average manufacturing wage on the premier example of success in the nation is less than half the average wage paid off the reservation, what does that say about the lives of the individuals receiving those wages? And why are the wages so low?**

**There are possible answers but, at least on the surface, it seems that the workers in the Choctaw communities are working at third world wage levels. No one addresses this problem in the testimony given you.**

#### PROFESSOR KALT'S TESTIMONY:

Professor Kalt's testimony was far more significant than the attention paid to it. Mr. Kalt testified that "de facto sovereignty" is very important to tribal economic progress. Few would question that comment. De facto sovereignty is important to many governmental efforts to build



strong economies. Port districts, counties, cities, towns, states, and other entities all find that de facto sovereignty is vital to their efforts to build economic prosperity for their citizens.

**Some senators eagerly leaped on Professor Kalt's comments about de facto sovereignty then completely ignored extensive testimony by the professor to the effect that "De facto sovereignty is not enough," (page 7) and that third party dispute resolution is a critical ingredient for success in development (page 102). Kalt most often expresses the last as a condition in which tribes "...provide a political environment in which investors - large or small, tribal members or non-members - feel secure." (Page 48 and others).**

It isn't to difficult to follow Dr. Kalt's argument. Sovereignty is vital to economic development but sovereign immunity destroys the ability to develop. It isn't to tough to look around the world and see what sovereign immunity does to nations. Nations with high risk factors for foreign businesses fail to attract the best businesses and the business they do attract comes only under conditions (slave labor wages, etc.) that assure a quick pay back for risk taken. Nations with lower risk factors and a willingness to allow recourse in courts businesses have confidence in attract better businesses and, almost always, have stronger economies and more prosperous people.

WHAT DOES THE TESTIMONY OFFERED TO CONGRESS MEAN?

**Absent sovereign immunity any ordinary business owner would find a reservation location attractive.** Tax advantages, the opportunity to improve the lives of a needy population, a workforce with an attachment to the area, and a number of other factors would make at least some reservations extremely attractive. **Unfortunately, with sovereign immunity, given the overall history of tribal relationships with business, a business owner would be irresponsible to locate on a reservation.** The situation is bad enough that it can be honestly asserted that a CEO responsible to shareholders is committing an immoral act in terms of his or her responsibility in putting resources at risk by investing on a reservation.

**Indeed, a corporation must treat a reservation investment as any investment in a third world country would be treated.** Such investments are only made on a risk vs income

basis. Since the risk is high, the tax advantages must be generous and the wages levels to be paid, and the level of investment required must be low enough to cover the company if default comes about and default must be assumed.

This is possibly what has happened in the Choctaw situation. Following are some points that should be considered in the Mississippi case.

**First, it should be noted, that the Choctaw offer partial suspension of sovereign immunity (to the level of investment - testimony page 128) as part of their development package. This is very significant as even the Choctaw consider it an important factor in attracting investment.**

**Second, there are, of course, significant tax advantages to doing business on a reservation.**

**Last, overall wages on the reservation are only 75% of those off reservation. Manufacturing wages are less than 50% of those off reservation. Wage differentials like those allow for taking a risk with a rapid payback. Unfortunately, the backs of the people bear the burden.**

Note that even with the wage differential, the suspension of sovereign immunity is necessary to obtain investments. When the extremely low wages, the ability to go to court to recover at least invested monies, and the tax advantages are all combined, the Mississippi Choctaw are, indeed, able to attract jobs. Will those jobs ever pay wages similar to those in the rest of the state? That, is unknown.

So what has happened in Mississippi? Either businesses are coming to the reservations and paying third world wages and pocketing the difference as is necessary when working in a chaotic political situation or, the tribe is pocketing the extra funds which gives them control over their people. The only other alternative is some third explanation that no one's bothered to document in any way, which seems unlikely given Dr. Kalt's extensive studies of the Indian economies.

**Whatever the explanation, it seems clear the tribal members working in most of the tribal businesses are not benefitting from the business and, as poverty level wage earners, are dependent on the tribe for the additional funds needed to subsist. That, in a world of**

**sovereign immunity for the tribes, is hugely dangerous.**

Inadequate testimony was given you to determine what the social impact of the Choctaw situation is or why it is taking place. **That alone probably says more about the kind of information you are given than anything else. Whatever the reasons, someone should at least ask why the average wage on the Choctaw reservation is only a small fraction of the wage off the reservation.**

#### CONCLUSIONS:

**The Honorable Senators should reread the testimony presented to them in 1996 regarding economies on Indian reservations. The testimony clearly demonstrates how suspension of sovereign immunity can help bring about economic prosperity on a reservation in that it makes it possible for reasonable people to do business with the tribes with some protection in case of dispute.** The testimony is also revealing in that it clearly shows that the incredible poverty on the reservations is at least partly due to tribal sovereign immunity. If Congress is going to ever truly help individual tribal members escape the horrific burden of poverty they live under as a result of sovereign immunity, it must force adjustments of sovereign immunity on the tribes. Otherwise, the poverty will continue and can only be considered to exist because Congress wants to keep the people of the Nations in poverty.

Thank you for considering the above.

Jack Petree  
2955 Sunset Drive  
Bellingham, Washington 98225  
(360) 733-1303 phone and fax

Joseph H. Suina  
*Governor*

Simon E. Suina  
*Lt. Governor*

Andrew Quintana  
*Treasurer*



P.O. Box 70  
255 Cochiti Street  
Cochiti Pueblo, New Mexico 87072-0070  
Phone (505) 465-2244 Fax (505) 465-1135

## **Written Testimony**

### **Pueblo de Cochiti**

#### **Senate Committee on Indian Affairs Hearing On SOVEREIGN IMMUNITY**

**April 7, 1998**

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The Pueblo de Cochiti has existed in the same site -- before the State or Colony of New Mexico, before the United States -- for over 700 years. During this long period, it has governed itself according to its own fundamental traditions, despite the pressures of foreign cultures and episodes of oppression. For us, this tradition means that tribal leadership is charged with oversight of all aspects of pueblo life. Although we live within the United States and within the State of New Mexico, our government does not always include the same subdivisions or separations that apply outside our community. Decisions follow traditional law, with respect for important social and cultural values and with a goal of preserving the community for future generations.

Maintaining our traditional ways has not been easy, but the alternative is unthinkable and would lead to the end of our identity. From the beginning, Spanish colonizers tried to abolish Indian traditions through religious



persuasion and violent coercion. Many of our people were killed for refusing to relinquish their beliefs. As such, we learned to keep them to ourselves. The United States government, in its turn, forbade our people to practice our traditional ceremonies, forbade our children to learn our language, and tried to extinguish our way of life. Still, we learned to keep our ways quietly.

Even though we have lost some of our lands and sacred sites, we continue many of our cherished ways of life and we still persevere in governing ourselves quietly and according to our old ways. When conflicts arise in our community, we resolve them as we always have. Our tribal council hears and decides internal matters according to traditional law, and its determinations are respected by our people. Rather than assessing levels of blame, our tribal officers are always concerned with rehabilitation and with reaching an outcome that will further the needs of the community. We are charged with a moral duty to follow our conscience, to uphold our teachings, and to safeguard what our ancestors preserved, often with great sacrifice, for each of us.

The traditional Pueblo community entrusts justice to Pueblo officers, who learn their responsibilities as part of their upbringing and who must carry out these responsibilities in a manner which serves not only the present community, but also future generations. Upon assuming office, we take an oath to protect our land and our people and to use all of our ability and judgment to correct anyone whose actions are contrary to our internal rules. Thus, punishment is less important than resolution and reconciliation, and our efforts must always be to bring people back to awareness of their duties and their place among the people.

This justice system is not like the European tradition that governs the outside world, and that applies to us in our lives outside the Pueblos. Instead of a body of written precedent and fixed rules, our decisions flow from spiritual

authority applied anew to each setting. The symbols of our authority are the canes of office given to us in recognition of our sovereign status by the Spanish King, the Mexican Government and the President of the United States as each successive "Supreme" government recognized the right and responsibilities of the Pueblo de Cochiti to govern itself as a sovereign entity.

The administration of justice by the Pueblo for itself is basic to the preservation of our traditional way of life. An outside court could not, even if it wanted to, attempt to apply Pueblo law. Our traditions are not accessible to outsiders, and cannot be applied by them, nor should they be. The internal resolution of internal disputes is essential to true reconciliation. S. 1691, proposed by Senator Gorton, threatens to open such disputes to adjudication in federal or state courts. It is possible that a wayward member would sue the Pueblo itself rather than be persuaded to find a path bringing him back to home and family. The result, inevitably would be irreparable loss to the individual and to the rest of the community. This is no less than a renewed assault on the traditions we have labored for centuries to preserve. The government of the United States has made such mistakes before. It should not do so again. The internal affairs of tribal communities should remain where they belong. Senator Gorton's bill would do little good, and great harm, and we urge that it be rejected by this honorable Committee.

Testimony of Matt Ryan, former Commissioner Kitsap County  
 9080 Illahee Rd NE; Bremerton, WA 98311 360-692-4750

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I want to take this opportunity to thank you for taking action to fill the vacuum of over a century of Congressional neglect of the relationship among the original Americans and those who came lately.

I suggest that you look at the rationale of the precedent setting Court decisions in the early nineteenth century. They correctly based their decisions on the then reality that Indians were a separate people, both physically, socially, and ethnically. Such is not the case today when all of the territories have been formed into states. Socially, we as a nation, have made the provisions of the 14th Amendment the norm of our society. Especially here in Western Washington, Indians go to our schools, work in our communities, and cater to our gambling vices. Ethnically, Indians are the fastest assimilating minority. I, personally, am a product of this change as my grandmother was descended from the Powhatans, an Indian empire that was liquidated well before the American Revolution.

What has evolved is a situation whose historical parallel is that of the native resident of a territorial concession granted to a foreign power. Non-tribal people are citizens of this nation, the United States of America, but within the bounds of Indian reservations have the standing of subjects of a satrapy. The non tribal residents of the Port Madison Indian Reservation, who comprise over 90% of its residents, have to continually hire lawyers to retain rights taken for granted in the rest of the nation. This huge majority have neither voice nor vote in tribal government. Yet, the tribe pushes continually for more control over their lives and property. My friend, David Oliver, cannot have the quiet enjoyment of his property because his easement and only access across tribal trust land was denied. Look at Exhibit 1, the news article from the 1995 tribal paper. I quote, "The ordinance will apply to all lands within the Reservation regardless of ownership type."

Whatever your origins, when you feel you have been wronged by a neighbor be that neighbor a citizen or a government, the attitude of governmental infallibility can only breed distrust and in time, hatred for that group. The very strong feelings expressed by the tribes are a harvest of past injustice to the American Indians. You cannot end discrimination by continuing discrimination. I respectfully urge you to take this first step toward providing for a forum for settling the disputes that inevitably arise as the Indians become fully engaged in contemporary American society by requiring that civil disputes be heard in state courts.

With assimilation comes another issue that I ask that you address in this legislation. Please give us a clear definition of who is an Indian for purposes of treaty rights. Is an individual who is 75% non-Indian eligible for rights under the treaties and largess from the federal government. 87 1/2%? 93 3/4%? 98%? I recommend a cut off at quarter blood, or 75% non-Indian. Please note that this does not mean that any individual of whatever minuscule Indian heritage can't continue to preserve tribal culture.

The County sued in federal court over location of the tribal bingo hall. One of the main

concerns was the drain field. The court ruled against the County. The drain field failed. They have enlarged the facility to include a casino. This failed drain field is a sorry monument to tribal sovereignty and the standards of the Indian Health Service, who use federal guide lines. [See Exhibit 2] This facility is not an Indian facility, it is a Indian owned business catering to the general public. Regulation of this sort in any other venue is done by local government. May I make the recommendation that you place the regulation of building, fire, drainage, health, sanitation, storm water codes and the alike under the state in which the reservation is located. I believe you will be pleasantly surprised as to how much money you'll save. To the tribal people, adhering to the standards of the state in which you live, does not reduce tribal sovereignty any more than a mayor's sovereignty is limited by requiring safe buildings for her residents. If anything, walking the walk of code compliance enhances your strong stands on vital environmental issues impacting your own treaty rights.

Senator Campbell, we have a large ugly clam called the geoduck that is harvested by divers from deep underwater tracts. It is greatly favored by Asians. Since most of the county's 224 miles of shore line is developed, the noise and lack of attractiveness of these operations are something that stirs deep emotions among local residents. Previous Boards of Commissioners have gone to court with the state to satisfy their constituents. Over time, differences were worked out. Now that we have the shell fish decision, the Tribe has gone into the geoduck business. The County shore line manager was left out of the loop. So now, we not only have the people living on the reservation impacted, we have water front residents also. The tribe's answer is to seek to establish compacts. However, from the experience I had with signage for their casino, I have doubts that any compact is enforceable. Please note the fact sheet, Exhibit 2, that stated, "There is no intention to use Las Vegas style neon exterior lighting." This was included in the fact sheet because local non-tribal residents felt such signage was not appropriate for their residential neighborhood. Senator, I live about three miles away from the casino and I can see the towering light from my house. This sign grossly violates the County's ordinance. They should be held to the same standards as any other citizen when it comes to meeting the specific conditions of a project. We shouldn't have to sue in Federal District Court to require Indians to live up to their word. These disputes should be solved at the state level.

In closing, we are all citizens of the state, city, county, or reservation where we live. No one of us lives in a vacuum. Our actions impact others. My grandfather's generation gave the Indians full citizenship. They vote in our elections. They give to candidates. They appeal local land use decisions. See Exhibit 3. Please take the next logical step and begin the process of recognizing a new paradigm. Indians are no longer a separate people. As their commercial ventures prosper and grow, it is to the benefit of both that disputes between tribes and tribal members, and non-tribal people be heard in the courts nearest to home, the local state courts. The tribes are mistaken when they believe that say that their culture is preserved by straight arming their neighbors. If anything, it is undermined. Please do the right thing. Vote this bill out of committee with a "do pass" recommendation.



## Tribe and DNR make interim geoduck agreement

The Tribe has entered into an interim agreement with the State Department of Natural Resources for sharing of geoducks in the Agate Pass area. The agreement allows the DNR to begin harvesting geoducks on a tract near Pt. Bolin, while preserving a tract with equivalent resource for Suquamish in Agate Pass. The DNR conducted a test dig of geoducks in the Pt. Bolin tract on Monday and Tuesday, April 10 & 11, in preparation for an auction of that tract on April 19. Actual non-treaty harvest operations probably will not begin until June.

In the meantime, the Fisheries Department is proceeding toward development of a harvest plan for the Agate Pass tract. The Tribal Council has decided that, for the remainder of this year, any Treaty harvest will be through a tribal venture only. The Tribe will hire or lease a boat, hire Tribal members to do the diving, provide the necessary insurance and equipment, and sell the product. The implementation plan for this year's fishery will be developed in conjunction with the Tribal Shellfish Committee. Tribal members, other than Shellfish Committee members, who wish to participate in the process, should contact Paul Williams for meeting schedules. Experience gained in this year's fishery will provide the foundation for a long term management and allocation plan for Suquamish members.

## Land protection ordinances being drafted

By Scott Crowell

The Suquamish Tribe's Department of Community Development, in conjunction with technical staff from other departments has been developing an ordinance that will have a significant impact on development within the Reservation, both on fee lands and on tribal member owned trust lands.

Tribal Council mandated at their May 1994 retreat that a Land Use Ordinance be drafted and implemented throughout the Reservation. Once completed the document will be administered through DCD.

The "land use" ordinance will be referred to as the Environmental Resource Protection Ordinance (ERPO). After extensive discussions among members of the legal department, planners and the Environmental Working Group it was decided to prepare one, all-purpose ordinance which would cover the functions of regulating grading and clearing, land usage, sensitive areas, shorelines, development standards, signage, plus administrative processes related to the ordinance. Previous public hearing information along with work already done by Scott Crowell, Marsha Reid, Rich Carlson and Karen Driscoll is all being incorporated.

The new ordinance will be built on the concept of protection of the es-

sential environmental resources of the Reservation. The ordinance will apply to all lands within the Reservation regardless of ownership type.

The Tribal Environmental Policy Ordinance, which is also being drafted at this time by the Legal Department and the DCD will work in conjunction with the Environmental Resource Protection Ordinance. The TEPO will have some similarity to the NEPA or SEPA documents. The purpose of TEPO will be to reveal information concerning any adverse environmental impacts created by a proposal and to indicate how those impacts will be dealt with. The TEPO will disclose environmental impacts from proposed development on the Reservation and the ERPO will regulate it.

The TEPO draft should be completed by the end of May and the ERPO by fall. These documents will impact both tribal members and non-tribal members whether you are on fee lands or trust lands. DCD would like very much to gain input from as many people as possible. If you have any questions, input or would like more information on how these documents impact you please contact Scott Crowell at the Tribal Center 598-3311. There will be a public hearing on Wednesday May 17 where a presentation will be made and input will be taken. Your participation is strongly requested.

Suquamish News ➤ May 1995

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G x h i b i t 1


**KITSAP COUNTY DEPARTMENT OF COMMUNITY DEVELOPMENT**

 614 DIVISION STREET MS-36, PORT ORCHARD, WASHINGTON 98366  
 (360)876-7181 FAX (360)895-4925

**RON PERKEREWICZ, DIRECTOR**

September 3, 1996

 Michael Hegewald  
 11260 Ogle Road  
 Poulsbo, WA 98370

Dear Mr. Hedewald,

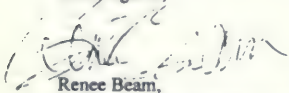
The Department has reviewed the revisions to your original bulkhead proposal and finds them to be consistent with the requests which have been made the Department of Fish and Wildlife and by the Department of Ecology. We have also made another site visit to your property with your Architect, Peter Brachvogel.

With the reduced scale of the project, as well as the new placement of the retaining wall several feet removed from the Ordinary High Water Mark, the Department now considers this structure to be a landscaping feature which is an appurtenance to your existing single family residence. Based on the fact that the height of the wall is less than 4 feet and that the wall no longer meets the definition of a bulkhead pursuant to WAC 173-16-060(11), the County accepts the withdrawal of the bulkhead permit application. Furthermore, pursuant to the Uniform Building Code, Chapter 70, a retaining wall under four feet in height does not require a building permit.

Based on the proximity of the proposed landscaping improvements, it appears that you will still be accessing the location by barge. This activity may require a permit from WSDFW. We suggest you contact Dave Gufler regarding the permits for the barge access.

I trust that this information will prove to resolve the permitting issues of your project. Should you have additional questions or need further assistance please do not hesitate to contact me.

Best Regards,

  
 Renee Beam,  
 Shoreline Administrator

RB:

cc: Peter Brachvogel

## FISHERIES DEPARTMENT

Area Code (360)

598-3311

Fax 598-4666



## THE SUQUAMISH TRIBE

P.O. Box 498

Suquamish, Washington 98392

September 19, 1996

RECEIVED

SEP 23 1996

Ron Perkerewicz  
Kitsap County Department of Community Development  
614 Division Street MS-36  
Port Orchard, WA 98366

KITSAP COUNTY COMMISSIONERS  
COPIES INDIVIDUALLY  
ADDRESSED TO ALL  
MEMBERS

Re: Retaining wall proposed for shore property north of Brownsville  
Proponent: Michael Hegewald  
Assessors account number: 122501-4-031-2007

Dear Mr. Perkerewicz,

The purpose of this letter is to express concern about the above referenced proposal and the administrative process for its review. According to your department's file on this project, the applicant originally applied for a shore permit to build a bulkhead. Subsequently, Renee Beam, Kitsap County Shoreline Administrator, in a letter dated September 3, 1996 states, "With the reduced scale of the project, as well as the new placement of the retaining wall several feet removed from the Ordinary High Water Mark, the Department now considers this structure to be a landscaping feature which is an appurtenance to your existing single family residence." As a result of this change Ms Beam contends no bulkhead permit is required.

The Tribe objects to Ms Beam's determination that no permit is required on the following grounds:

1. The proposed wall meets the definition of Substantial Development in the Shoreline Management Act (SMA),
2. The construction of a retaining wall for a landscaping feature does not meet the definition of an appurtenance in WAC 173-14-040(g), and
3. The Kitsap County Shoreline Management Master Program emphasizes that substantial development permits shall be required for unidentified uses (this is one) on page 7-1.

Unless the proposed retaining wall were to be placed so that the base of the wall was located at an elevation of approximately 130 feet, which seems highly unlikely as it would place the wall roughly half the horizontal distance and a little over half the vertical distance between the house and the beach, the structure would be within the jurisdiction of the SMA.

This proposal lies within the usual and accustomed fishing area of The Suquamish Tribe. The usual and accustomed area is the area within which the Tribe explicitly reserved rights to fisheries resources with the Treaty of Point Elliott. This proposal jeopardizes those treaty-reserved resources because it entails activities within the shore process zone which are harmful to shore processes and the aquatic organisms they support. Kitsap County has recognized the environmental sensitivity of sites such as this one in the Kitsap County Critical Areas Ordinance (CAO). The entire area between the house and the shore is defined as a Geologically Hazardous Area in the CAO. Section 400 classifies any slope greater than 30% as an Erosion Hazard Area. Please note that the slope for this proposal exceeds 50%. The CAO also provides Development Standards which directly conflict with the proposal action. Without requiring permits for the construction of this proposal, Kitsap County will not ensure compliance with regulations adopted by the Kitsap County Board of Commissioners and supported by the Suquamish Tribe.

It is not clear that the County has formally issued a departmental ruling regarding whether a permit will be required for the construction of a retaining wall on this site. We would appreciate clarification of this prior to October 1, 1996. According to the County's rules regarding appeal of an administrative decision, the Tribe has until October 1, 1996 to file notice of appeal. Unless we hear otherwise from your department, the Tribe will regard the letter dated September 3, 1996, which we first viewed on September 17, 1996, as a departmental ruling.

Sincerely,



Phyllis Meyers  
Fisheries Environmental Program Manager

cc: Merle Hayes, Fisheries Policy Coordinator  
Randy Hatch, Fisheries Director  
Mary Pearson, Tribal Attorney  
Kitsap County Board of Commissioners  
WDOE  
WDFW  
Jim Svensson, Kitsap County Department of Community Development  
Renee Beam, Kitsap County Shoreline Administrator





Area Code (206)  
598-3311  
Fax 598-6295

## THE SUQUAMISH TRIBE

P.O. Box 498 Suquamish, Washington 98392

October 25, 1993

Honorable Win Granlund, Chair  
Kitsap County Board of Commissioners  
614 Division Street  
Port Orchard, Washington 98366

Dear Board of Commissioners:

The Suquamish Tribe is not opposed to development, is certainly not opposed to well planned and resource sensitive development, but is opposed to development that severely degrades the natural systems. There is such a threat to the natural systems that the Suquamish Tribe protests this development.

The Suquamish Tribe has been active in attending public scoping meetings, as was held in Indianola June 17, 1991, and advising development and project staff regarding tribal concerns. These efforts have been on-going and sporadic since early 1991.

Here we are, some many months, and several government, citizen and developer dollars later addressing this project. Some of the 450-acre site, as pointed out in earlier and continuing testimony, has/had what we believe are serious flaws of non-compliance with the Forest Practice Act. The Suquamish Tribe supports this earlier and continuing testimony from Charlie Burrow and other citizens.

Additionally, the Suquamish Tribe has consistently maintained that the impact of the Whitehorse development to the Tribe is serious and warrants specific attention. However, consistently inaccurate Port Madison Indian Reservation boundary information provided to the developer by Kitsap County continued to mislead the developer into believing the jurisdiction and concerns of the Suquamish Tribe were non-issues. Boundary information has since been corrected; a large leg of the development reaches into the Reservation.

The Tribe's jurisdiction includes reserved treaty rights for habitat and water quality protection as well as protection of on-Reservation water resources. Presently the community of

Suquamish Tribe to KCBOC

RE: Whitehorse Golf Course and Residential Development

Indianola is a rural waterfront village noted as an historic village in the drafts of the Kitsap County Comprehensive Plan. The community has water problems as we speak, and the voracious water appetite of the 450 acre development with a golf course plus 224 single-family homes in the upscale perimeter does not bode well for the earth, the shallow wells, the creeks, streams and estuaries the development will affect.

Obviously, the Suquamish Tribe prefers the Grovers Creek/Miller Bay watershed be protected as much as possible from urbanization so that the resulting impacts will not further degrade this important resource to the Suquamish Tribe and the community. As of this date, Kitsap County still has no far-reaching protections of watersheds implemented.

The Tribe's environmental working group, composed of representatives from our departments of Fisheries, Natural Resources, Community Development, Human Services and Legal, have reviewed the Whitehorse plans and updates throughout these several months. The written testimony provided today is quite detailed while the verbal testimony, in deference to your time, will highlight but a few of the specifics to: Grovers Creek Watershed, Grovers Creek Hatchery, Groundwater, Transportation, Number of Homes, and General Comments.

#### GROVERS CREEK WATERSHED AND GROVERS CREEK HATCHERY

The site for this proposed development is situated in the headwaters of the Grovers Creek watershed. This watershed is small, has a long hydraulic residence time, is riddled with wetlands, and supports the Suquamish Tribe's Grovers Creek Hatchery. These factors make this watershed especially susceptible to this development.

Grovers Creek is the largest tributary to Miller Bay, and important shellfish production and harvest area to both Tribal and non-indian clam diggers. The additive impacts this development will have with existing growth will affect the surface water quality and quantity in the watershed and, potentially, the intertidal area.

Grovers Creek was selected by the Suquamish Tribe in 1977 for a hatchery location because its historic native salmon runs were extinct and therefore a hatchery operation would not impact existing natural genetic populations. The Grovers Creek Hatchery is essential for the Suquamish Tribe's fall chinook enhancement program.

The first fall chinook releases from the hatchery were in 1979, and through the early 1980s, coded wire tag data indicated exceptional survival of these salmon - over three times normal Puget Sound rates. Grovers Creek fall chinook progeny are worth millions of dollars annually in all sport and commercial fisheries, and are especially important to tribal members exercising their historic treaty fishing rights within the marine waters of Kitsap County. Grovers Creek fall chinook are the mid Puget Sound indicator stock for the Pacific Salmon Commission (200,000 are coded wire tagged annually).

In a memo of June 12, 1991 from our Department of Fisheries to our Department of Community Development, Rich Brooks indicated "recent studies by the U.S. Geological

**Suquamish Tribe to KCBOC**

**RE: Whitehorse Golf Course and Residential Development**

Society and the Department of Health and Social Services (Department of Health) indicate that water quality in Grovers Creek is close to being unsuitable for salmonids. Due to the degenerating water quality and quantity in Grovers Creek, the Suquamish Tribe in 1990 initiated pond aeration and fish medication programs to counteract nutrient loading of Grovers Creek, and also began groundwater supplements of the creek water supply to obtain minimum flow requirements for the hatchery. Further degradation, however small, could preclude a salmonid propagation program at Grovers Creek."

At the direction of the Suquamish Tribal Council, the Suquamish Tribal Fisheries Department, Department of Natural Resources, Department of Human Services, and Department of Community Development concerns and requests were compiled in lengthy reports forwarded to the county and the developer. The Tribe contends that:

1. The developer should initiate actions in the watershed to ensure existing beneficial uses (i.e. hatchery) are maintained and protected. These actions should include methods to ensure that there will be no further degradation of the surface waters that would interfere with or become injurious to these beneficial uses. Measures should also be described to protect these uses during the construction phases and during the lifetime of this proposed development.
2. The developer should maintain a monitoring program to assess the additive effects this proposed project will have on the surface water quantity and quality.
3. Hydrologic changes this proposed project will have on the recharge of Grovers Creek and on the wetlands in the area.
4. Methods of stormwater treatment, including grassy swale specification, length of detention, and goals for water quality and quantity discharges.
5. Methods for ensuring the protection of the wetlands in the area. Methods should include procedures that will be conducted to fully characterize the wetlands prior to, during, and after the proposed development.
6. Corrective action program that will assess and decide on the mitigation actions to be taken in the event the beneficial uses, surface waters, and/or wetlands are affected by the proposed project. The funding mechanism to support the program and the corrective actions should be described.

## **GROUNDWATER**

Groundwater quantity is a major issue of concern with this project. The Kitsap County Ground Water Management Plan's Suquamish-Miller Bay aquifer system suggests that there is only one significant water producing horizon currently recognized in the project area. This horizon has a water rights appropriations from the State of approximately 4,000 acre-feet per

**Suquamish Tribe to KCBOD****RE: Whitehorse Golf Course and Residential Development**

year (1.3 billion gallons or 174 million cubic feet per year). Without an adequate appraisal of groundwater availability extreme care must be exercised in evaluating the groundwater needs and availability for a project of this magnitude.

Information indicates that Whitehorse would draw from the Kingston PUD #1 well. Kingston shallow wells are in jeopardy as we speak, with many reports of reduced water availability. If a deeper aquifer is located in this area, water level observations should be made at not only the production wells outlined by the Ground Water Management Plan's Suquamish-Miller Bay aquifer, but also the deep PUD well (27N/2E-35K01) to determine possible interference.

Based on the evaluation of the Kitsap County Ground Water Management Plan Exhibit A-9, "Shallow Aquifer Groundwater Elevation and Flow Directions Hansville-Indianola" and the USDA Kitsap County Soil Survey, the White Horse Project area rests upon approximately 50% of the suggested recharge area for the Indianola area. Particular concern and care must be addressed to the affect of the planned development to both the protection and the function of this area for groundwater recharge.

**TRANSPORTATION**

Since the early renditions of the Whitehorse project plans, traffic has significantly increased in North Kitsap. Certainly residents must make decisions on what level of service (LOS) we are content to accept. Whitehorse, following Pope Resources Applewood Development, is but another attraction to urbanites seeking a rural scape. Urbanites prefer efficient transportation systems. This development, as but another example of large residential developments in rural or semi-rural areas, adds to the transportation mix without any noticeable plans for transportation alternatives: bicycle path improvements, public transportation to the area, shuttles for recreational users, etc. Widened and improved roadways to three or more lanes on the routes the residents and users of this proposed project would utilize add to the cumulative degradation of tribal resources.

**NUMBER OF HOMES**

On June 17, 1991 the Tribe notified the developer: "Each home has the potential for dumping herbicide and pesticide contaminants into the soil and storm run-off system. The Suquamish Tribe would look favorably upon covenants that restrict the use of such contaminants. A reduction of homesites within the external boundaries of the Port Madison Indian Reservation is preferred, with the greenbelt area preserved linked into the Indianola greenbelt necklace for preservation and additional buffering." We have to date seen nothing that addresses these concerns.

**GENERAL COMMENTS**

People are impacted by such a development. As such a project would involve much construction, landscaping, customer services, business management, a good number of jobs



Suquamish Tribe to KCBOD

RE: Whitehorse Golf Course and Residential Development

would be associated with the building and operation of the development. As such, a conversation about the potential for tribal member employment was held at the wrap-up of the June 17, 1991 meeting with Mr. Gordon Bell, representing the developer. In that conversation with Marsha Reid, he indicated job opportunities for tribal members in grounds and golf course maintenance would probably be available. That comment clearly indicated the lack of understanding of the employment base available among college educated tribal members and others.

Thus far, the Whitehorse development has been a cumulative impact threat to the natural systems and the Port Madison Indian Reservation. Little has been said or written to indicate benefit.

By stretching out this process, the developer absorbs enormous costs, governments continue to fund their staff to prepare necessary documents, citizens take off from work to be present at inconvenient public testimony opportunities. Nerves get frayed, integrity gets impugned, and meanwhile, more and more evidence gets collected and reported that indicates the size and scope of this development is inappropriate for North Kitsap. It certainly is inappropriate on top of Indianola. It certainly is inappropriate for on top of and extending into the Port Madison Indian Reservation.

Sincerely,



Marsha A. Reid  
Department of Community Development

cc: Suquamish Tribal Council  
Governor's Office of Indian Affairs

Sorenson, a branch supervisor for a seed company.

She has announced she will run for the District 1 county commission seat currently held by Commissioner Bob Hart, and would like to return to county government after an absence of nearly eight years. Sorenson is a Democrat and Commissioner Hart, who is expected to run for re-election, is a Republican.

### Video Location Shooting Begins Next Week

(WSAC)

Producer Marty Gustafson and his camera crew will be on the road this month doing location shots for the video on county government. Work on the video, a joint project of Pierce County and WSAC, is well underway now; and plans are to premiere the finished product at the Summer Convention next month.

### Yakima County, Tribe Terminate Pact

(WSAC)

Yakima County and the Yakima Indian Nation have been forced to terminate their joint law enforcement agreement.

In 1994, the county and the tribe signed an agreement for cooperative law enforcement efforts within reservation areas. Among other things, the agreement would have meant the tribal officers would be deputized by the county to enforce state laws as they apply to non-tribal persons within the reservation area.

But the agreement hinged on the tribal police receiving law enforcement training at the state academy, or equivalent training. Another component required that tribal officers involved in individual disputes related to their jobs (such as wrongful arrests or wrongful deaths) would be handled in state courts.

WSAC (360) 753-1886

206 Tenth Avenue SE • Olympia, WA 98501

WACO (360) 753-7319

Many legislators are keenly interested in this idea already. If we should be prepared to introduce it again next year. While the legislature seemingly ran out of time, we should be prepared to introduce it again next year. While the legislature seemingly ran out of time, we should be prepared to introduce it again next year. While the legislature seemingly ran out of time, we should be prepared to introduce it again next year.

those services to be delivered. In the advent of future

WASAP COUNTY COMMISSIONERS

Number 9 MAY 13 1996

RECEIVED

se Journal

THREE COPIES INDIVIDUALLY ADDRESSED TO ALL

his candidacy for Secretary-Treasurer of the Washington State Douglas County Commissioner Brian Mayle has announced

WSAC Secretary-Treasurer

The Courthouse Journal •

Without assured uniform and recognized training standards for tribal officers, Sheriff Doug Blair felt that the county would be exposing itself to too much liability if it cross-deputized the tribal officers. To date, none of the tribal officers received state training.

Also, the tribal council passed a resolution which expressed its policy to never give up its sovereign immunity. That seemed to mean that tribal officers could never be taken to state courts to answer for actions they may have taken. Again, that apparently leaves the county totally liable for tribal officer actions if they were cross-deputized by the county to enforce state law.

The tribe counters that its officers receive training in a federal academy in New Mexico which is equal to or better than the state's training. Sheriff Blair said he cannot criticize the training the tribal officers have received because he doesn't know what precisely it is--and that is the point. He wants state training standards to be adhered to or, otherwise, the liability for the county is too great.

The tribe also says that as to the issue of liability, it is a matter of protecting the tribe's sovereign integrity rather than avoiding responsibility for the actions of its officers. As it now stands, the county and the tribe are back to cooperating where they can, such as sharing information on criminal activity.

### NACo Committee Positions Are Open

(WSAC)

All steering committees of the National Association of

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To: "Ryan, Matt"  
From: Perkerwicz, Ron  
Subject: pear street  
Date: 9/27/95 Time: 4:04PM

the porche is on tribal land and we can not do anything about this, sorry !

This was in regard to a citizens  
complaint regarding an abandoned  
car.

h

Exhibit 3

## Historic meeting with PUD, Commissioners and Council called off

By Charles Sign, Tribal Council Member

On April 25th, the Suquamish Tribal Council was to host what would have been a historic meeting between the Council, the Port Gamble S'Klallam Tribal Council, the Kitsap County Commissioners, and the Public Utility District (PUD) Commissioners. The Council scheduled the meeting to bring together the elected officials to discuss land growth and water usage related issues in the northern part of Kitsap County, near and on the reservation. We also wanted to discuss our concerns about off-reservation fishing areas, where we want to protect the habitat for our natural resources. The meeting was to be a beginning of a better relationship between the Tribes and County over land use, growth management, and water-related issues.

The meeting never took place.

We thought that we had set the ground rules of having only the elected officials in the meeting, with no staff, no lawyers, and no public. We thought wrong! The Suquamish and S'Klallam Tribal Council were waiting in the Council Chambers, when in comes County Commissioner Matt Ryan and PUD Commissioners, with their lawyer and others, including Pierce Davis, one of the most anti-Indian, anti-treaty rights persons living in our usual and accustomed area. Their justification was that it is unlawful for the Commissioners to meet, unless it's a public meeting. We requested that all the others leave the Chambers. Once this happened, they wouldn't meet with us. We tried to regroup, and meet with only one Commissioner, but the damage had been done. The S'Klallams went home, as did part of our Council.

Len Forsman and I went and talked with them in the Tribal Center lobby, to try and reschedule. County Commissioner Phil Best and a Sun reporter were also there. Len and Commissioner Ryan got into

some heated discussion, but we still made it clear that all we want is a working "government-to-government" relationship where the Tribe is included in early land use planning and decisions when it effects our people and resources. We want them to respect our government and recognize us for the sovereign nation that we are. Len made it clear that we are not going away and that they will have to deal with us.

The Suquamish Tribe is already appealing decisions or suing the County on several fronts dealing with land use, growth management, or water-usage. We believe that many of these issues could have been settled early on if the County would deal with us as a sovereign and on a "government-to-government" basis. The President of the United States deals with us this way (Chairman Emerson George will meet for the second time with President Clinton on April 28, 1995), so we wonder why Kitsap County, which is named after our greatest warrior and war chief, won't do the same.

Our plan now is to reschedule for late May, and hopefully find a way to meet with them, without the public, and without the lawyers and staff from both sides. We still look forward to doing this.

The Human Services Department has put together a resource booklet. The guide contains names and telephone numbers of agencies that provide services in the Kitsap area. Please come by or call Human Services (Ext. 460) if you would like a copy of this booklet.

polish. Other ideas are entirely new and well trained in those aspects of service delivery. First, the principles of "traditional police" are entirely sure exactly what the Tribal Council find out what it is and put it into practice in areas like drug testing for our police officers and is on-going. All the other mandates for studied and implemented whenever and where

I want to say now, however, that you and YOU, as an individual become involved in will not be successful in achieving what you want and a healthy community does not have hard work on everyone's part. I am going to Robert Peel in his short synopsis on police and times a relationship with the public that gives the police are the public and that the public are members of the public that are paid to give full incumbent on every citizen in the interest of common words, public safety is everyone's business.

The department, in the not too distant community member involvement in an effort to Program. The central element behind the concept is, once again, a partnership between the police to effect a safe and healthy environment for everyone can be integrated into the program if the departments who attempt such a venture as a position within the department of "Community the luxury of an additional position to handle it to find a way to do it without. That may not be INSUPPORTING THE PROGRAM PLEASE C

New Hiring: We are still in the process of the four top candidates for the two open hope to have everything completed soon, and are not going to cut any one background check target date, however. The responsibility to hire with the review board and the department. lightly. We will announce the names in the with a picture and a short write-up about them

The department applied for a COPS F. Justice for one additional police officer. If awarded, the new officer will be designated as a Specialist. He/she will be responsible for pro Traditional Policing Concepts. That position we now have in our 24-hour coverage attempts. We cannot function effectively like someone as police officers and putting them on call. You call 7 days a week and only pay them for 40 hours. cannot expect anyone to work or be on call 24 other hand, public safety is a 24 hour job, and I do that job. Your safety and the community's takes sufficient numbers of personnel carefully most efficient manner possible. When we do no officers to do the job, the Tribal community as violating the laws.

Your Tribal police department survives sources. The department begins with a basic Affairs. That budget is enhanced by grant award from this office to the BIA and other sources. To so far and I am in the process of writing on funding we would have an extremely difficult year with the limited funds available from the not new nor is it unique to our department. To with the same problems. We have, thus far, Suquamish. If you would like to know more about please call or stop in any time and we'll talk.

PLEASE NOTE: The adult civilian community members. We haven't heard from

Suquamish News

MAY, 1995

was Open at the law & justice  
public relations



## **TESTIMONY BY MATT RYAN BEFORE THE KING COUNTY COUNCIL 11-10-97**

As a former County Commissioner, I was asked to testify about assertion of county sovereignty over non tribal or fee land on Indian Reservations in King County.

In Kitsap County we asserted sovereignty because over 90% of the people living on the Port Madison Indian Reservation are non-tribal. If you haven't been doing it on your patch work reservations, my only comment is that you are failing to protect your constituents. For most citizens, who are of modest means, appeal and actions by you are the only bulwark they have against the governmental tyranny. They have neither voice nor vote in tribal councils. In cases that go to tribal court, there is no appeal. And from experience by some non-tribal Suquamish residents, justice was denied.

Rates for bonds and levies are based on assessed valuation. If you aren't taxing fee land in Indian ownership, you are shifting taxes to the non Indian population. Tribal members may choose to own fee land to be assured of the right of inheritance. Or in the case of large commercial projects they may have to in order to secure financing. If it isn't on your tax rolls and it isn't in trust, you are giving them a free ride.

Only in the United States would "sovereignty" be defined as full citizenship on one hand and exemption from common sense state and local regulations on the other. With patch work land ownership patterns, local governments and Indian tribes are attempting to rule the same piece of land simultaneously. Evolution of tribal governance, court decisions, and out of date legislation make a mockery of the basic tenets of tiered governance from federal to state to local levels. It makes no sense to create parallel regulatory structures which perpetuate points of friction from property rights and contracts to safety and the environment. Indians are no longer a separate people when they build casinos, amphitheaters, restaurants, and hotels that cater to the general public. In the notes that accompany my written testimony is a rebuttal article to what was published in the October 8 issue of Seattle Weekly. I ask you to join me in asking Congress to make needed and reasonable changes to the law. Of all people who deserve to be brought fully within the fold, the American Indians are they, the fastest assimilating minority in the United States.

Matt Ryan  
9080 Illahee Rd NE  
Bremerton, WA 98311-9308  
360-692-0186

*Exhibit 4*

## Stop Blaming the Courts for Problems with Tribes, Blame Congress

by  
Matt Ryan

History has taught painful lessons about geographically separating people in "ghettos" or reservations. It is so much easier for bigotry to justify intolerance when "they" are all together "over there." Isn't it time to declare that no matter what our origins be, we are all people? Americans? Of all people who should be brought fully within the fold, the American Indians should be they. They are the fastest assimilating minority in the United States.

We have focused our anger with the courts, who have struggled to create fair rulings in the vacuum left by Congresses since the end of the Indian Wars. As long as they choose to ignore the fact that the Indian Wars ended over a century ago, the long term affront to the losers of those wars goes on unabated, namely the reservation system. No other minority would allow themselves to be placed on a reservation.

Finally there is a Senator in the majority party, Senator Slade Gorton, who has the wisdom and guts to attempt to bring relations with the tribes into the modern world and the media paints him as a modern day General Custer. Nothing could be further from the truth.

At the heart of this issue is the fiction that tribes are "sovereign nations." Only here would "sovereignty" be defined as full citizenship on one hand and an exemption from local government on the other. With patch work land ownership patterns, local governments and Indian tribes are attempting to rule the same piece of land simultaneously. Like so much the federal government does, the special status has fostered a sense of dependency for individuals. The treaties with the federal government ignore the existence of state and local government, resulting in continuing needless friction and the catch twenty-two world where local people are forced to spend their money defending rights while paying taxes to pay for those whose resources are as deep as the federal treasury.

Rather than spell out the many continuing points of friction, it is better to stress that Indians are no longer a separate people when they build casinos, amphitheaters, restaurants, and hotels that cater to the general population. It makes no sense to create parallel regulatory structures.

The recent well publicized opposition to Senator Gorton's modest reforms displays well the fact that their leadership, whose interests are vested in the socialistic paternal system that has held them back, are the strongest advocates of keeping things the way they are.

Maintaining the facade of "sovereignty" is very expensive for the tribe and the federal government. Locally, the total Suquamish tribe comes to close to 900 people of

whom the tribe says about 450 live on the reservation. They have over 100 people employed in tribal government. Earlier suggestions that they enter into regional agreements have been rebuffed using the argument that to do so would be an infringement on their sovereignty. They have an administration of administrators, technicians, and tribal police, many of whom aren't tribal members. The tribe is a slim minority, less than 10% of the total population living on the reservation.

The treaties with the tribes should be honored. The major problem is not what is in the treaties, but what isn't. When they drew up and ratified them, neither side knew about health, fire, drainage codes that have evolved as the states were settled. Nor was the idea that individual members could sell off parts of the reservation. Or that Congress would turn hunters and gathers into innkeepers and croupiers serving all the people. Neither side could believe that today more children with Indian blood are born to white mothers than to Indian mothers. Or that demographers project that American Indians will be but 1% of the 2020 population.

These are the reforms that Congress needs to pass for the benefit of us all:

1. Change the definition of "sovereignty" to require tribal government to come under the umbrella of state and local laws as well as federal for all the usual functions of civil government. Unless they are organized into a different form of government, they should enjoy the same level of local sovereignty as a city.

2. For purposes of eligibility for rights and immunities spelled out in treaties and benefits whose cost is underwritten by federal appropriations, declare that the minimum "blood" for recognition as a tribal member is one quarter. Like most of the people in the United States, Native Americans are a soft minority who along with the rest of us in the melting pot are being molded into American Natives through the simple process of intermarriage. Such a floor does not imply that any one of whatever minuscule tribal ancestry cannot enjoy and take part in tribal culture and tribal governmental affairs to the extent the tribe allows.

3. Make provision for protection of the rights of those, who by choice or inheritance reside on reservation land, but do not qualify for tribal membership by establishing the requirement for a transitional government. Such government would require voice and vote in the civil government in the same manner as has been decided upon in the state in which the reservation is located. My recommendation would set the starting point when tribal population drops to between sixty and seventy percent.

- a. Such a standard would not mean that non-tribal people would take over tribal councils for they would continue to function to enjoy the property rights and privileges established under treaty. They would serve to protect and nurture the tribal heritage as much as societies and non-profit corporations do for other religious and ethnic groups. It should be up to the individual to decide

who he or she is for cultural heritage purposes.

b. Try civil disputes between Indians and non-tribal people in the appropriate state court.

4. If it hasn't been spelled out, only qualified tribal members should be allowed to harvest fish, shellfish, etc. Establish trigger points for reducing the harvest quota downward from 50% as the tribal population diminishes through assimilation. The deep seated anger of honest working men denied their livelihoods through this arbitrary quota system can only be aggravated as time diminishes their numbers.



**FACT SHEET**  
**SUQUAMISH CLEARWATER CASINO**  
**PUBLIC MEETING NOVEMBER 28, 1995 7:00 P.M.**

The Suquamish Tribe wishes to welcome you to Clearwater Casino Public Meeting. A great deal of planning has gone into the preparation and construction and we wish to share with you this information. This fact sheet addresses a number of concerns expressed by interested parties.

**TRAFFIC:**

The State Ferry System has included anticipated traffic from the Suquamish Clearwater Casino in its long range plans for the ferry system. The Casino is studying alternative ways to transport patrons to the casino.

Highway 305 - The study for Corridor 305 has already taken into account the anticipated traffic flow to the Casino. If and when modifications are needed to the existing traffic control at the intersection of Suquamish Way and Highway 305, changes will be made. As with the original traffic light, costs will be shared between the Tribe and the State DOT.

Plans are being made for providing Kitsap Transit busses between the ferry and the Casino and nearby towns and the casino. Plans are also being considered for coordinating employee travel to and from the Casino. The Tribe will provide incentives to both employees and Casino patrons to utilize public transportation and alternative forms of transportation, including high occupancy vehicles, as they become available. Any private transportation costs will be paid by the Casino.

**EMPLOYMENT:**

95% of the Casino employees are from the local area, i.e. within driving distance of the Casino facility. Less than 5% of the Casino employees (13 of 224) are relocating to this area from out of State. Impacts to the local school system will be minimal.

**PUBLIC SAFETY:**

The Tribe has entered into a compact (agreement) with the State of Washington which provides for an Impact Mitigation Fund. This fund could be as much \$200,000 per year to be paid to local jurisdictions, including Kitsap County, for public support services such as police and fire protection. Under the draft agreement, yet to be signed by Kitsap County, the County Sheriff's Department will receive half of the mitigation fund for the first two years to provide additional police services to the casino and the North Kitsap County area.

**ENVIRONMENTAL ISSUES:**

The Suquamish Tribe is not subject to the zoning or building permit rules of Kitsap County. No environmental assessment is required, as this is an expansion of the Tribe's current facility. An environmental assessment will be completed if and when a permanent facility is built on site.

On the current construction activity, the Tribe has made sure the necessary protections for the environment are being implemented and maintained during and after construction. Buffers have been maintained along the stream. Storm water is being managed. No additional trees will be cut. Noise levels will be managed during construction. Noise from busses warming up will be controlled so as not to disturb neighbors. Parking lot lighting will be subdued but provide maximum safety for patrons. Vegetation has already been planted. There is no intention to use Las Vegas style neon exterior lighting.

Sewage will be trucked off site until the Suquamish Wastewater Plant is expanded. The agreement between the Tribe and the County provides for sewer service at the expanded Plant with the Tribe paying commercial rates. The Tribe has sufficient water to provide service to the Casino and its patrons without affecting the wells of residential neighbors. No Marina at the site is anticipated. Although the Tribe has studied the possibility of a hotel and restaurant, no plans have been finalized.

*Exhibit 2.*



**Salt River**  
**PIMA-MARICOPA INDIAN COMMUNITY**

10005 E. OSBORN RD. / SCOTTSDALE, ARIZONA 85256-9721 / PHONE (602) 874-8000

**TESTIMONY OF THE**  
**SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY**  
**SCOTTSDALE, ARIZONA**

March 23, 1998

REFERENCE TO S-1691 "THE AMERICAN INDIAN EQUAL JUSTICE ACT WHICH WOULD WAIVE TRIBAL IMMUNITY FROM SUIT. CREATE JURISDICTION IN FEDERAL AND STATE COURTS FOR ACTIONS AGAINST INDIAN TRIBES. REQUIRE THE COLLECTION OF STATE SALES TAXES BY A TRIBE FROM NON-MEMBERS AND ITS REMITTANCE BY THE TRIBE TO THE STATE AND OTHER JURISDICTIONAL CHANGES.

The purpose of this written testimony is to oppose S. 1691 entitled "The American Indian Equal Justice Act" and to share how the Salt River Pima-Maricopa Indian Community deals with Business Dispute Resolution. Attached is a copy of the document entitled Salt River Pima-Maricopa Indian Community Business Dispute Resolution Practices and 25 U.S.C. S 416a (c). Lease Provisions. We request our written testimony be part of the record on the Sovereign Immunity Hearings conducted by the Senate Committee on Indian Affairs.

**BACKGROUND**

The Salt River Pima-Maricopa Indian Community was established by Executive Order on June 14, 1879 by President Rutherford B. Hayes. The Community is comprised of the Pima who are descendants of the Hohokam and the Maricopa who lived along the Gila and Colorado rivers and later migrated toward Pima villages in the 1800's. The Community is located in Maricopa County and is adjacent to the metropolitan Phoenix cities of Mesa, Tempe, Scottsdale, and Fountain Hills. The current enrolled membership is 6,060 and the land base is 53,000 acres.

**TRIBAL GOVERNMENT**

The Salt River Pima-Maricopa Indian Community is governed by the Tribal Council which is comprised of the President, Vice-President and 7 council members elected by the enrolled members of the Community. The President, Vice-President and Community Manager oversee the management of the comprehensive government development, operations and service including police, economic development, planning and engineering, education, employment and training, finance, fire, health and human

services, housing, human resources, judicial center, public works and recreation. The Tribal council operates like a state and federal government which must provide services and be responsible to its constituents.

### **TRIBAL ECONOMIC DEVELOPMENT**

The Salt River Pima Maricopa Indian Community is a Self-Governance tribe receiving only 3% of federal funds to support its programs. With its strong desire to strive for economic self-sufficiency, its location and need to protect cultural lands, the Community developed its own vision statement for use when making decisions about development in the Community.

Some of the business enterprises include the following: The Pavilions is the largest commercial development ever on Indian land and offers 1,000,000 square feet of retail shops, restaurants and entertainment facilities. The Phoenix Cement Company produces the most uniform cement in its marketing areas. The company supplies products to Arizona, Southern California, Nevada, Utah, Colorado, and New Mexico markets. In 1994, the Community became one of the major investors in purchasing controlling interests in Miss Karen's Inc., a nationally recognized premier yogurt company. Recently the Community launched Frozen Fusion, a fresh fruit juices frozen yogurt franchise. The Salt River Landfill is located on 200 acres. It opened in 1993 and received the Valley forward Award of Merit for Environmental Excellence and the Solid Waste Association of North America Bronze Award in national competition. The Salt River Sand & Rock specializes in ABC, select, sand, rock and landscape materials. In 1986 & 1987, this enterprise was rated one of the top ten sand and gravel producers in the United States.

With the interaction of Indian and non-Indians within the interior and exterior boundaries of the Community we have made an effort to not only protect our vested interests but to equally protect the interests of those we do business with. The credibility of our Community is a very serious matter we are conscious of when seeking business ventures.

### **ANALYSIS OF S.1691**

The bill S.1691 entitled "The American Indian Equal Justice Act" flies in the face of the very history of sovereign immunity from suit that is cited in the findings of the Bill (b) (4) by requiring of Indian Tribes what was done by the Federal and state governments' voluntarily and over time. The fact that the governments of the United States and the several States allow claims to be filed against them and suit filed under conditions different from those applied to ordinary citizens is not basis for requiring the waiver of the immunity held by Tribal governments. The Federal Government and the State governments waived immunity from suit in limited ways not as a recognition that governments occupy the same status as individual citizens but in order to allow the orderly flow of commerce.

Governments have a responsibility to the citizenship which exceeds the right of individual citizens. With government is placed the obligation to promote the general welfare and insure domestic tranquillity. From time to time the duty of the government to accomplish these goals may cause displeasure to some of its citizens. Tribal governments will find their own way to deal with the question of waiver of immunity from suit when that issue becomes an important one for the tribe, its members, on-members who live on the Tribal reservation and those that do business with the Tribe and its members.

## DEALING WITH BUSINESS DISPUTES

The question of Tribal waiver of sovereign immunity from suit has been a subject of interest of the Salt River Pima-Maricopa Indian Community for many years. As significant commercial activity became possible for the Community the need to find a way to grant waivers from immunity from suit became necessary. Without the ability to resolve disputes arising out of commercial activities it is not possible for Tribes to enter into the commercial mainstream. For the Salt River Community the issues of the nature of adjudication and the forum for adjudication of disputes were an important part of the resolution of the immunity question.

In the Act of November 22, 1983 (P.L. 98-163;97 Stat. . . 1016) 25 USC 416a (c) the Salt River Pima-Maricopa Indian Community laid the groundwork for resolving all three issues in proper cases. That statute provided for the grant of waivers of sovereign immunity from suit, provided for arbitration as the form of adjudication and granted jurisdiction the federal District Court as the forum of adjudication consistent with the Federal Arbitration Act. The effect of the Act was limited to situations in which the approval of contracts was required under 25 USC 81 and approval of leases under 25 USC 415 and 416. Every lease and every section 81 contract entered into within the Salt River Community since the enactment of the Act has contained a provision for arbitration under a waiver of immunity.

Some activities of the Salt River Pima-Maricopa Indian Community are not covered by the terms of the Act. Without the predicate of section 81 approval or lease approval the Federal District Court would not have Federal Arbitration Act jurisdiction over disputes involving the Community. The Community has recognized the need to provide for adjudication of disputes between itself and those it deals with in general commercial activities. It has met the need in various ways. Each of the business enterprises of the Community is organized under an ordinance enacted for that purpose.

Each such ordinance provides for waiver of sovereign immunity in three circumstances:

- 1) to secure return of personal property under the replevin ordinance of the Community,
- 2) to bring an action in tort in cases where the Community or its enterprise is insured for such a claim (the Community is fully insured) and



3) to bring an action in contract for money. The waiver and the consent to sue is further conditioned on the action being brought in Community Court and recovery being limited to the assets of the Enterprise.

The Salt River Indian Community has long had the policy of maintaining liability insurance sufficient to protect any person who was injured by the action of the Community or its employees. The Salt River Pima-Maricopa Indian Community has engaged in borrowing money from banks and other commercial lenders. While on occasion such transactions require section 81 approval, often from suit and agreed with the lender that adjudication may take place in the form of an arbitration in a forum having jurisdiction (either the Community or State court). In cases where it is not clear whether section 81 approval is required, waiver of immunity is consented to for Federal District Court jurisdiction under the Federal Arbitration act with the caveat that in the event the court does not accept jurisdiction a court having jurisdiction will be the forum.

The test of a system for the adjudication of commercial disputes might well be the extent to which the system has been used. In the fifteen years since the enactment of the Act, no party who has been subject to it has ever claimed relief under it. That there is a fair, clear and just way of adjudicating disputes has enabled parties to resolve their disagreements informally.

The Salt River Pima-Maricopa Indian Community determined in 1983 that the commerce with which it was becoming involved required it to develop a system of immunity waiver that would not unduly infringe on its ability to continue to govern itself and would achieve the purpose of dispute resolution. This it accomplished. As commerce and other involvement in the non-Indian world requires that mechanisms be created to resolve disputes, those Tribes and those persons with whom they have relationships will work out methods of dispute resolution that work for them.

## CONCLUSION

We are not faced with a system in great need of repair. Tribe governments are being assaulted by a narrow band of ideologies who wish the world was different. Different groups of people deal with their worlds in different ways. People legislate when the need arises and not in response to governmental threats.

The Salt River Pima-Maricopa Indian Community is a Government. Tribal sovereignty does not mean avoiding the jurisdiction of courts in all events and at all costs. It means having the same authority like a state or the federal government to decide for itself whether it wants to be sued or not and the manner it will be sued.



**Salt River**  
**PIMA-MARICOPA INDIAN COMMUNITY**

1806 S. OSBORN RD. / SCOTTSDALE, ARIZONA 85256-9722 / PHONE (602) 974-8000

## **SRPMIC Business Dispute Resolution Practices**

### I. CLAIMS MADE BY THE COMMUNITY AGAINST ANOTHER PARTY

Where the Community asserts a claim against another person the sovereign tribal status of the Community is substantially irrelevant. The Community pursues its claims as would any non-Indian entity. It has asserted claims on many occasions in the United States District Court in Phoenix, and in the District Court and Court of Claims in the District of Columbia. Although it prefers to proceed in federal court it has proceeded in the State Superior Court when it has been necessary to do so.

### II. CLAIMS MADE AGAINST THE COMMUNITY

#### A. Contract Claims

In its substantial commercial contracts that are approved by the Community Council the Community is almost always required to waive sovereign immunity and to submit to suit in actions arising under the contract. A binding arbitration clause is then placed in the contract.

This is always done by invoking 25 U.S.C. §416a(c), which affects only the Community and the San Xavier Indian Tribe. A copy of the statute is attached. Note that 416a(c) by its terms is limited to contracts subject to Section 81 and affecting reservation lands. This is the means of bringing the contract dispute into federal court where there would not otherwise be federal court jurisdiction and for this reason the Community relies heavily on it in all of its contracts. Some contracts may not affect reservation lands so the standard provision waiving sovereign immunity allows the other party to pursue it claims in any court of competent jurisdiction if the federal court declines jurisdiction.

In fact, there has never been a lawsuit under 25 U.S.C. 416a filed in any court since the law was passed in 1983. Disputes have always been resolved short of litigation.

B. Tort Claims

In most cases where the Community may be subject to tort liability it will be insured against the liability. In those cases the Council has taken the position that the Community, and not the insurance company defending it, may waive or assert sovereign immunity and, further, that sovereign immunity should be waived to the extent of the insurance coverage.

C. Other Situations

In situations not covered by A or B above, the Council decides, on a case-by-case basis, whether or not to assert sovereign immunity. For example, sovereign immunity has been waived in certain instances where an issue of importance to the Community would be decided one way or the other and it is better to be involved in the decision than to boycott it.

III. CONCLUSION

From this one may conclude that tribal sovereignty does not mean avoiding the jurisdiction of courts in all events and at all costs. It means authority to make reasoned decisions about assertion or waiver of sovereign immunity.

**25 U.S.C. § 416a. Lease provisions**

(a) **Covenant not to cause waste, etc.** Every lease entered into under the first section of this Act [25 USCS §416] shall contain a covenant on the part of the lessee that he will not commit or permit on the leased land any act which causes waste or a nuisance or which creates a hazard to health of persons or to property, wherever such persons or property may be.

(b) **Judicial enforcement.** The State of Arizona, or any political subdivision thereof contiguous with the San Xavier or Salt River Pima-Maricopa Indian Reservation, may bring suit, without regard to the amount in controversy, in the United States District Court for the District of Arizona to abate or enjoin any violation of the covenant required under section 2(a) of this Act [subsec (a) of this section]: *Provided*, That if, by reason of the citizenship of the parties and the law applicable to the cause of action, the District Court finds it lacks jurisdiction to hear and determine such suit, it may be brought in any court of competent jurisdiction of the State of Arizona.

(c) **Binding arbitration of disputes.** Any lease entered into under this Act [25 USCS §§416-416j] or the Act of August 9, 1955 (69 Stat. 539), as amended, or any contract entered into under section 2103 of the Revised Statutes [25 USCS §81], as amended, affecting land within the Salt River Pima-Maricopa Indian Reservation may contain a provision for the binding arbitration of disputes arising out of such lease or contract. Such leases or contracts entered into pursuant to such Acts shall be considered within the meaning of "commerce" as defined and subject to the provisions of section 1 of title 9, United States Code. Any refusal to submit to arbitration pursuant to a binding agreement for arbitration or the exercise of any right conferred by title 9 to abide by the outcome of arbitration pursuant to the provisions of chapter 1 of title 9, sections 1 through 14, United States Code, shall be deemed to be a civil action arising under the Constitution, laws or treaties of the United States within the meaning of section 1331 of title 28, United States Code.

(Nov. 2, 1966, P. L. 89-715, §2, 80 Stat. 1112; Nov. 22, 1983, P. L. 98-163, 97 Stat. 1016.)



TESTIMONY OF THE  
SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION  
ON SENATE BILL 1691, 105<sup>TH</sup> CONGRESS 2d SESSION

The Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in southeastern Idaho, present the following written testimony in opposition to Senate Bill 1691. Senate Bill 1691 strikes at the heart of tribal sovereignty by seeking to eliminate an essential attribute of such sovereignty – tribal sovereign immunity. This broad, far-reaching legislation is in direct conflict with the established federal policy of tribal self-determination, contravenes the well established principles of federal Indian law enunciated by the United States Supreme Court and Congress supporting tribal courts, and treats tribal governments in a discriminatory manner in violation of its trust responsibility. Senate Bill 1691, if enacted would have a devastating impact on the basic functioning of tribal governments to pursue economic development through contracting; to provide a stable revenue base for its membership without intrusions from state courts and tax agencies, and private sector; to protect their governmental coffers from frivolous lawsuits; to preserve their tribal judicial system from outside interference of foreign federal and state court judges; and provide for the general health, welfare and safety of their tribal community and reservation homelands. For the reasons above and presented more fully in this testimony, the Shoshone-Bannock Tribes must strongly oppose Senate Bill 1691.

The status of Indian tribes as governments has been confirmed repeatedly by the United States Supreme Court. It is thus well established that Indian tribes are sovereign entities with inherent powers of self-government. These inherent powers of tribal sovereigns are powers not delegated from Congress, but rather are powers that originate from the original sovereignty of Indian tribes, sovereignty which predates the European arrival to this continent and the formation of the United States.

Tribal sovereignty has several adjuncts, one of the most important of which is tribal sovereign immunity. Indeed, over 75 years ago, the Supreme Court recognized the tribal immunity doctrine. Turner v. United States, 248 U.S. 354, 359 (1919). This doctrine has been consistently reaffirmed by the Supreme Court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Oklahoma Tax Comm'n. v. Potawatomi Indian Tribe, 498 U.S. 505 (1991). Moreover, the common law immunity of Indian tribes is coextensive with that of the United States. Kennerly v. United States, 721 F.2d 1252 (9<sup>th</sup> Cir. 1983).

Tribal sovereign immunity is necessary to preserve the autonomous political existence of tribes. Furthermore, one of the fundamental purposes of sovereign immunity is to protect against unconsented lawsuits for retroactive relief in the form of money damages payable from a public treasury. Such relief is prohibited because it would deplete the public treasury as a means of compensating for past wrongs. Sovereign immunity also prevents unwarranted frivolous suits being filed against governments which can cripple a government's ability to govern if it must continually respond and defend such suits.

Senate Bill 1691 seeks to authorize the blanket waiver of the thoroughly embedded doctrine of tribal sovereign immunity, and open the door for lawsuits against tribal governments in several areas including general contracts actions, state taxation, and tort claims. The proposed legislation also permits such lawsuits to proceed in federal and state courts and totally disregard the established tribal court system and tribal laws enacted to control business and civil matters and relationships on Indian reservations and involving tribal governments. The Shoshone-Bannock Tribes adamantly oppose Senate Bill 1691 based on several reasons.

First, Senate Bill 1691 is a major retreat and is totally inconsistent with the well established federal-tribal relationship. The three branches of the federal government have formally acknowledged tribal sovereignty through two centuries of treaties, executive

orders, legislation and judicial opinions. In 1975, President Richard Nixon reversed the decades of assimilationist and domineering federal policy towards Indian tribes by announcing a new era of "Self-Determination" in which tribes would be supported in their efforts to gain tribal self-sufficiency. Each succeeding administration has embraced this Indian policy and the important government-to-government relationship, including President Clinton who reaffirmed it on April 29, 1994 when he issued his directive in dealing with Indian tribes. Accordingly, each administration has pledged its commitment to upholding its treaty obligations to tribes, and its trust responsibility to protect and preserve tribal institutions, resources and land, and communities from the intrusions of the majority society.

Similarly, an immense body of Indian law has developed in the judicial arena interpreting federal and other laws to uphold tribal sovereignty and its adjunct – sovereign immunity. The Supreme Court has most consistently recognized the inherent powers of tribal governments and interpreted many laws, regulations, and policies to reaffirm the essential powers of tribes to enter undertake commercial and business dealings, to control and regulate their territories, and to raise revenue in the form of taxes. In general, the Supreme Court has consistently upheld tribal self-determination, and preempted the intrusions of states into tribal matters.

The Congress has played a major role in bolstering tribal sovereignty and promoting the goal of tribal self-sufficiency. Congress has facilitated the self-determinations of tribes by the passage of legislation in a broad spectrum of areas including, economic development, financing, exemptions from certain state taxation, improvements for judicial and law enforcement systems, contracting, cultural preservation, education, social services, environmental regulation, and natural resources development. Significantly, Congress provided an exclusive role for tribes in each of these acts rather than assuming

that the federal or state agencies would undertake such responsibility. Indeed, in the field of environmental regulations Congress has treated tribes as states for purposes of primary authority, in the area of natural resource development, tribes have been provided greater flexibility in negotiating and entering into mineral agreements, and in the area of economic development tribes Congress has enacted legislation to facilitate tribal control and increase their governing capacity.

Overall, the major legislation enacted by Congress has vested important decisionmaking in tribal governments, and tribes are meeting the challenges of greater responsibility entrusted to them by the Congress and the courts. Tribal governments are increasingly complex entities with major infrastructures implementing and administering laws, controlling and regulating their territories and conducting business and development with majority society. Senate Bill 1691 now seeks to shift and abruptly change the major federal Indian policy of self-determination. Such a drastic change is unwarranted and would not be rationally related to the federal government's treaty commitments to tribes, and its trust relationship to tribes.

Second, Senate Bill 1691 threatens the political integrity of tribes in terms of their sovereign right to determine the law of torts, contracts and civil rights occurring on the reservation. The proposed legislation would permit state law to be applied in actions involving torts and contracts and federal law in civil rights actions, even if the case arose on in Indian territory and involved a tribal government. The Supreme Court has declared that tribal courts play a vital role in tribal self-government. Iowa Mutual Ins. V. LaPlante, 480 U.S. 9, 14 (1987). A tribe's role is critical particularly with respect to torts, an area of common law traditionally addressed through a judicial forum. The Tribes, no less than the states, have an essential interest in providing a court to hear tort claims arising within its territory and involving the tribal government. Moreover, allowing state law to be



applied to reservation based incidents is a direct intrusion into the affairs of tribal governments and their ability to make and enforce their own laws.

Senate Bill 1691 also disregards the tribal judicial systems established to hear civil matters including contract disputes, tort claims and civil rights violations, and instead permits such actions to be directly filed in federal and state courts. Elevating the power of state and federal courts at the expense of tribal courts is a direct assault on the concept of tribal sovereignty. Central among the powers of a sovereign and essential to tribal self-government is the provision of a forum for disputes arising on an Indian reservation. Indeed, the authority to provide a forum for such disputes is integral to the definition of tribal sovereignty. See, Iowa Mutual. Moreover, the examination and interpretation of tribal documents, constitutions and laws must in the first instance be undertaken by a tribal judge not a state or federal court judge. The doctrine of exhaustion of tribal court remedies provides state and federal courts with the benefit of a tribal judge's expertise. National Farmers Union Ins. Co., v. Crow Tribe, 471 U.S. 845 (1985). Additionally, in considering the Indian Tribal Justice Act, the Senate emphasized that "tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." S.Rep.No. 103-88, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 8 (1993). Similarly, the House confirmed the same understanding. H.Rep. No. 103-205, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 9 (1993).

Furthermore, over 160 years ago, the Supreme Court first articulated the policy against state interference in Indian affairs. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The concept that state law has no force in Indian country remains today and has been reaffirmed in an unbroken line of authority. In 1945, Justice Black proclaimed, "The policy of leaving Indian free from state jurisdiction and control is deeply rooted in this Nation's history." Rice v. Olson, 324 U.S. 786, 789 (1945). These basic federal Indian

law principles reinforce tribal sovereignty and a tribe's political ability to make their own laws and be ruled by them. Permitting the filing of lawsuits against tribal governments in federal and state forums, off-reservation, especially for reservation based actions totally ignores the well established case precedent. And, the bill permits the interference of state law in reservation and tribal activities, a concept that is inherently detrimental to any tribal political integrity and the authority of tribal courts. As emphasized in 1886 by the Supreme Court for its justification in excluding state control over Indian affairs: "They [Indians] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375 (1886). That justification is equally viable today for rejecting Senate Bill 1691.

Third, Senate Bill 1691 broadly waives the sovereign immunity of tribes for tort and contract claims while preserving the sovereign immunity of states. This unprecedented proposal amounts to an unequal treatment of tribal governments as opposed to the treatment of state governments in similar situations. This discriminatory unequal treatment of Indian tribes is certainly not "tied rationally to the fulfillment of Congress' unique obligation toward Indians." Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977). Significantly, Senate Bill 1691 is in direct conflict with the Congress' trust responsibility to protect the right of tribes to govern themselves and their reservations through and by the enactment of tribal self-determination legislation and policies.

Again, this proposed legislation is a direct assault upon the sovereignty of tribes. The legislation provides for a general, unlimited waiver of tribal sovereign immunity for contract and tort claims. Rather than recognizing that tribal governments have the authority to negotiate and decide to waive their immunity, particularly in business and commercial dealings, Senate Bill 1691 consents to lawsuits against tribal officials and

government. Senate Bill 1691 is based upon the misconception that every tribal government refuses to waive its sovereign immunity in all situations. Additionally, Senate Bill 1691 disregards the fact that many tribes doing business under their Section 17 Indian Reorganization Act Corporations have a waiver of sovereign immunity in their charters. Thus, there is an established means by which tribes do waive their sovereign immunity, but it does not waive the immunity of the tribal government as proposed wholesale by Senate Bill 1691. Tribes also waive sovereign immunity to the extent of the limits of liability insurance that the tribal government has purchased, and provide for limited waivers of sovereign if the proceeding is brought in the tribal court.

Congress has provided funding and legislation for tribal governments to pursue a wide array of business and commercial dealings to bolster tribal economies and provide for basic essentials on many reservations. Congress must also permit tribes the opportunity to make business decisions and enter into contracts without direct interference as set forth in Senate Bill 1691.

Finally, Senate Bill 1691 subordinates Indian tribes to individuals and corporations for the purpose of permitting tort claims against tribal governments. In short, such action would extinguish the entire sovereignty of tribes and turn back the hundreds of years of case precedent, congressional acts and executive orders recognizing tribes as sovereign governments. As made perfectly clear by the Supreme Court, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and territory." And Indian tribes "are a good deal more than 'private voluntary organizations.'" United States v. Mazurie. 419 U.S. 544 (1975).

In conclusion, Senate Bill 1691 is attempting to eliminate tribal sovereignty. Senate Bill 1691 is attempting to do so in the absence of any concrete facts or rational reasons to justify such devastating Congressional action. Clearly, this legislation must be rejected in

light of the overwhelming federal policy of supporting tribal self-government by all three branches of the federal government; in light of the established case law recognizing and upholding the authority of tribal judicial systems to adjudicate civil contract, tort and civil rights cases; and in lights of the Congress' trust obligations to Indian tribes.



# RED LAKE BAND of CHIPPEWA INDIANS



Red Lake, MN 56671

Phone 218-679-3341 • Fax 218-679-3378

DIVISION:

**TRIBAL COUNCIL**  
Organized April 18, 1918  
(Revised Constitution & By-Laws,  
January 6, 1960)

## OFFICERS:

BOBBY WHITEFEATHER, Chairman  
JUDY ROY, Secretary  
JAMES (GUS) STRONG, Treasurer

## DISTRICT REPRESENTATIVES:

ROMAN P. STATELY, JR.  
FABIAN COOK  
LARRY DUDLEY  
PRESTON GRAVES  
LAWRENCE BEDAU  
ALLEN ENGLISH, JR.  
BRUCE STILLDAY, SR.  
CLIFFORD C. HARDY

## ADVISORY COUNCIL:

7 HEREDITARY CHIEFS

## CHIEF COUNCIL OF 1880

May-dway-gwa-no-sied  
Nah-gau-t-gwa-ah  
Maya-co-ca-way  
Ahmah-me-ay-go-shig  
Naw-ay-tah-woob  
Nah-wah-quay-go-shig

## TESTIMONY OF THE HONORABLE BOBBY WHITEFEATHER, CHAIRMAN

### RED LAKE BAND OF CHIPPEWA INDIANS TRIBAL COUNCIL

Before the U.S. Senate Committee on Indian Affairs

Field Hearing in Seattle, Washington  
April 7, 1998

Mr. Chairman and Mr. Vice Chairman, I thank you and the other distinguished members of the Committee for this opportunity to provide written testimony on behalf of the Red Lake Band of Chippewa Indians on S. 1691, Senator Gorton's bill that would strip away from our tribe all of the vital protections of sovereign immunity. On behalf of the people of Red Lake, who reside on our reservation in northern Minnesota, we respectfully register our strenuous opposition to each and every provision in S. 1691.

### Background on the Red Lake Band of Chippewa Indians

Red Lake is a large tribe with 9,300 members. Our 840,000 acre reservation, including land and water areas, is held in trust for the tribe by the United States. While it has been diminished in overall size, our Reservation has never been broken apart or allotted to individuals. Nor has our Reservation ever been subjected to the criminal or civil jurisdiction of the State of Minnesota. Consequently, we have a large land area over which the tribe exercises full governmental authority and control, in conjunction with the United States. We have just completed our first year operating BIA-funded programs under tribal self-governance authorities and it has been a huge success.

Due in part to our location far from centers of population and commerce, we have few jobs available in the private sector economy. While unemployment rates throughout Minnesota have dropped to historically-low levels of 2.6%, our unemployment rate remains at an outrageously high level of 65%. The lack of good roads, communications, and other necessary infrastructure continues to hold back economic development and job opportunities.

Red Lake Enterprises: Red Lake Sawmill, Red Lake Fishing Industry,  
Red Lake Bingo, Red Lake Builders, Chippewa Trading Post-Red Lake & Ponemah

Until the United States government destroyed our timber, Red Lake was a wealthy, self-sufficient tribe in terms of the yearly value generated by renewable harvest of our natural resources that were supposed to be held and maintained in trust for our beneficial interest by the United States. These trust assets included a vast forest of renewable hardwood timber on our Reservation which, in the end, the United States mis-managed so terribly that it completely disappeared decades ago. Although it was our "trustee", the United States did not apply anything close to a trustee's care for our forests. Our trees could and should have been harvested in a renewable manner. Instead the United States pillaged our forests, stole the proceeds from that harvest, and never planted a renewable harvest. Now, generations later, we are left without our valuable renewable natural resources and are located far from population centers with their service and employment markets. While it has become the biggest of our revenues sources, gaming is only a small part of the answer for a remotely-located Tribe like Red Lake.

### **Overview of the Red Lake Band's Opposition to S. 1691**

The Red Lake Band of Chippewa Indians adamantly opposes each provision of S. 1691. While the bill claims to restore "justice" to individuals who deal with tribes, there is no justice to "restore" because it has never been lost. People are not being unjustly treated by our Tribe. The bill, S. 1691, is based upon completely negative and erroneous assumptions about Red Lake and other tribes, and betrays a dangerous misunderstanding of the unique relationship each recognized tribal government has with the United States government. We believe that if the bill became law it would impose upon tribes an injustice that is greater than the injustices of the past two and one-half centuries that our tribe has borne. If adopted into law, the bill would directly cause the functional termination of our tribal government and the complete theft of our remaining tribal resources, ending both our special relationship with our land and water and our unique government-to-government relationship with the United States. We believe S. 1691, if enacted, would financially bankrupt our tribe because it would expose our tribal government to costly suits in the courts of other sovereign governments who would have complete authority to hear any suits by any person with any kind of complaint against our tribal government.

S. 1691 claims it will restore fairness, equity, and due process to individuals, both tribal and non-tribal members, by completely removing sovereign immunity from all Indian tribal governments. If a United States Senator proposed a federal bill to completely remove the sovereign immunity of the Minnesota state government, it would be considered an outrage. It is just as outrageous for Senator Gorton to propose to completely remove the sovereign immunity of the Red Lake tribal government. The underlying reasons for our sovereign immunity are the same as those supporting Minnesota's immunity. No one but the state itself should be able to remove the state's sovereign immunity. Likewise, no one but the tribe itself should have the power to remove the tribe's sovereign immunity. The only proper entity that has the authority to waive or remove its sovereign immunity should be the government the immunity protects.

Like all governments, the Red Lake Band of Chippewa Indians has, on occasion, waived its sovereign immunity from suit in limited circumstances for limited purposes. That decision was made by the sovereign authority of the tribe, because the tribe believed it was in its best interest to do so on a case by case basis. Many states today similarly maintain strong immunity protections. Like tribes, state waivers of their sovereign immunity are often very limited, leaving individuals with sharply limited or no relief when injured by state workers acting in the course of

their employment. Our Tribe exercises our immunity in ways that are very similar to state and local governments. But if one reads the "findings" set forth in S. 1691, it would appear we are the villains of all that is wrong in America at the close of the 20<sup>th</sup> century - that our tribal sovereign immunity is "frustrat[ing] justice and provok[ing] social tensions and turmoil inimical to social peace." S. 1691, Section 1(b)(8). Nothing could be further from the plain and simple truth.

The truth of the matter is this — most state and local governments routinely exercise their sovereign immunity. As a result, people who are injured by these governments or their employees cannot recover damages for injury even though a private party would be liable if it caused such an injury.

The *Seminole Tribe of Florida vs. State of Florida* case is perhaps the clearest recent example of how states regularly exercise their sovereign immunity. While states may join with Senator Gorton in opposing tribal sovereign immunity, they are entirely unwilling to surrender their own.

Another "finding" in S. 1691 asserts that governments universally afford "all persons ... legal remedies for violations of their legal rights." S. 1691, Section 1(b)(1). Again, this finding is a fiction. Federal, state and local governments typically limit the amount of damages that can be assessed against them when they waive their immunity. The United States has imposed significant limitations on tort suits against itself or its employees by enactment of the Federal Tort Claims Act, which limits recovery to certain amounts and for certain wrongs and retains complete immunity against prejudice interest or for punitive damages.

One "finding" conspicuously absent from S. 1691 is the fact that the United States has extended coverage under the Federal Tort Claims Act for years to tribal governments, and their employees acting within the scope of their employment, when they are carrying out the purposes of a contract, grant or agreement under the Indian Self-Determination and Education Assistance Act of 1975, as amended, Pub. L. 93-638, whereby the tribe has assumed programs, functions, services and activities that were previously administered by the federal government. This means that most of the essential governmental services performed by most Indian tribal governments are treated the same, for purposes of tort liability, as if a federal worker was involved. If a BIA-funded tribal police officer accidentally causes injury while performing his or her duties, the tort liability is borne by the United States under the Federal Tort Claims Act, just the same as it would be if a BIA federal police officer had been involved instead of the BIA-funded tribal police officer.

Another finding set forth in S. 1691 implies that "more than a century" ago all other governments in America "dramatically scaled back" their sovereign immunity. S. 1691, Section 1(b)(4). Again, this "finding" is contrary to the truth. For example, it was only in 1994 that the highest state court in North Dakota first waived North Dakota's immunity in tort and then only for non-discretionary acts and only prospectively.

It appears that most state governments have waited to issue limited waivers of their immunity until they have become satisfied that their public treasuries can handle the legal and financial costs that follow a waiver. Tribes like Red Lake are only in recent years beginning to re-develop and restore the economic and political systems that can survive waivers of immunity. Tribes like

ours are many years behind state governments in this regard. We have only very limited resources, no tax base to speak of, and depend to a significant degree on the federal treasury to fund essential governmental services. Our sovereign immunity is an absolutely vital part of our recovery plan. S. 1691 would take away our freedom to decide when an immunity waiver will help or hinder our growth and development. It should be opposed as the height of colonialism.

Not only would S. 1691 remove our sovereign immunity, Section 6(a) would decide that cases brought against us would be filed in courts other than our own. This would be unprecedented in America. When the federal or state governments waive their own immunity from suit, they each limit that waiver only to apply only to cases brought in their own courts and not the courts of their neighboring governments. Indian tribes are entitled to similar treatment.

"Indian tribes enjoy immunity because they are sovereigns predating the Constitution ... and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy."<sup>1</sup> Without immunity as a shield, our tribal treasury will quickly be exhausted, and our tribal political decision-making process will be unduly influenced, as we defend against the threat and filing of lawsuits in foreign courts that challenge the choices we have made concerning the lands and people in our territory.

We must stress, however, that the Red Lake Band of Chippewa Indians is not in the business of harming and injuring people. We regularly resolve disputes that arise in our dealings with non-members. We purchase liability insurance. Much of our activities are covered by the Federal Tort Claims Act. Our tribal government operates in an open manner, with our business meeting minutes published for all to see and review. Our tribal courts have been functioning for many years, accomplishing a great deal with very little resources. Our voters actively participates in tribal elections, resulting in a stable tribal government which demonstrates that loyal dissent has been integrated into and given a voice in our tribal governing structures.

What we lack is the sustaining tribal economy we had decades ago before the United States looted our forests.

In discussing why he believes S. 1691 should be enacted, Senator Gorton has noted that one Justice of the U.S. Supreme Court has called tribal sovereign immunity an "anachronism". Mr. Chairman, the tribal sovereign immunity of the Red Lake Band of Chippewa Indians is not an anachronism in any sense of the word. It is alive and well and extremely useful as a bulwark against an inevitable onslaught of litigation designed to cripple our fragile Reservation economy and gain access to our land, water, and natural resources by bankrupting our tribal government operations.

People who may be injured by the action of our tribal government employees have several avenues for relief. Coverage is extended in most instances under the Federal Tort Claims Act and our various insurance policies. Moreover, the courts have found, under the doctrine of *Ex*

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<sup>1</sup>/ *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8<sup>th</sup> Cir. 1985).



*Parte Young*<sup>2</sup>, that Tribal officials who act outside the scope of their duties or in excess of the authority which the Tribal government can confer on them<sup>3</sup>, can be sued for prospective injunctive or declaratory relief to require them to comply with the law.<sup>4</sup> While suits for monetary relief are not within the scope of the *Ex Parte Young* doctrine, because they would affect a Tribe's treasury and are thus against the sovereign,<sup>5</sup> in virtually all instances injured parties can find some relief.

Another provision in Section 4 of S. 1691 would vest the federal district courts with jurisdiction in "any civil action or claim which arises under the Constitution, laws or treaties of the United States." This provision of the bill would legislatively overturn the decisions of the Supreme Court in *Santa Clara Pueblo v. Martinez*<sup>6</sup> and *National Farmers Union Insurance Company v. Crow Tribe of Indians*.<sup>7</sup> Both of these decisions upheld the inherent sovereign right of Indian tribes to be self-governing which has been affirmed continuously by the Congress and the federal courts, including the right to establish their own forums for the resolution of disputes arising within their territories.

In Section 5 of S. 1691, the language apparently intends to extend to Indian tribes the waivers of sovereign immunity which the Congress has authorized for the federal government in the Federal Tort Claims Act.<sup>8</sup> However, there are significant exceptions and limitations to the waiver of

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—2/ 209 U.S. 123 (1908).

—3/ *Santa Clara Pueblo*, 436 U.S. at 58. See, *Wisconsin v. Baker*, 698 F.2d 1323, 1332 (7th Cir. 1983), *cert. den.* 463 U.S. 1207 (1983) ("[A]n official of an Indian tribe should be stripped of his authority, and corresponding immunity, to act on behalf of his tribe whenever he exercises a power that his tribe was powerless to convey to him."). The federal courts have entertained a variety of suits by non-Indians against Indian tribes which have challenged tribal laws or the application of tribal laws. See, *Kerr-McGee Corporation v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) and *Tenneco Oil Company v. Sac and Fox Tribe of Indians*, 725 F.2d 572 (10th Cir. 1984).

—4/ See, e.g., *Arizona Public Service Company v. Aspaas*, 77 F.3d 1128, 1133-34 (9th Cir. 1995); *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 63 F.3d 1030, 1050-51 (5th Cir. 1995) and *Northern States Power Company v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 460 (8th Cir. 1993).

—5/ See, *Edelman v. Jordan*, 415 U.S. 651 (1974). The Tenth Circuit has recognized the equitable recoupment doctrine as an exception to the bar on monetary relief which applies to Indian tribes to the same extent it is applied to the federal and state governments. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982).

—6/ 436 U.S. 49 (1978).

—7/ 471 U.S. 845 (1985).

—8/ 28 U.S.C. §§ 2671 et seq. (1994).

federal sovereign immunity under that Act which are not extended to the tribes under S. 1691.<sup>9</sup> Section 5 of S. 1691 would effectively repeal 25 U.S.C. §450f(d), thereby eliminating Federal Tort Claims coverage for tribal employees who are carrying out federal functions pursuant to the Indian Self-Determination Act. However, the bill would continue to provide for federal or state immunity for any federal or state employees who may be employed by a tribe. The federal procedure provides an opportunity for each federal agency to review, "adjust, determine, compromise and settle" any claim for damages against the United States as a result of a negligent or wrongful act or omission of an employee of the agency. Acceptance of an award by an agency "constitute[s] a complete release of any claim against the United States and against the employee of the government."<sup>10</sup> Section 5 of S. 1691 authorizes a tribe to settle or compromise a claim, but it fails to make such a settlement or compromise binding on the claimant. The bill fails to extend to tribes the provision applicable to claims against federal agencies that require that a claimant submit the claim to the agency and exhaust agency remedies prior to vesting jurisdiction over the claim in the federal courts.<sup>11</sup> The bill would subject tribes to liability "in the same manner and to the same extent" as a private individual or corporation. The federal government is only subject to liability as a private individual under the Federal Tort Claims Procedure.<sup>12</sup> In addition, the United States is authorized to assert its judicial or legislative immunity "as well as any other defenses to which the United States is entitled" with respect to any claim brought against it.<sup>13</sup> The bill does not include any similar provisions for Indian tribes. If a judgment is entered on a claim under the Federal Tort Claims Procedure, it operates as a complete bar to any action by the claimant against the federal employee.<sup>14</sup> S. 1691 fails to provide similar protection for tribal employees. In cases of wrongful death, the bill would make an Indian tribe liable for actual or compensatory damages to each person on behalf of whom an action is brought. There is no similar provision in the Federal Tort Claims Procedure. The Federal Tort Claims Procedure limits attorney fees to 25% of any judgment or 20% of any settlement.<sup>15</sup> S. 1691 does not include any limitations on attorneys fees for claims against Indian tribes. The federal procedure provides that the remedies authorized against the United States are exclusive and precludes any other civil action for damages against the United States.<sup>16</sup> S. 1691 does not include comparable

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—2/ It is also should be noted that the federal Tort Claims Procedure was not enacted until 1948 and that it was amended as recently as 1988 in order to restrict and limit possible claims against federal employees. 62 Stat. 982 (June 25, 1948); P.L. 100-694, § 3 (Nov. 18, 1988).

—10/ 28 U.S.C. § 2672 (1994).

—11/ 28 U.S.C. § 2675(a) (1994).

—12/ 28 U.S.C. 2674 (1994).

—13/ Id.

—14/ 28 U.S.C. § 2676 (1994).

—15/ 28 U.S.C. § 2678 (1994).

—16/ 28 U.S.C. § 2679(b)(1) (1994). This exempts civil actions against federal employees for Constitutional violations or pursuant to a particular statute. 28 U.S.C. § 2679(b)(2) (1994).

provisions for tribes. The only exception to the waiver of tribal sovereign immunity in the bill pertains to matters involving disputes over tribal membership. Among the numerous exceptions to the waiver of federal immunity in the Federal Tort Claims Procedure are claims: based on the performance or non-performance of discretionary functions or duties by federal employees; based on the assessment or collection of taxes or the detention of any goods or merchandise by a law enforcement officer; or arising out of assault, battery, false imprisonment, false arrest (with an exception for acts or omissions by federal law enforcement officers) malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.<sup>17</sup>

The foregoing analysis reveals that while S. 1691 purports to waive tribal immunity in a manner similar to the waivers of federal immunity, it does not do so. Rather, it waives tribal immunity completely, opening the door to virtually unlimited lawsuits against a tribal government or tribal official or employee, while leaving in place numerous and significant limitations on the ability of an aggrieved or injured person to bring suit against the federal government or a federal official or employee.

Finally, Section 6 of S. 1691 would authorize suits against Indian tribes in state courts for tort or contract claims. Such suits could not be removed to federal court. In contrast, the Tucker Act and the Federal Tort Claims Procedure vest jurisdiction to hear claims against the United States exclusively in the federal courts and provides for the removal to the federal courts of any claims filed in the state courts.<sup>18</sup> This section of the bill also would overturn long standing federal judicial doctrines which require civil claims arising on Indian reservations or in Indian Country to be heard in tribal courts<sup>19</sup> and statutory limitations on the ability of state courts to assert jurisdiction over actions arising in Indian Country.<sup>20</sup> The effect of this provision would be to eliminate any role for tribal law and tribal courts in contract or tort actions, thus removing essential attributes of governmental power—the power to establish laws and tribunals for the resolution of disputes—from the tribes.

Finally, S. 1691 would, by its terms, apply to cases filed on or after the date of enactment rather than to claims that arise on or after the date of enactment. This would remove tribal sovereign immunity retroactively and subject tribes to suits over matters which arose several years before the date of enactment, depending on the applicable statute of limitations.

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<sup>17</sup>/ 28 U.S.C. § 2680 (1994).

<sup>18</sup>/ 28 U.S.C. 1346(b) (1993), 28 U.S.C. 1441 (1994) and 28 U.S.C. 2679(d)(2) (1994).

<sup>19</sup>/ See, e.g., *Williams v. Lee*, 358 U.S. 217 (1959); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) and *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

<sup>20</sup>/ 28 U.S.C. § 1360 (1993) and 25 U.S.C. §§ 1321 et seq. (1983).

### Conclusions

Despite what is said by Senator Gorton, tribal sovereign immunity is not a "complete shield" by which tribal governments are able to engage in unchecked abuses of power. In many respects, tribal immunity is already parallel to the immunity enjoyed by the United States and the state governments.

The underlying rationale for S. 1691 is to deal a fatal blow to the ability of Indian tribes to protect tribal assets and to function effectively as governments. Such proposals are contrary to longstanding federal policies. The Congress has consistently affirmed its special relationship with and responsibility to Indian tribes.<sup>21</sup> In the Tribal Justice Act of 1994, the Congress found that: "[T]he protection of the sovereignty of each tribal government" is part of the federal "trust responsibility to each tribal government."<sup>22</sup> As the Supreme Court stated in *United States v. Wheeler*, "[o]ur cases recognize that the Indian tribes have not given up their full sovereignty."<sup>23</sup>

S. 1691 is a proposal to dismantle the federal trust relationship with tribes, to abandon the trust responsibility for Indians, and to override centuries of colonial and constitutional history by terminating the self-governance of the tribes over their actions, territories and people.

The doctrine of tribal sovereign immunity has been the cornerstone of federal Indian law and policy since the beginning of the United States. If enacted, S. 1691 would eliminate that immunity, remove jurisdiction from our tribal courts, subject our Tribe to unfettered litigation in the state and federal courts without our consent. We would go bankrupt, and once without the power that resources provide to us, cease to function as a tribal government. The result is as deadly to tribal government as were the explicit termination proposals of the mid-20th century. S. 1691 is supported by false fears and fictional allegations. It is the request of the Red Lake Band of Chippewa Indians, that S. 1691 be rejected and defeated.

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<sup>21/</sup> See, e.g., 25 U.S.C. §§ 450(a) and 1601(a) (1983) (referring to "the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people"); 25 U.S.C. § 1901(2) (1983) ("Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources."); 25 U.S.C. § 2401 (Supp. 1997) ("[T]he Federal Government has a historical relationship and unique legal and moral responsibility to Indian tribes and their members."); 25 U.S.C. § 2502(b) (Supp. 1997) ("The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing trust relationship and responsibility to the Indian people . . ."); 25 U.S.C. § 2701(4) (Supp. 1997) ("[A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."); 25 U.S.C. § 2901(2) (Supp. 1997) ("[S]pecial status is accorded Native Americans in the United States, a status that recognizes distinct cultural and political rights, including the right to continue separate identities.") and 25 U.S.C. § 3601(3) (Supp. 1997) ("Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes.").

<sup>22/</sup> 25 U.S.C. § 3601(2) (Supp. 1997).

<sup>23/</sup> 435 U.S. 313, 323 (1975).





Confederated Tribes and Bands  
of the Yakama Indian Nation

Established by the  
Treaty of June 9, 1855

**Statement of the Yakama Nation Relative to the Proposal By Senator Gorton to  
Eradicate Tribal Sovereign Immunity (S. 1691)**

**April 7, 1998**

Toppenish, Washington - Last year, in an attempt to justify a far-reaching proposal that would have destroyed the authority and ability of Indian tribes to carry out their functions as units of government, Senator Slade Gorton repeatedly referenced a vehicular accident that occurred on our reservation involving a tribal police officer and a young non-Indian reservation resident named Jered Gamache. This statement is intended to update the public on the status of that situation and to express our disappointment regarding the inappropriate use of the Gamache incident as a means to discredit the Yakama Indian Nation. While this was a sad and unfortunate incident, it does not remotely support Senator Gorton's argument that tribal governments should be deprived of our sovereign immunity.

On October 25, 1994, a fully trained police officer of the Yakama Nation was responding to an emergency call for back up assistance from the Yakama County Sheriff's office. What had initially started as burglary at a convenience store had escalated into reports of gunfire, and the officer was proceeding in her cruiser to the scene. She had both her emergency flashers and sirens on as she approached an intersection on Route 97. The officer slowed down, ascertained that the one vehicle she could see (a van) at the intersection was aware of her presence and then proceeded through the intersection as the light turned from green to red. Unfortunately, a smaller vehicle being driven by Jered Gamache was behind the van and completely out of the officer's line of sight. Mr. Gamache pulled his vehicle into the intersection and was struck by the officer's police cruiser. (It may be that the radio in Mr. Gamache's car prevented him from being able to hear the police cruiser's sirens.) Mr. Gamache was killed by the impact of the accident. The tribal police force has expressed great remorse to the family involved and the officer has suffered tremendously and emotionally as a result of the accident.

Last year, Senator Gorton sighted the Gamache tragedy and made a shocking analogy to the infamous beating and sodomy inflicted on Haitian immigrant Abner Louima by rogue New York city police officers. To suggest that there are similarities between a vehicular accident involving a police officer carrying out her official duties (and following standard procedures), and the illegal beating by cops acting outside their line of duty was breathtaking in itself. In making the analogy, the Senator wondered why, if Mr. Louima was going to be seeking compensation, should the Gamache family be barred from seeking compensation. Senator Gorton publicly stated, "Jered Gamache's family has been unable to obtain any recourse or any compensation for the loss of their son's life."

**This statement is now, and was at the time, completely false.** At the same time that the Senator made this statement, the Gamache family was proceeding with a claim in federal district court against the police officer under the authority of the Federal Tort Claims Act (FTCA). The FTCA applies to federal employees carrying out their official responsibilities and to tribal employees carrying out federal

responsibilities pursuant to an Indian Self-Determination Act contract. **As reported in the Yakima Herald Republic newspaper on December 10, 1997, the Gamache family has in fact reached an out of court settlement and been compensated.** What is important to keep in mind is the fact that the FTCA is the precise remedy that would have been available to the Gamache family had their son been killed by a law enforcement officer of the National Park Service, the FBI, the Bureau of Land Management or any other federal law enforcement official. Had an FBI agent been involved in the same accident as the tribal police officer, would Senator Gorton have made the analogy he did to the beating of Abner Louima? Clearly, he would not have been so reckless.

The Gorton proposal to eliminate the sovereign immunity of tribal governments is based on his assertion that such immunity, in his words, is an "anachronism" and that no other governments in the United States (state, local or federal) rely on it except for Indian tribes, which, he intimates, rely on it in every instance. This statement also is completely false. The last time we looked, the Eleventh Amendment of the United States Constitution had not been repealed. In fact, ironically, the Supreme Court has twice in the last two years relied on the Eleventh Amendment to prohibit an Indian tribes from suing a state in both the Coeur d'Alene Tribe's case against Idaho and the Seminole Tribe's case against Florida. Volumes of cases could be cited wherein states still rely on sovereign immunity as a defense against suit. When states do voluntarily waive their immunity, they severely limit the manner and extent of the claims that can be pursued against them. For instance, Arkansas, Georgia, Hawaii, Idaho, Maine, Mississippi and Missouri only waive immunity to the extent of their insurance coverage. Nebraska, North Carolina, South Dakota, Tennessee, and Vermont have laws that cover the limits of the liability for municipalities and political subdivisions. We understand that suits against the state of Texas can only proceed if the state legislature has first taken action to authorize the suit. Furthermore, in every instance where there is a waiver, the claim must be pursued in the state's own courts. The Gorton proposal in S. 1691 is not only an absolute waiver of all aspects of sovereign immunity, it would allow suits against the tribal government in the court system of the state and federal governments, not before tribal courts. Imagine the reaction from the state of Washington if the Congress passed a law totally waiving all aspects of state and local immunity and further directed that suits against the state could be heard only in federal or tribal court. The response from the state AG's office would be deafening. To suggest that tribal courts are not impartial and that state courts are somehow "neutral" defies the experiences of tribes for many years as confirmed by the Supreme Court in the case of *United States v. Kagama* wherein the court opined, "Tribes owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." Additionally, the best solutions to jurisdictional problems that exist between tribal and state governments are those which are negotiated and resolved locally. As long as tribes and state both have a degree of sovereign immunity, they can approach each other as governments and respect each other's relative independence. These arm's length discussions have led to hundreds of negotiated agreements. Radically altering the playing field to disadvantage tribes will erode tribal/state relations rather than encourage mutually acceptable government-to-government agreements. As Governor Gary Locke stated in correspondence on September 10, 1997, these proposals would "undoubtedly weaken the political, social and economic infrastructure needed to ensure healthy, stable tribal communities."

Contrary to Senator Gorton's assertions, many tribal governments waive their immunity from suit on a regular basis. However, just as the state waivers are determined by state legislatures and only authorize actions to be brought in state courts, tribal waivers also take place under terms decided by the

tribal government and authorize claims in tribal courts. The Indian Law Reporter is replete with case after case in which tribal courts have heard cases against tribal governments. A number of the attorneys who testified at the March 11 hearing of the Indian Affairs Committee on S. 1691 cited those cases or referenced them by citation in their written testimony.

In recognition of the inter-relationship between sovereign immunity and tribal economies, the highest courts have noted that a blanket waiver as proposed by S. 1691 could surely bankrupt all but the few wealthiest tribes. In the recent Potawatomi decision, the Supreme Court stated:

A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. Congress has consistently reiterated its approval of the immunity doctrine [in Acts which] reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."

Finally, it is not only Indian tribes and dozens of legal scholars in the field of Indian law but at least ten State Attorneys General who oppose the eradication of tribal sovereign immunity. After a five-year investigation into the field of Indian law and civil rights matters on Indian reservations, including numerous field hearings, the United States Civil Rights Commission determined that further encroachments into tribal government sovereignty were "unwarranted and inappropriate". Numerous newspaper editorials have opined against the Gorton proposals, including the local Yakima Herald Republic, which stated last September that "Senator Gorton's latest broadside at Indian tribes is off the mark in both form and content." The editorial went on point out that "tribal sovereignty is a reality, guaranteed and recognized by treaties with the United States government." Furthermore, the Herald Republic said that Gorton's efforts to draw similarities between the Gamache and the Louima situation were "outrageous" and concluded by indicating that it is most appropriate for the tribes to fashion a program of justice on their reservations, as it is they who have the authority to do so. The Chattanooga Times last year editorialized that governmental immunity is a concept which is "commonly invoked by local governments" clearly taking exception to the Senator's view that it is an anachronism. The paper concurred with and cited Interior Secretary Babbitt's view that the legislation is "one of the most radical and unjust of a stream of recent Congressional proposals" to undo Indians' remaining rights and concluded by stating that the President should not hesitate to veto legislation containing the Gorton amendments. Last September, the Oregonian called on the Senate to "reject the Gorton riders out of hand." In the same month, the Lewiston Morning Tribune referred to the Gorton riders as "a one-man crusade to destroy those treaty rights American Indians still have..." In an editorial on March 21, 1988, the New York Times stated that S. 1691:

"would fundamentally alter America's longstanding commitment to self-governance among the nation's 554 tribes, a commitment backed by Federal treaties, statutes and court decisions. Sovereign immunity is essential to self-governance because it protects the public treasury and shields governments from being sued into extinction. Federal, state and local governments, as well as tribal governments, have always been able to claim this prerogative, although they have voluntarily waived it in some circumstances."

We are enclosing the entirety of the recent New York Times editorial and urge the rejection of this ill-conceived and meritless legislation.

"All the News  
That's Fit to Print"

# The New York Times

VOL. CXLVII . . . . No. 51,103

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SATURDAY, MARCH 21, 1998

## A Threat to Indian Sovereignty

Senator Slade Gorton has once again declared war on the Indians. Having failed last year to undermine the concept of Indian sovereignty with a sneaky amendment to an appropriations bill, the Washington State Republican has now offered a freestanding bill, erroneously labeled the "American Indian Equal Justice Act," that is a reprise of last year's rider. The bill would, among other things, deprive Indian tribes of their sovereign immunity against civil lawsuits.

This would fundamentally alter America's longstanding commitment to self-governance among the nation's 554 tribes, a commitment backed by Federal treaties, statutes and court decisions. Sovereign immunity is essential to self-governance because it protects the public treasury and shields governments from being sued into extinction. Federal, state and local governments, as well as tribal governments, have always been able to claim this prerogative, although they have voluntarily waived it in some circumstances. Without immunity, lawsuits could cripple smaller tribes.

Mr. Gorton's bill would also authorize civil actions against tribes in Federal and state courts

rather than in tribal courts. He argues that this merely places disputes in a neutral forum, but in fact this change is an assault on the administration of justice by tribal governments. The bill would also allow states to sue tribes in Federal court for the collection of sales taxes on purchases made by non-Indians on Indian lands. But states are already free to sue individual tribal officers for failure to collect taxes. They can also resolve this issue through tribal-state agreements on tax collection, and more than 200 tribes already have such compacts.

Mr. Gorton's crusade appears based on isolated anecdotes from aggrieved non-Indian plaintiffs. He offers no compelling reason to curtail sovereign immunity or tribal rights. Yet, as noted by Timothy Egan in a recent Times report, Mr. Gorton may gain ground simply because of a public backlash against some tribes that have become more prosperous and politically assertive.

But the fact remains that most tribes are very poor. Eliminating sovereign immunity would further jeopardize their survival and, more broadly, betray the Federal Government's longstanding moral and legal obligations to the tribes.



STATEMENT OF SENATOR DANIEL K. INOUE  
 VICE CHAIRMAN  
 COMMITTEE ON INDIAN AFFAIRS  
 BEFORE THE  
 APRIL 7, 1998 HEARING  
 ON PROPERTY RIGHTS AND CIVIL RIGHTS  
 AS THEY RELATE TO  
 THE SOVEREIGN IMMUNITY  
 OF TRIBAL GOVERNMENTS

WE MEET THIS MORNING TO CONSIDER MATTERS THAT HAVE BEEN THE SUBJECT OF SOME DEBATE IN THE SENATE OVER THE PAST FEW YEARS.

THE PROPOSALS THAT HAVE FUELED THAT DEBATE NO DOUBT ARISE OUT OF CONCERNS EXPRESSED BY THE CONSTITUENTS OF VARIOUS MEMBERS OF THE CONGRESS.

SUCH IS THE NATURE OF THE LEGISLATIVE PROCESS AT THE FEDERAL LEVEL.

WHEN WE ARE NOT IN THE NATION'S CAPITOL, WE LOOK FORWARD TO MEETING WITH THOSE WE REPRESENT — AND MOST OFTEN, OUR CONSTITUENTS COME TO US WITH PROBLEMS AND CONCERNS THAT THEY WANT US TO ADDRESS.

OF COURSE, WE ALSO HEAR FROM THE CITIZENS OF OUR RESPECTIVE STATES VIA THE TELEPHONE, THE TELEFAX, AND THROUGH WRITTEN COMMUNICATIONS.

EACH SENATE OFFICE RECEIVES THOUSANDS OF LETTERS EACH DAY.

I MAKE THESE OBSERVATIONS BECAUSE I BELIEVE IT IS IMPORTANT THAT WE UNDERSTAND THE CONTEXT OF THIS HEARING.

I WOULD VENTURE TO SAY THAT IN EVERY CONGRESSIONAL DISTRICT ACROSS THIS GREAT COUNTRY OF OURS — COMPLAINTS AND CONCERNS ARE REGISTERED ON A DAILY BASIS.

IF A MEMBER OF THE CONGRESS BEGINS TO RECEIVE EXPRESSIONS OF CONCERN FROM SEVERAL OF HIS OR HER CONSTITUENTS, HE MAY BE PERSUADED TO INTRODUCE A BILL IN THE CONGRESS TO ADDRESS THE CONCERNS OF THOSE HE REPRESENTS.

ONCE A BILL IS INTRODUCED — IT IS REFERRED TO THE APPROPRIATE COMMITTEE OF JURISDICTION.

AND IT THEN BECOMES THE TASK OF THE COMMITTEE TO DETERMINE WHETHER THE CONCERNS EXPRESSED BY THE CITIZENS OF ONE STATE REFLECT A MORE WIDESPREAD PATTERN OR PRACTICE.

TO MAKE THAT DETERMINATION, THE COMMITTEES OF THE CONGRESS TYPICALLY HOLD HEARINGS — EITHER IN WASHINGTON, D.C. OR IN THE FIELD.

SOMETIMES, AS A RESULT OF HEARINGS AND THE TESTIMONY THAT IS PRESENTED TO THE COMMITTEES, WE LEARN THAT A PROBLEM THAT HAS BEEN IDENTIFIED BY THE CITIZENS OF ONE STATE IS ACTUALLY A PROBLEM THAT OTHER CITIZENS ACROSS THE UNITED STATES ARE TRYING TO RESOLVE.

OTHER TIMES, WE LEARN THAT THE EXPERIENCES OF A FEW PEOPLE ARE IN FACT NOT WIDESPREAD.

WE MAY LEARN INSTEAD THAT WHILE THERE ARE ANECDOTES OR EXPERIENCES WHICH MAY SHARE SOME COMMON ELEMENTS, WE CAN'T SAY THAT THESE PROBLEMS ARE EXPERIENCED IN EVERY STATE OR IN EVERY LOCALITY.

SO, THAT IS WHY WE ARE HERE TODAY.

TODAY, WE EXPECT TO RECEIVE TESTIMONY FROM CITIZENS WHO HAVE CONCERNS AND COMPLAINTS ABOUT INDIAN TRIBAL GOVERNMENTS — CONCERNS THAT RELATE TO PROPERTY RIGHTS AND CIVIL RIGHTS.

THESE CONCERNS ARE IMPORTANT — AND I CAN ASSURE ONE AND ALL, AS THE VICE CHAIRMAN OF THIS COMMITTEE — THAT YOUR CONCERNS WILL NOT BE TAKEN LIGHTLY.

BUT IT IS ALSO OUR RESPONSIBILITY TO DETERMINE WHETHER THESE CONCERNS ARE FOUND ON EVERY INDIAN RESERVATION OR EVEN IN A MAJORITY OF INDIAN COMMUNITIES.

TOWARD THAT END, WE HAVE ALSO INVITED THE ELECTED OFFICIALS OF TRIBAL GOVERNMENTS TO PRESENT TESTIMONY TO THIS COMMITTEE ON THE MANNER IN WHICH TRIBAL GOVERNMENTS ASSURE THE PROTECTION OF PROPERTY RIGHTS AND CIVIL RIGHTS.

TODAY'S HEARING WILL NOT HOWEVER CONCLUDE THIS COMMITTEE'S INQUIRY INTO THESE MATTERS.

THERE ARE MORE THAN 250 TRIBAL GOVERNMENTS LOCATED WITHIN 28 STATES.

THUS, WHILE WE HAVE 20 WITNESSES WHO WILL PRESENT TESTIMONY TO THE COMMITTEE TODAY, THE DETERMINATION OF THE NEED FOR FEDERAL LEGISLATION IS TYPICALLY BASED ON MORE.

OUR WORK, THEN, IS FAR FROM COMPLETE.

BUT AS I INDICATED EARLIER, THE TESTIMONY OF EACH WITNESS IS IMPORTANT TO THIS COMMITTEE, AND WE LOOK FORWARD TO YOUR THOUGHTS ON THESE MATTERS.



# SOUTHERN UTE INDIAN TRIBE

TRIBAL AFFAIRS BUILDING

*From the office of:*

**Howard D. Richards, Sr.**

*Southern Ute Indian Tribal Council*

May 27, 1998

Ben Nighthorse Campbell, Chairman  
Committee on Indian Affairs  
United States Senate  
Washington, DC 20510-6450

Dear Senator Campbell:

This letter is in response to your letter dated May 5, 1998, in which you request a response to two supplemental questions related to my testimony at the April 7th hearing on tribal sovereign immunity in Seattle, Washington. Your questions, together with my responses, are provided below:

**QUESTION: 1.** *Please describe the nature of existing agreements between the Town and the Tribe regarding cooperative efforts involving economic development, jurisdiction, or other cooperative agreements.*

**RESPONSE:** I am not aware of any existing cooperative agreements between the Town and the Tribe relative to economic development, jurisdiction, or other issues. Many of the major jurisdictional issues relative to the Town and the Tribe were essentially settled by the enactment of Public Law 98-290 by the United States Congress in 1984. This legislation was broadly supported by the Tribe and State and local governmental officials, including officials of the Town. Pursuant to P.L. 98-290, the State and Town can enforce their criminal laws against Indians within the Town. While P.L. 98-290 settled the major issues, important issues remain unresolved. For example, Town officials have complained about the lack of jurisdictional authority under P.L. 98-290 for town officers to enforce state civil regulatory provisions, including non-criminal driving provisions. These complaints by Town officials have been the subject of internal tribal discussions and I anticipate they will be the subject of future discussions between the Tribal Council and the Ignacio Town Board. Additionally, the Tribe and the Town have been exchanging drafts and discussing an agreement for the exercise of concurrent jurisdiction within Ignacio. Hopefully, agreements can be reached which further the mutual goal of effective law enforcement, while respecting each entity's existing jurisdictional authority.

May 27, 1998  
Page 2

Although I am unaware of any cooperative efforts involving economic development between the Tribe and the Town, the Tribe's successful economic development efforts certainly benefit the entire Reservation community. Attached to my written testimony for the April 7th hearing in Seattle was an exhibit that listed the Tribe's contributions to the economy and human service programs in the Ignacio area. These contributions are substantial and, in many instances, reflect the desire of the Tribe to work cooperatively with its neighbors for the economic benefit of all concerned. On two recent occasions the Tribe again demonstrated its community-minded spirit. In response to the vandalism at the Ignacio Jr. High and High School the Tribe made a \$25,000 contribution to assist in the cleanup. Also, the Tribe recently entered into a cooperative agreement with the Ignacio School Board for funding for a new kindergarten and first-grade school. I have enclosed a copy of the *Durango Herald* newspaper stories on these cooperative tribal actions.

**QUESTION: 2.      *Would the Tribe support Federal enabling legislation to encourage and facilitate agreements between the Town and the Tribe regarding jurisdiction, law enforcement, hot pursuit and other contentious issues?***

**RESPONSE:** It is important to state at the outset that my response to this question represents solely my own views and is not an official expression of the position of the Tribe. As a single member of the Southern Ute Indian Tribal Council, I am not authorized to provide you with an official tribal response to your question. Given this initial disclaimer, I believe no federal legislation is necessary at this time to encourage and facilitate agreements between the Town and the Tribe. The issues that have given rise to the feelings of frustration by Town officials and tribal officials are contentious but, as stated above, they are the subject of internal tribal discussions and I anticipate they will be the subject of future discussions with the Town. Before any federal involvement, the parties should have an opportunity to discuss the issues thoroughly and resolve them through their own efforts. Premature federal intervention could be counterproductive. The Tribe has a long history of successfully resolving difficult issues by agreement, rather than litigation. Presently, the Tribe is pursuing separate intergovernmental agreements with a federal agency and a state agency. We have also recently concluded an MOU with the state, La Plata County and Archuleta County for a Gaming Impact Study. I am, therefore, confident that every reasonable effort will be made by the Tribe to resolve concerns expressed by Town officials in an amicable and mutually satisfactory manner.

In conclusion, thank you for the opportunity to supplement the hearing record with my responses to your questions. Also, thank you for your interest in the relationship between the Tribe and the Town. My hope is the present issues that are adversely affecting relations between the Tribe and the Town can be resolved and we can restore a cooperative relationship. Should you have additional questions, please feel free to contact me.

Sincerely,  
SOUTHERN UTE INDIAN TRIBAL COUNCIL

  
Howard Richards, Tribal Council Member

cc: Tribal Council, Southern Ute Indian Tribe  
Town Board, Ignacio



# Utes ink deal with Ignacio

## Tribes to finance new school, school district to manage

By Bret Bell  
Herald Staff Writer

**IGNACIO** - The Ignacio School Board Thursday night entered into a partnership with the Southern Ute Tribe to develop a kindergarten and first-grade school that emphasizes Ute language, history and culture.

Under threat that the tribe would move forward without the board's blessing, members unanimously approved a "memorandum of understanding" that outlined each side's responsibilities for the project.

Under the agreement, the tribe will pay for teachers and supplies and build and maintain the facilities for the "Alternate K-1 School."

However, the tribe hopes to have the school built and operating this September - a timeline that drew skepticism from some school officials.

The Ignacio School District will manage the school, hire staff members, provide bus transportation and allow students

■ See SCHOOL, Page 14A

Continued from Page 1A

to participate in the district's school lunch program. The district, in turn, will receive state funding for students who attend the alternative school.

Lee Briggs, education director for the Southern Ute Tribe, said the idea for the school started six months ago when the Tribal Council asked him to start a school for tribal children age 5 to third grade.

Briggs said that was too big of a goal for the time, and proposed the K-1 school.

"We would like to work with the school system with this," Briggs said at Thursday's meeting at the Ignacio School District administration building. "But if the school board does not approve this we will go private and not be a part of the public school system."

Briggs said the tribe wants a school that incorporates Ute language, history and culture and teaches the Montessori method that the tribe's Head Start program has used for the past year.

The Montessori philosophy uses tools to develop self-discipline and self-motivation, and allows students to learn at their own rates.

Ignacio School Board President Roger Phelps said the school will be a good opportunity to evaluate an alternative curriculum that may some day be incorporated in Ignacio Elementary School. He envisioned two kindergarten through sixth-grade schools in the future, each offering different learning programs.

"It is to our benefit to try and make this program work," he said. "The fact that the tribe and the district can work together rather than split shows a good effort on their part."

The union comes after years of threats by the tribe to pull Ute students from Ignacio schools.

Briggs said many tribal parents have pressured him to form a separate private school, but "we wanted to work as part of the school system."

"The tribe wants to have a quality education for its children and if it benefits you, then that is great," he said.

The agreement calls for a school open to all students, not just Utes. Class size is to be limited to 15 students per grade.

Superintendent Bruce Yoast said 30 Ute students was about the number predicted to enter those two grades at Ignacio Elementary next year. He said the alternative school will be good "because it provides choice." He said the agreement does not require staffing changes at IES.

"It could be a K-6 or K-12 school eventually depending on how it succeeds," Yoast said.

But several hurdles remain. Building the school, implementing programs and finding teachers who are trained in the Montessori method by September will be difficult, school board members said.

"There are more questions than answers," Ignacio Elementary School Principal Roy Lyons said. "Choices are good, but to set up a school takes a lot of time and a lot of logistics to do it right and the timeline is very short."

"A lot of people are getting caught off-guard by this," he said. "I just want to be cautious and if it is something that happens I want it done right for the sake of our children."

# Utes take the lead

## Partnership with Ignacio schools benefits both

The Southern Ute Tribe's decision to fund kindergarten and first-grade classrooms that will include an emphasis on Ute history, culture and language is an exciting one. The tribe has long felt that the Ignacio public schools haven't given its culture the priority it deserves, and with just 1,300 or so members, maintaining and strengthening that culture is critical for the tribe's future.

It's also satisfying that the tribe will be working with — rather than apart from — the Ignacio public schools. The partnership means benefits for both.

The logistics of running a school, particularly a small one with no economies of scale, can consume a lot of time and energy. Just ask the charter school administrators in Durango. Under the agreement, the tribe will build the new classroom building and the Ignacio school district will operate it. The district will also handle transportation and food service. Most people would agree that that allows the tribe to concentrate on what really counts: the classroom setting, attracting and nurturing the best teachers and incorporating the most appropriate curriculum.

Ignacio, to its benefit, gets to keep the Southern Ute children, estimated at about 60 in the two grades, in its all-important student census for state funding.

That both Indian and non-Indian are working together in this partnership is only logical. That's what's required daily on the streets and in the businesses of multi-ethnic

Ignacio.

For the tribe to initiate its educational project for the early years makes sense, too. Ages 5 and 6 are formative years. There's an opportunity to combine age groups, as some innovative schools do, and not attach grade levels until all skills are mastered. That avoids advancing an unprepared student. And, with the confidence that comes from spending the first years in a classroom of peers, a youngster should be a stronger performer in subsequent years. That's what bilingual education tries to accomplish.

At the same time there must be the realization that at some point Ute and non-Ute children will share a classroom, and that eventually Utes will be competing with high school and college graduates from across the United States for good jobs. Tribal language and history may not help in those competitions. Critics of bilingual programs say that curricula that strengthen culture may not be those that produce strong skills in reading, writing and mathematics.

Ideally, there ought to be curricula that include both culture and academics. But if there aren't, where the line between the two is drawn will be controversial.

We wish the Southern Utes the best in this new venture. Nothing is more important than good education. And if the Utes and the school district can have the school open as soon as September, as the tribe wants, so much the better.

# Oglala Sioux Tribe



Box H  
Pine Ridge, South Dakota 57770  
(605) 867-5821  
(605) 867-5303  
Fax: (605) 867-1004



March 25, 1998

The Honorable Ben Campbell  
Chairman, Senate Indian Affairs  
830 Hart Senate Office Bldg.  
United States Senate  
Washington, D.C. 20510

Office of the Fifth Member  
PHILIP UNDER BAGGAGE  
NANWI KCAJIN

Dear Chairman Campbell;

I am writing to you in behalf of the Oglala Lakota Nation, in reference to Senator Slade Gortons bill on Tribal Sovereign immunity. We feel this is a direct attack on our Nation, and our efforts to govern ourselves. Senator Gorton, and others of the same mentality are attempting to erode away the "Trust Responsibility" of the United States government and Treaty obligations. There are a number of Supreme Court cases, and Treaty laws. Guaranteeing our Tribes Sovereignty Ex-Parte Crow Dog, 109 US. 556, 568-69 (1883) the Supreme Court ruled under the Treaty of 1868, with the Sioux, the arts of civilized life, the intent of the Treaty is to introduce and Naturalize the Indians, and the highest order of that, Is the right of self government. Another Treaty law, 7 stat. 18. these Treaties between the Indians and the United States, also pledged that Indian Reservations would be preserved as the "Permanent Homes" of the Indian peoples, Treaty with the Sioux of 1868, 15. Stat. 635. the Supreme Court has held that Indian Tribes retain essential rights, "Necessary to make their reservations


liveable." In *Seminole Nation Vs-United States* 316-US.-286, 296-97 (1942) Mandates that when the United States as a trustee for and Indian Tribe it's conduct should "be judged by the most exacting Judiciary standards" and there is a unique and distinctive relationship between the United States and Indian Tribes as defined by Treaties, Statutes, Executive orders, Judicial decisions, and agreements. This relationship has given rise to a special federal Trust Responsibility, Involving the legal responsibilities and obligations of the United States toward Indian Tribes with respect to Indian lands, trust resources, and the exercise of Tribal rights. And the right to exercise Sovereign Immunity. The United States Congress has a trust responsibility to Indian Tribes that includes the protection of the Sovereignty of each Tribal government. based on Treaties and federal laws, Congress is mandated for the continual recognition of Tribal Sovereign immunity. Article six, of the United States Constitution states "Treaties are the Supreme Law of the Land" and directs all state and federal elected officials to abide by the U.S. Constitution by oath or affirmation. The "Doctrine of Sovereign immunity" can be compared to the Sovereign immunity of the United States self protection, and only Congress may waive the Sovereign immunity of the United States.




"Indian Tribes are Sovereign Nations" which predate the formation of the United States. The Oglala Lakota Nation is Exercising "Home Rule" based on Treaty laws and federal statutes, and may enact their own waivers of Sovereign immunity Williams Vs-Lee 385-US. 217 (1959) states, Jurisdiction over a suit by a Non-Indians doing business on Indian reservations lies with the Tribal Court rather than state Courts. Indian Tribes needs to retain Sovereignty. To allow state courts jurisdiction would infringe upon the Indians right to govern themselves. The Oglala Lakota Nation enacted the "Implied Consent" law allowing Non-Indians redress of grievances. In Tribal court based on Treaty law, I.E. "Indian traders Licenses" The Tribe by contracting 93-638 funds, and creating "Chartered" Organizations consent to be held liable for suits. The Oglala Lakota Nation demand the United States government waive it's sovereign immunity from suit to address the long standing claim of our Sacred Black Hills, so that we can initiate suit for the return of lands and Natural resources.

Thank you for allowing us to submit testimony in behalf of the Oglala Lakota Nation.

Sincerely,

  
Philip Under Baggage  
Fifth Member  
OGLALA SIOUX TRIBE

\_\_\_\_\_  
John Yellow Bird Steele  
President  
OGLALA SIOUX TRIBE

  
Oliver Red Cloud  
Chief  
OGLALA SIOUX TRIBE

# THE HOPI TRIBE



Wayne Taylor, Jr.  
CHAIRMAN

Phillip R. Quochoyewa, Sr.  
VICE-CHAIRMAN

April 22, 1998

Senator Ben Nighthorse Campbell  
Chairman Senate Committee on Indian Affairs  
380 Russell Senate Building  
Washington, D.C. 20510

Re: S.B. 1691

Dear Senator Campbell:

On March 11, 1998, the Hopi Tribe submitted to you and the Committee on Indian Affairs written comments setting forth the Hopi Tribe's views on Senator Gorton's proposed legislation, S. 1691. We expressed our firm opposition to its' passage. On April 7, 1998, at a field hearing on the Bill held in Seattle, Washington, Caleb Johnson, a member of the Hopi Tribe and a Tribal Council Representative gave testimony in support of S. 1691. I write this letter to clarify several mischaracterizations and misleading statements in Mr. Johnson's testimony and to supplement the written comments of the Tribe as previously submitted.

As rationale for his decision to support the Gorton Bill, Johnson alleged that his "rights of due process have been violated by the Hopi Tribal Court," and that he has filed a complaint against the Hopi Election Board in the U.S. District Court of Arizona, "for the violation of my . . . rights." These allegations apparently stem from Johnson's unsuccessful run for Hopi Tribal Chairman in 1997.

What Johnson failed to report to the Senate panel is that the Hopi Election Ordinance includes provisions allowing for an appeal of Election Board decisions to the Hopi Tribal Court and that he had in fact failed to follow these provisions. Mr. Johnson's attorney has filed a complaint in Tribal Court but there is a question of whether it was filed within the 30 day time limit for such appeals. Nevertheless, Mr. Johnson has not pursued his Tribal Court case and has instead gone directly to Federal Court. He chose to ignore available remedies and now seeks review by a non-Hopi Court of a purely Hopi internal matter, i.e. the election of Hopi Tribal Officials. Please refer to the attached letter dated April 15, 1998 from Chief Judge, William McCulley of the Hopi Tribal Court for further information in this matter.

**CHIEF JUDGE:**  
William McCulley

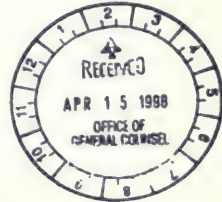
**CHILDREN'S JUDGE:**  
Alene Delgarito

**ASSOCIATE JUDGE:**  
Delfred Leslie  
Marjorie Talayumptewa



**HOPi TRIBAL COURT**  
P.O. BOX 156  
KEAMS CANYON, ARIZONA 86034  
**TELEPHONE (520) 738-5171**  
**FAX (520) 738-5589**

April 15, 1998



Hopi Tribal Council  
Post Office Box 123  
Kykotsmovi, Arizona 86039

Thru: Mary A. Felter, Tribal Secretary

Dear Council Members:

The March 20th issue of the Tutuveni contained a letter from Councilman Caleb Johnson in which he explains a complaint he filed with the U S District Court. I believe it appropriate for me to set forth all the pertinent facts in this matter.

On December 29, 1997, the Hopi Tribal Court received a "Complaint (and Notice of Appeal)", case no. 98CV000005 from attorney Richard M Grimsrud, who was not admitted to practice before the Hopi Tribal Court, on that date. Mr. Grimsrud, who was representing Councilman Johnson, enclosed with the complaint his application to be admitted to practice. However, I was on leave on that date. It is the Chief Judge's responsibility to approve or disapprove the admission to practice of attorneys and advocates to the Hopi Bar. I returned from leave on January 5, 1998 and approved Mr. Grimsrud's application on January 7, 1998, whereupon, the complaint which the Court received was stamped as filed.

It is not the practice of the Hopi Tribal Court to accept complaints from attorneys, until they are admitted to practice before it. That is not to say a complaint which is received by the Court within statutory time limitations, for appeal, (in this case from Election board), but not stamped filed until after the time limit has expired will necessarily be dismissed.

In any event the Court did not dismiss the complaint. It followed the normal procedure of returning to the attorney a filed copy of the complaint and a summons directed to the respondent (Hopi Election Board), and signed by the court clerks. This was done by mail on January 9, 1998.

It was then his obligation to serve the summons on the Election Board and return a notice of service to the Court. Since then, the Court has received nothing from either Mr. Grimsrud or Councilman Johnson regarding this matter.

In his letter to Tutuveni Mr. Johnson states "I decided to appeal to the U.S. District Court because legal counsel for the Election Board would have my appeal dismissed on the "timely" issue. There is no question that the Tribal Court would have dismissed my appeal on the "timely" issue."

The fact is the "timely" issue has not been put before the Court, and until it is there is no certainty as to what the Court's decision on the issue will be.

I am also advised that on April 7, 1998 the testimony of Councilman Johnson was presented before the Committee on Indian Affairs, United States Senate concerning Tribal Sovereign Immunity. In that testimony he states, among other things that

"In discussing my complaint with my legal counsel, Mr. Richard M. Grimsrud I have been advised that it will most likely be dismissed due to the doctrine of sovereign immunity claimed by the Hopi Tribal Government.

-----  
My complaint makes it very clear that the Tribal Court deliberately delayed stamping my complaint "filed" until 30 days had passed so that the Court would dismiss it as not being filed on a "timely" basis."

Neither the issue of timely filing or sovereign immunity has been raised by either of the parties in this case at this time. Until such time as these issues are raised and decided by this Court it is presumptuous, to say the least, for either Councilman Johnson or his attorney to make assumptions as to what the Court's decision on these issues will be.

Councilman Johnson has completely failed to follow up on the complaint he has filed in the Hopi Tribal Court. If the issues he is concerned about are raised in Tribal Court and are decided against him, he has the right to appeal the Court's decision to the Appellate Court of the Hopi Tribe. Until he has done all this his claim that he has been



"deprived of life, liberty or property without due process of law", under either the Indian Civil Rights Act or the United States Constitution, is premature

Sincerely,

  
William McCulley.  
Chief Judge

cc: Chairman  
Vice Chairman  
General Counsel  
file



Wayne Taylor, Jr.

CHAIRMAN

Phillip R. Quochoyewa, Sr.

VICE-CHAIRMAN

VIA TELEFAX-Hard Copy U.S. Mail

June 2, 1998

The Honorable Ben Nighthorse Campbell  
Chairman of Senate Indian Affairs Committee  
838 Senate Hart Building  
Washington, DC 20510

Dear Mr. Chairman:

The Hopi Tribe understands that complaints have been made to the Senate Indian Affairs Committee that the Tribe's government is officially retaliating against Council member Caleb Johnson because of his testimony before your Committee in support of S.1691. Please be assured that this charge is absolutely false. There is no action pending before the Hopi Tribal Council to discipline or disadvantage Council member Johnson in any way.

It is certainly true that Mr. Johnson's support of S.1691 is diametrically opposed to the official and strongly held position of the Hopi Tribe. The Tribe deeply believes that S.1691 threatens to destroy tribal powers of self-government at Hopi and for all Indian tribes, so the Tribe has urgently asked your Committee not to recommend passage of it or any portion of it to the Senate. The Tribe strongly applauds the decisions of the Committee at its' May 20 "mark-up" which are in accord with our position. Since the overwhelming majority of the members of our Council vigorously oppose S.1691, Mr. Johnson's contrary position on a subject they believe is vital to the Tribe and to Indian country in general has provoked controversy and occasioned public expressions of opposition to his position. That of course is all part of the Tribal political process on a matter of major public importance like this. However, the Tribal Council has taken no official action against Mr. Johnson because of his views on this matter.

Mr. Johnson's position on S.1691 and some other public actions he has taken—such as his public opposition to tribal land purchases, and his filing of litigation in federal court challenging the most recent election for Chairman and Vice-Chairman of the Tribe—have also been very unpopular with many tribal members on our reservation, including a number of residents of his own village, Kykotsmovi. I understand that the Village of Kykotsmovi is considering taking action to rescind his certification as one of their representatives on the Tribal Council.

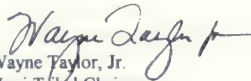
Hon. Ben Nighthorse Campbell  
RE: Council Member Johnson  
Page 2

This is a potential risk and a political fact of life that every representative on our Council faces, and it is certainly not a matter the Hopi Tribal Council or any part of the Hopi Tribal government has any control over. Under the Hopi Constitution, "the Hopi Tribe is a union of self-governing villages" (Art. III, Section I). Under Article IV, Section 4 of our Constitution, "each village shall decide for itself how it shall choose its representatives" to the Hopi Tribal Council, and "representatives shall be recognized by the Council only if they are certified by the Kikmongwi of their respective villages." If a village Kikmongwi--the traditional religious leader of the village--or the village governor withdraws the certification of a representative to the Council at any time, our Council cannot continue to recognize that representative.

The withdrawal of certification has happened several times over the years, at times even depriving the Council of a quorum for doing business. So if the village which selected Mr. Johnson as a representative to the Tribal Council withdraws that certification for any reason, the Council must of course honor that decision of his village.

Sincerely,

THE HOPI TRIBE

  
Wayne Taylor, Jr.  
Hopi Tribal Chairman

xc Hopi Tribal Council  
File



April 4, 1998

The Honorable Slade Gorton  
United States Senate  
730 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Gorton:

As President of Citizens Equal Rights Alliance, I want to personally thank you for introducing S.1691, the "American Indian Equal Justice Act." This is the first bill in memory which addresses the unequal application of justice in "Indian country." It is high time that Congress takes a serious look at the problems which exist on Indian reservations due to the unaccountability of tribal governments when it comes to dealing with tribal members, non-members who live within reservation boundaries, state and local governments, and companies that conduct business with the tribe.

I have attached a statement which describes our organization and its philosophy. The statement also gives examples of injustices that have been perpetrated by tribal governments under the guise of sovereign immunity. I am sure that you are aware of many of these incidents, yet I am just as sure there are hundreds of similar stories that have gone unreported. I request that you enter my statement into the official hearing record for S.1691.

America was founded under the concept that it is "the People" who are sovereign. Governments were created by the people, for the people, and of the people. Unfortunately, this concept has dimmed considerably over the past 222 years, and it is "the People" who are suffering as a result. Inherent rights are being abused daily by governments out of control.

Senator Gorton, those of us who have been personally harmed by this nation's Indian policies look to you for justice. As the initial finding of S.1691 so eloquently states, "a universal principle of simple justice and accountable government requires that all persons be afforded legal remedies for violations of their legal rights." We are currently without such remedies, and we implore you to stay the course until our Constitution applies to all Americans, everywhere in America. Godspeed!

Sincerely,

*James L. Mitchell*  
for Howard B. Hanson  
President





**STATEMENT OF HOWARD B. HANSON  
PRESIDENT, CITIZENS EQUAL RIGHTS ALLIANCE  
ON S.1691, "THE AMERICAN INDIAN EQUAL JUSTICE ACT"  
APRIL 4, 1998**

I am Howard Hanson, President of Citizens Equal Rights Alliance. CERA is a national coalition of local groups and individuals from 37 states. Our officers and members consist of Indians and non-Indians alike. Through education and communication, CERA is dedicated to effecting positive change in federal law and federal Indian policies so that all Americans -- Indian and non-Indian -- can exercise fundamental freedoms guaranteed by the Constitution of the United States.

According to the latest census figures, more than 370,000 non-Indians reside within the boundaries of Indian reservations in this country. This figure represents 45.8% of all reservation residents. As a matter of fact, on at least 30% of all reservations, non-Indians outnumber Indians. A significant number of these individuals live on land that was sold to non-Indians by the federal government in the late 1800's during implementation of the Dawes Act. The intent of the land sales was to integrate Indian people into the broader spectrum of American culture and eliminate the reservation system. When that policy was reversed by the Indian Reorganization Act of 1934, it created a legal morass of dual laws and governments which is flourishing still today.

What the federal government has created is essentially an apartheid system which fosters inequities of justice, jurisdictional confusion, abuses of power, needless litigation, and racial divisiveness. The apartheid system is based on the notion of "dependent sovereign nations", a notion which is incongruent with the tenets on which this country was founded, the core ideals expressed in the United States Constitution.

In its misguided attempt to promote "self-determination" for Indian tribal governments, Congress and the federal bureaucracies have trampled the Constitutional rights of individual Indian and non-Indian citizens. By creating and supporting governments which cannot be held accountable by the people over which those governments exercise jurisdiction, the Congress has basically stipulated that "government", in and of itself, is more important than "the People", who are the true sovereigns. This attitude is inherently wrong and inherently destructive.

Not only has Congress promoted tribal governments which are unaccountable, it has also historically granted those governments immunity from any attempt at legal redress. Not surprisingly, unscrupulous individuals in positions of power in tribal governments have taken advantage of their unique status to violate the civil rights of individual citizens. Here are a few of the hundreds of examples in which tribal governments have denied the Constitutional rights of American citizens. Individuals in the executive and legislative branches of the federal government, to the extent they have supported tribal sovereign immunity, are accomplices in these injustices.

\* A suit by the First National Bank of Altus, Oklahoma, to recoup proceeds of a \$560,000 loan to the Kiowa, Comanche, and Apache Land Use Committee was dismissed by an associate district judge on grounds of sovereign immunity. This decision was made even though the Land Use Committee is not a tribe, but a separate entity formed by three different tribes to conduct business outside the territory of the tribes themselves.

\* A state bank in South Dakota was sued by the U.S. Department of Justice for failing to make secured loans if the collateral securing the loans was located on an Indian reservation. In addition to paying fines to alleged victims of discrimination, the bank was required to actively market loans in reservation areas.

\* Bruce Williams, a non-Indian car dealer in New Mexico, after filing suit against the Navajo tribe for an illegal traffic arrest, was the victim of unabashed retribution. Seven years after the fact, the tribe brought charges against Williams in tribal court for "illegal repossession" of a vehicle from a tribal member who had not made any of his contractual payments. The tribal court rendered a judgement of \$6,000 dollars in actual damages and \$25,000 in punitive damages for a vehicle valued at \$300.

\* Attempts by a homeowners association in Arizona to challenge the illegal creation of the Chemehuevi Reservation was thwarted when a judge dismissed the action on the basis of "sovereign immunity." The judge ruled the controversy could not be settled without the participation of all affected parties, and the tribe refused to participate.

\* Del Palmer of Montana has been cited on four different occasions for hunting on his own land, which is situated within the boundaries of the Confederated Salish and Kootenai Reservation. On each occasion, Palmer held a valid Montana hunting license, but was charged because he did not have a joint state-tribal hunting license.

\* A former president of the Navajo tribe proposed blocking federal and state highways running through Indian reservations to "educate" the general public on "tribal sovereignty." This Blockades in the State of New York and in Canada to protest various Indian issues have led to violent confrontations.

\* A non-Indian woman in Oregon was denied the opportunity for a judicial hearing in state court to present a claim for \$3000 in wages which the Confederated Tribes of Siletz Indians refused to pay. A state court judge ruled such disputes must be made in tribal court unless the tribe waives sovereign immunity.

\* The Lummi tribe of Washington has attempted to exert jurisdiction over non-Indians on its reservation by claiming zoning authority, superior water rights, refusing to provide utilities services to non-Indians, and by constructing a commercial well which threatened the viability of a well owned and operated by a non-Indian water cooperative.

- \* The explosion of gambling on Indian lands has prompted tribes all over the country to purchase land and request that the Bureau of Indian Affairs place the land in trust status. When that occurs, local governments are faced with the loss of tax revenues, yet they are still expected to provide various services to the owners and residents of the trust lands. The inequities of such situations have prompted numerous governors, state legislators, mayors, and the National League of Cities to oppose such transfers of land.

- \* Lawsuits have been filed by tribes, tribal members, and tribal advocates in Montana and Nebraska to correct perceived injustices in the make-up of voting districts. The lawsuits claim that districting which does not guarantee the election of Indians to state and local positions violates the Fourteenth Amendment principle of "one-person, one-vote." Yet the plaintiffs are silent when it comes to the rights of non-Indians to be represented in tribal government elections, even when those governments attempt to exercise jurisdiction over non-Indians.

- \* Five members of the Tonawanda Band of Senecas were banished from the tribe on the grounds of treason, even though they were never brought to trial or afforded any other semblance of due process. They were declared "non-Indian", stripped of all tribal benefits, and lost all their property and possessions. The federal judge ruled that the forfeiture of property, denial of rights, and exclusion from the reservation were insufficient deprivation of liberty to invoke the rule of habeas corpus.

- \* Citing its sovereign nation status, the Blackfeet tribe of Montana assessed tribal property and gross receipts taxes on non-Indian property and business owners. The tribe also asserts a right of first refusal on any lands put up for sale within the reservation boundaries.

- \* Under the Indian Child Welfare Act, tribes are currently allowed to claim jurisdiction in any custody case involving a child who is at least 1/32 Indian. By placing greater emphasis on the "rights" of tribal governments than on the rights and welfare of individuals, the federal government has contributed to tragic heartache and gross injustice.

- \* Tribes in California claim that, as "sovereign nations", they can conduct any type of gambling, even if it is in violation of state and federal laws.

- \* In 1997, the Oneida tribe of New York notified the state Lobbying Commission that since it is a "sovereign nation" it did not intend to follow lobbying expense disclosure rules.

- \* Several years ago, a non-Indian tribal police officer in Washington experienced blatant racial discrimination by supervisors and was ultimately fired. To date, the officer has not been granted a legal forum to lodge his complaint because the tribe has asserted sovereign immunity.

- \* A New Mexico woman was fired from her position in the financial department of an Indian casino for announcing her intention to present financial improprieties to the tribal council. The woman has not been granted a legal forum to file a claim for unpaid wages or unlawful dismissal.

\* In another case involving a New Mexico woman, two federal appeals courts ruled that a federal age discrimination law does not apply to Indian tribes because of their right of self-government. Title VII of the Civil Rights Act of 1964 expressly excludes Indian tribes from the definition of employer, and also contains a provision that sanctions the use of Indian preferences in employment decisions by tribal or private businesses operating on or near a reservation. The Americans with Disabilities Act also excludes Indian tribes from the definition of employer.

These are only a handful of the hundreds of cases of injustice perpetrated on American citizens by anachronistic federal Indian policies. The government of the people has found it more expedient to promote the agendas of a distinct class of citizens than to safeguard the Constitutional liberties of all citizens. Failure to correct this intolerable situation is a national disgrace.

S.1691 is a first step in recognizing that all governments which operate in our democratic society should be held accountable. Congress should fulfill its trust responsibility to all American citizens, not just those with Indian heritage, by passing this bill as quickly as possible. We strongly support the provisions of S.1691 which would hold tribal governments accountable and would provide due process for aggrieved citizens. Our only recommended change is to remove the provision which would disallow punitive damages against tribes. If we are indeed dedicated to the proposition that all citizens should be treated equally, then tribes and their government officials should also be subject to punishment for their misdeeds.



## W. SHERWIN BROADHEAD

Rt. 1 Box 35A, Reardan, WA 99029  
(509) 835-3615

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April 2, 1998

The Honorable Ben Nighthorse Campbell  
Chairman  
Committee on Indian Affairs  
838 Hart Senate Office Bldg.  
Washington, DC 20510-6450

The Honorable Daniel K. Inouye  
Vice-Chairman  
Committee on Indian Affairs  
838 Hart Senate Office Bldg.  
Washington, DC 20510-6450

Dear Mr. Chairman and Mr. Vice-Chairman:

I appreciate the opportunity to share my views regarding S. 1691 with you and the Committee.

I have spent nearly my entire career involved in issues relating to Indian Law and its real impact on individuals and governments. Some of the highlights include:

- Served as Chairman of the Jurisdiction Task Force of the American Indian Policy Review Commission
- Special Assistant to Sen. James Abourezk, Chairman of Indian Affairs Committee
- Served Congressional Relations Officer for Bureau of Indian Affairs (BIA)
- Superintendent of Colville Agency for the Colville Confederated Tribes (a tribe once threatened with termination)
- Researcher and Lecturer for Institute for Development of Indian Law

Given this experience, I must express my grave reservations concerning the potential implications of S. 1691, introduced by Sen. Slade Gorton of my home state, Washington.

I have read the Chairman's written statement of March 10, 1998 and would like to underscore his reference to "failed federal policies." In fact, the record of the federal government's relationship with Indians is filled with examples where Congress made mistakes that later proved difficult to repair. I am concerned that, if passed, this legislation would write yet another damaging chapter in this sorry history.

In the last two centuries, three incredibly detrimental pieces of legislation to the Federal/Tribal relationship were passed and had to be later rescinded by Congress. They were:

### The General Allotment Act

In 1887, Congress passed the General Allotment Act, legislation to try to force Indians to abandon their reservation land granted by various treaties. The Act called for large areas of reservation land to be carved up into allotments with the resulting "surplus land" to be put up for sale to non-Indians. As a result of the General Allotment Act, Indian land holdings were reduced by two-thirds over the next 47 years. Although tribes presented substantial opposition at the time, Congress paid them no heed.

Forty-seven years later in 1934, Congress finally recognized their error by passing the Indian Reorganization Act (IRA), which stopped the allotment process and returned remaining surplus lands to the tribes who accepted the provisions of the IRA. At that point, unfortunately, the damage was already done.

### Termination

On August 1, 1953, the U.S. House of Representatives passed House Concurrent Resolution 108, which mandated that all designated tribes be removed from federal supervision, meaning the tribal members would no longer be recognized as "Indians" in the eyes of the United States. As a result of HCR 108, 109 tribes were terminated.

Other tribes were put on lists and forced to develop plans for termination. For example, the Colville Tribe, which was still attempting to get title to their surplus lands taken in the General Allotment Act and subsequent allotment acts, was forced to develop a plan for termination within five years.

Termination, much like the General Allotment act before it, caused havoc in Indian country and Congress was eventually forced to repeal it as well. It was repealed by the Nixon-era "Self-Determination" policies which strengthened tribal governments and tribal legal systems. Congress had to reinstate the status for several of the terminated tribes.

### PL 280

In 1954, PL 280 became law, which unilaterally removed tribal jurisdiction over their reservations for tribes in designated states. It also made provisions for states to assume jurisdiction over tribal lands and members. Because PL 280 was essentially an "unfunded mandate" to the affected counties, many tribal members were left without basic government services such as police protection.

The Honorable Ben Nighthorse Campbell  
The Honorable Daniel K. Inouye  
April 2, 1998  
Page 2 of 4

Realizing their mistake, Congress was again forced to act to correct PL 280. In a move called "retrocession" Congress allowed tribes to reclaim and restore jurisdiction over their lands. Again, however, much harm had already been done. Families were broken up by culturally insensitive social workers, tribal members were discriminated against by local governments a host of other civil rights violations occurred under the law.

### A Better Solution

Out of the ashes of these failed federal policies, rose the Indian Self-Determination Act. Passed by Congress in 1975, this new policy allowed tribal governments to design and operate programs that had been previously directed by the federal government from Washington, DC. Thus, tribal governments were empowered with the responsibility and the opportunity to improve the quality of life on their reservations.

Another reason for this policy's success is that it was developed in consultation with Indian tribes and organizations—representing one of the first times federal Indian legislation had been enacted on a negotiated basis.

More than twenty years later, the results of the Self-Determination Act are very encouraging. Tribes are in better economical and cultural shape than at any time in recent history.

### A Return to Bad Policy?

S. 1691 threatens a major policy reversal on the part of the federal government. This legislation would force Tribal governments to either forfeit the gains made through the Self-Determination Act or waive their sovereign immunity. Essentially, tribes would choose between the "Devil and the Deep Blue Sea" with each choice bringing disastrous consequences and threatening the continued existence of the tribe.

This legislation attempts to classify tribal governments as individuals or corporations. The bill does not recognize that tribal governments simply are not individual nor corporate entities. They are governments that perform a variety of governmental functions such as a maintaining a legal system, providing social welfare, executing administrative duties, etc.

Sovereign immunity is a basic protection that is afforded to all types of governments. Thus, under the terms of S. 1691, a plaintiff could sue a tribe merely because they disagreed with a tribal court's decision. Imagine any other legal system in the United States efficiently operating under such an arrangement.

The fact is that tribal governments are democratically elected and their legal systems are based on those of the United States. Legislation such as S. 1691 that does not acknowledge these basic truths will be doomed to failure. If enacted, S. 1691 will eventually go the way of the General Allotment Act, PL 280, and Termination policies.

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The Honorable Daniel K. Inouye  
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Congress will have to repeal this bad law, like they have others before it, great damage will have been done in the meantime.

In closing, the federal government has tried to get rid of Indians through eradication, termination, assimilation and now through endless litigation. The simple truth is that Indian people and their tribes will not simply be legislated away. Nor should they be

As tribes prosper economically and more non-Indians move to reservations, conflicts will undoubtedly occur. If the federal government truly wants to help equitably resolve these conflicts, the federal government should provide an alternative mechanism for dispute resolution between tribal governments and state and local governments. Conflict resolution will not occur simply by taking away basic legal protections from tribal governments.

It is my sincere belief that should Congress pass S. 1691, it will be creating yet another "failed federal policy" that will have to be later repealed. I would welcome an opportunity to further discuss with you a constructive step the federal government could take towards improved conflict resolution in Indian country.

Thank you for allowing me to share my thoughts on this legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Sherwin Broadhead". The signature is fluid and cursive, with the first name "W." and last name "Broadhead" clearly distinguishable.

W. Sherwin Broadhead

The Honorable Ben Nighthorse Campbell  
The Honorable Daniel K. Inouye  
April 2, 1998  
Page 4 of 4



SKAGIT COUNTY  
FIRE PROTECTION DISTRICT #13  
Box 532  
LaConner, WA 98257

April 7, 1998

To: The Honorable Ben Nighthorse Campbell  
The Honorable Slade Gorton

Re: Public input

For your public hearing on this date at Tukwila, WA,  
please consider the following:


The attached sheet shows the shortfall in funding that this small district has experienced in supporting the Swinomish Tribe. In direct operating costs alone, the shortfall since 1991 amounts to \$87,723. If capital expenditures are included, the cumulative deficit is \$237,469.

This taxing district has no recourse with the Swinomish Tribe. We are at the mercy of whatever the tribal leaders wish to make as a donation. The leaders and their attorneys claim sovereign immunity and exemption from service charges by reason of a Comptroller General ruling from 1955. This ruling deals only with fire fighting services, while over 90% of our services to the Swinomish people are emergency medical calls.

The tax payers of our district will no longer subsidize the cost of fire and EMS services to the Swinomish Tribe. Accordingly, a process has been started under Washington State law to withdraw the Swinomish village and the casino areas from the fire district boundaries. Withdrawal will probably come up for a district-wide vote in September, 1998.

The above approach is being taken reluctantly. Instead, Fire District #13 would prefer to follow Section 4 of your proposed legislation. It will bring equity to the relationship between this district and the Swinomish Indian Senate because it will permit this governmental unit to sue in federal court to recover the costs of services provided to a recognized tribal government.

Sincerely,

  
James L. Grove  
Chairman

Fire and EMS support for Swinomish  
By Fire District #13

Direct cost of operations:

Year	Calls	Cost/call	Tribe cost	Donations	Short
1992	77	228.44	17,590	0	17,590
1993	90	265.41	23,887	10,000	13,887
1994	86	300.24	25,821	10,000	15,821
1995	94	331.93	31,201	24,750	6,451
1996	103	295.13	30,398	16,448	13,950
1997	108	278.00	30,024	10,000	20,024
<b>Totals</b>	<b>558</b>	<b>284.81</b> (avg)	<b>158,921</b>	<b>71,198</b>	<b>87,723</b>

Capital costs:

1992 Rescue truck - Summit	77,764
1993 New bay at Summit	53,925
1994 Pumper - Hope	158,760
1996 Aid van - LaConner	113,438
1997 Pumper - LaConner	237,327
1997 New roof at Summit	39,450
<b>Total capital spending</b>	<b>680,664</b>

Calls to Tribe/Casino area account for 22% of calls.

22% of capital costs =	149,746
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<b>Total shortfall</b>	<b>237,469</b>
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Senitt

April 1, 1998

TO: Senator Ben Campbell

RE: Legislation to Waive Sovereign Immunity

Dear Senator Campbell and Members of the Senate Indian Affairs Committee:

## **I. FACTUAL BACKGROUND**

The Treaty with the Duwamish, Suquamish entered into on January 22, 1855, ratified March 8, 1859 and proclaimed April 11, 1859 set forth the terms between the Northwest Washington Tribes and the United States of America. One of the requirements of that Treaty was that the Tribes were to preserve friendly relations. In Article 9 of the Treaty:

"The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities."

The Snee-Oosh Land Company ("Land Company") is a community of sixty (60) residences and the Hope Island Inn, located along the shore of Skagit Bay within the geographic boundaries of the Swinomish Indian Reservation. The approximately 120 acres is owned in fee simple, purchased in 1925 from individual Indians and the sales sanctioned by the Department of the Interior. The Land Company has a water system dependent on ground water wells. The Land Company's water rights were granted by the State of Washington in 1935 and renewed in 1953. However, the Land Company owners are not the only fee simple land holders within the reservation boundaries; non-tribal residents are numerically significant, constituting a majority of residents on the reservation, owning more than 70 percent of the land.

## **II. SOVEREIGN IMMUNITY ISSUES**

We have been asked to help illustrate how tribal sovereign immunity has impacted the Land Company and other non-tribal members who own property in fee located within the exterior boundaries of the Swinomish Indian Reservation.

Snee-Oosh - Tribal Sovereign Immunity Matter - 1.  
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In approximately 1982, the Swinomish Tribe ("Tribe") tried to charge a \$200 "Bulk Head Permit" to every beachfront property owner in the area and it was only after area people organized into the "Civil and Equal Rights for All" (CERFA) group and confronted the Tribe with a refusal to pay did the Tribe relent. Sovereign immunity allows tribal officers to pass and attempt to enforce laws and harass non-tribal members at will with no threat of accountability or judicial recourse.

In the early 1990's, the Tribe attempted to take over Skagit County Sewer District No. 1 ("SCSD No. 1"). During negotiations to send sewage from SCSD No. 1, through the public road right-of-way (through the Reservation) to the LaConner Treatment Plant, the tribal officials demanded that SCSD No. 1 be disbanded and reformed as a tribal sewer district. It was only with the intervention of Land Company that the tribal demand was denied. The threat of sovereign immunity causes county and state agencies to submit to the Tribe's demands despite the deleterious effect on non-tribal landowners.

In 1990 and again in 1995, the Tribe passed two versions of a "Swinomish Water Ordinance." Each version claimed that the Tribe owns all water resources - regardless of the underlying ownership of land and without regard to state issued water rights, and the ordinance actually stated that if any conflicts arise, that the Swinomish Water Commission (Tribal Senate appointees) is directed to find in favor of tribal or tribal members' uses. Each version of the ordinance attempted to lump non-tribal landowners under the direction of tribal law and subject their land to inspection by tribal officers. Further, the only appeal of rates was through the Tribe. It is only because the Department of the Interior has not approved these ordinances that the Tribe has not attempted to enforce them. If the Department of the Interior ever approves any of these ordinances, the tribal entities will utilize the concept of sovereign immunity in order to enforce this ordinance and avoid any meaningful judicial review of its unfair and unconstitutional requirements.

The Tribe has attempted to zone non-tribal fee land. In addition to being subject to Skagit County zoning, the Tribe has attempted to require owners of non-tribal fee land to comply with tribal zoning; threatening not to furnish water (which it gets from the City of Anacortes water system) or not allow any other water purveyor to supply water to the property. County agencies are afraid to challenge the Tribe due to sovereign immunity.

The Tribe has attempted to require tribal forestry permits to harvest trees on non-tribal fee land. In addition to obtaining permits from the Department of Natural Resources (DNR) the Tribe requires a permit which, in turn, requires the submission of the applicant to tribal law. Additionally, foresters and loggers are subjected to threats of non-consideration for tribal projects if they do not agree to tribal demands on non-tribal projects. Even though state agencies attempt to avoid confrontation with the Tribe due to sovereign immunity, the process is expensive and time consuming and without recourse. For example, even though the Tribe submitted written opposition against the select cut of an Eighty (80) acre parcel owned in fee by the Land Company, the DNR



approved the permit. Then after the DNR permit was issued the Tribe officials placed two (2) stop work orders on the project and threatened to use force to stop the logging, unless the Land Company submitted to the Tribe's permit process, which required the Land Company to submit to tribal jurisdiction.

The Tribe has attempted to require compliance of non-tribal members to comply with building code requirements on fee land. This is an additional requirement to owners having to obtain Skagit County building permits. Sometimes permits are delayed for months because the County will fail to support non-tribal members due to sovereign immunity and the threat of litigation.

The tribal police with official police cars, lights, sirens, uniforms and guns stop many cars each day (even on State Highway 20) and issue routine traffic tickets to non-tribal members. These tickets require reporting to and paying the Tribe for breaking tribal traffic law -- even though it is legally well established that tribal police only have jurisdiction over tribal people in these minor traffic areas.

The Tribe sees no problem with charging renters/leaseholders for capital improvements (water/sewer lines) within the Reservation, and not charging the Indian/tribal landowners for the same improvements. So far, the tribal agencies have not been held accountable in a state or federal court due to sovereign immunity.

There are several occasions when the Tribe has failed to pay for sewer service to the City of LaConner and for water service provided by the City of Anacortes -- utilizing "sovereign immunity" -- in order to negotiate a reduced price or not pay at all.

Whenever the Tribe simply wants to accomplish a project, they "spot zone" the area and give themselves all necessary permits - even if the project involves non-tribal fee land, and should customarily fall under county and state agencies for permitting.

These are just a few of the most recent issues involving the effect of sovereign immunity on non-tribal fee landowners.

Overall, tribal sovereign immunity denies remedies for violations of legal rights. It is an anachronism in today's world. Although tribes may sue a citizen or governments at any level, non-Indians and state governments may not seek justice in an impartial court when they have a dispute with tribal governments.

What we ask is tribal responsibility and accountability for tribal actions. The doctrine of sovereign immunity frees tribes from these twin burdens which all other citizens and the federal, state and local governments must bear. Immunity from civil suit is not "guaranteed" in any treaty with any tribe not is it a constitutionally guaranteed. Sovereign immunity of Indian tribes is a judicially created doctrine; it is also a doctrine

Snee-Oosh - Tribal Sovereign Immunity Matter - 3.


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that the Supreme Court has explicitly stated that Congress retains the absolute right to define, limit or eliminate.

Self-sufficiency and self-governance come with a price tag -- responsibility and accountability. The waiving of tribal sovereign immunity would enable those harassed or threatened by the Tribe or tribal officer's actions to have recourse in the state or federal court systems. If we are truly a nation of laws, all should be governed equally by these laws.

Respectfully submitted,

SNEE-OOSH LAND COMPANY

By   
MITCH GINETT  
Its President

ROBERT P. GIBB, M.D.

PATHOLOGIST  
204 VIEWCREST RD., BELLINGHAM, WA 98226 \* (360) 733-5775

April 7, 1998

Senator Ben Campbell, Chairman  
Senate Indian Affairs Committee  
U.S. Senate, SR 380  
Washington DC 20510

RE: U.S. Senate Hearing on Tribal Sovereign Immunity

Dear Senator:

As Medical Examiner for the Coroner/Medical Examiner of Whatcom County, Washington for 34 years and as the medical expert doing examinations of all reported victims of sexual assault for 17 years in Whatcom county including the Lummi Indian Reservation, I am writing concerning my experience, observations and considerations of the criminal justice system for Indian Reservations during that period. For the most part this applies specifically to the Lummi Reservation and the neighboring communities.

Enclosed is a letter, authored by me, published in the December 16, 1992 issue of the Journal of the American Medical Association (Att #1). It is, I believe, self explanatory..

My concerns are for the civil rights of non Indians who encounter Native American criminal justice systems, and also for the rights of Indians who live within the Reservation.

During my tenure as Medical Examiner there were 3 women who were victims of unsolved homicides on the Lummi Reservation. During that same period there were 2 women victims of unsolved homicide in all of the rest of Whatcom County, a major demographic disproportion. That this experience may not be confined to the Lummi Reservation is exemplified in the attached newspaper article about the Yakima Reservation (Att.#2).

My experience with sexual assault is similarly disproportionate. Women of claimed Indian ethnic origin constituted 3 fold expected representation based on population figures at that time. This figure may be low because for a period, it became impossible for me to examine sexual assault victims from the Reservation because I could not obtain reimbursement for my services but more important, all proceedings occurred in Federal Court in Seattle, despite there being an unused Federal Courtroom in Bellingham. As a solo, overworked practitioner, I did not have the day or two to spend commuting and waiting to testify in Seattle. Further, I considered this a major abuse of the victims and the accused and their families and friends for the forced expense and inconvenience of traveling to Seattle.

Improvements have occurred over the past 45 years but problems continue to exist. There will never be adequate resource for tribal law enforcement to address the sophisticated technological and training demands of present day criminal investigation.

Discrimination against women is not confined to criminal activity. Because they are more often victims, judicial discrimination compounds their problems. Business Council actions also suggest this bias (Att.#3)

Disturbing is the definition of who constitutes a tribal Indian. Changing definitions of tribal eligibility necessitated by marriages with non Indians diluting the ethnic genetic pool is contributing to increasing hostility. Inter racial and inter ethnic marriages continue at an accelerating rate in the melting pot known as the United States of America detailed in the two accompanying press reports (Att #4).

The serious social and psychological problems created and perpetrated by treaties and reservations, intentionally or unintentionally, designed to maintain Native American people as second class citizens, will persist. Reservation politics and the well intended, naive public assure that this social anomaly will continue. The losers are those who have the misfortune of being born on reservations in a culture with



many positive attributes but with enough governmental and resource weaknesses to guarantee eventual disintegration.

Social and economic, politically correct, life supports prolong the agony.

The proposed legislation, Senate Bill 1691, is a step in the right direction. It will diminish ethnic hostility and promote ethnic harmony toward solving the discriminatory problems which have continued to plague our nation for more than a century and which have intensified in the past 25 years.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert P. Gibbs", written in a cursive style.

Robert P. Gibbs, M.D.

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systems have yet been shown to decrease inappropriate prescribing, doctor shopping by patients and drug abuse, or pharmacist fraud to a degree that supercedes their detriments or warrants their widespread institution.

Certainly, prescribing can be improved. As Sampson points out, our desire to find and punish people who abuse a system often leads to broad programs that ultimately punish the innocent. We should demand that the efficacy of the recently instituted systems for control of benzodiazepines be shown effective before expanding them widely. However, we should not abandon attempts to improve prescribing that will raise the general quality of care. Physician and patient education about medications, development and propagation of prescribing guidelines, as well as better communication of new knowledge to practitioners may avoid the need for circumventing burdensome prescribing control programs so as not to harm the innocent.

Michael Weintraub, MD  
Briarcliff Manor, NY

1. Weintraub M, Singh S, Byrne L, Maharaj K, Guttmacher L. Consequences of the 1989 New York State tripartite benzodiazepine prescription regulations. *JAMA*. 1991;266:2392-2397.

**In Reply.**—Although Dr Sampson's descriptions of the inconvenience involved in writing triplicate prescriptions will resonate for many physicians, I wonder whether a majority of them would agree that the nuisance factor is really "the major issue for physicians." Many of his complaints could be addressed by procedural changes and would be eliminated by electronic point-of-sale prescription surveillance systems.

Changes in surveillance methods could decrease the inconvenience for physicians but would not remove the need to balance concerns about confidentiality, stigma, and the freedom to prescribe appropriate treatment against attempts to control inappropriate prescriptions and diversion. These issues are carefully considered in a recent *JAMA* article from the National Institute on Drug Abuse.<sup>1</sup>

Richard M. Glass, MD  
Deputy Editor, *JAMA*

1. Cooper JR, Caschowitz DJ, Petersen RC, Molinaro SP. Prescription drug diversion control and medical practice. *JAMA*. 1992;268:1306-1310.

### Alcohol-Related Deaths of American Indians

**To the Editor.**—The article on pedestrian and hypothermic deaths among Native Americans in New Mexico<sup>1</sup> parallels the experience of the Whatcom County Medical Examiner's Office in Northwest Washington. In our community the incidence of sexual assault of Native American women<sup>2</sup> and homicide of and by Native American women is similarly disproportionate. Alcohol is similarly a major feature in these assaults.

At issue is the statement that was made in the accompanying Editorial that "the surrounding communities and individuals must recognize tribal sovereignty" and the conclusion that "[t]he strategy for solving alcohol-related problems must be comprehensive and must acknowledge tribal sovereignty."<sup>3</sup>

As long as the American Indian community insists on being considered a third world nation, demanding special social and economic welfare-type handouts, a significant segment of its population will perceive themselves as second-rate citizens and seek escape in self-destructive social and health behavioral practices. Poor self-esteem, culturally approved assault on women, alcoholism, violence, and health problems will continue. Most recently, we have blessed them with the opportunity to preferentially develop socially addictive and de-

structive gambling businesses, assuming that generated revenues will solve personal-identity psychological problems.

It is national hypocrisy to preach integration for minorities and promote segregation for American Indians. The "reservation" was and remains the most discriminatory policy ever created by the US government for any minority group. The only real solution will be full integration with the rest of the United States, where for the most part, the educated escape the reservation and where all Americans appropriately belong. A large segment of the American Indian population escapes temporarily to the bars; others partially escape to low-income housing clusters in adjacent communities where many are ill-prepared to cope economically. Low self-esteem, sexual and other forms of assault, and alcohol and drug abuse prevail. Wishful behavioral commands such as outdated "tribal sovereignty" will not solve social anomalies.

Robert P. Gibb, MD  
Bellingham, Wash

1. Gallaher MM, Fleming DW, Berger LR, Sewell CM. Pedestrian and hypothermic deaths among Native Americans in New Mexico between bar and home. *JAMA*. 1992;267:1345-1348.  
2. Gibb RP. Symposium sexual assault: advances in medical-legal issues. Seattle University of Washington, February 19-20, 1987.  
3. Lujan CC. Alcohol-related deaths of American Indians: stereotypes and strategies. *JAMA*. 1992;267:1354.

**To the Editor.**—The recent article by Gallaher et al<sup>1</sup> concerning the excess mortality due to unintentional injuries among Native Americans in New Mexico highlights a major health problem related to alcohol abuse in the population studied. Lujan's<sup>2</sup> Editorial cautions against generalized solutions across American Indian tribes. As she points out, there are many similarities, but also many differences among Native American tribes. However, the mortality statistics for American Indians living in the 33 reservation states make it essential that attention be given to the major causes of excess mortality. For example, of all American Indian and Alaska Native people who died during 1986 through 1988, 33% were under 45 years of age, compared with 11% of the non-American Indian population.<sup>3</sup>

Mortality statistics represent the tip of the iceberg—one extreme of a continuum of morbidity, disability, and reduced quality of life caused by disease and injuries among Native Americans. Because many of these causes of illness and death are preventable, substantial improvements are possible in the health of Native Americans. Native Americans themselves are in the best position to identify and implement the interventions that can break this cycle of excessive morbidity and mortality.

Recognizing this central role of American Indian people in reversing their high rates of mortality and morbidity, The Robert Wood Johnson Foundation (Princeton, NJ) launched its Improving the Health of Native Americans Program in 1989. This program encourages Native Americans to develop innovative approaches to their major health problems, including incorporation of traditional cultural values. The foundation allocated more than \$6 million to fund 36 projects addressing a variety of health problems identified by American Indian people. A majority of the applications received concerned the harm caused by substance abuse in American Indian/Alaska Native communities. Thus, the foundation will launch a new initiative later in 1992 to help Native Americans address this problem by developing prevention and early intervention programs for youth as part of communitywide efforts to integrate prevention with treatment, aftercare, and supportive services.

The study by Gallaher et al is useful in helping to understand the causes of excess mortality among Native Americans and is a logical step in developing an information base

A6—The Bellingham Herald Tuesday, January 26, 1993

## ▼ NORTHWEST

# Link suspected in 13 deaths

**CRIME:** Agencies aren't coordinating on reservation killings of Indian women.

THE ASSOCIATED PRESS

**TOPPENISH** — The remains of 13 women have been found across the vast Yakima Indian Reservation since 1980. All died violently. Most were Indian.

None of the cases has been solved and some wonder if the slayings are the work of a serial killer, the Yakima Herald-Republic reported Sunday.

The sexually mutilated body of the latest victim, Shari Dee Sampson Elwell, was found Dec. 30 off Old Maid Road in a section of the 1.3 million-acre reservation that is closed to non-Indians. She was strangled.

Melford Hall, who oversaw criminal investigations here for the Bureau of Indian Affairs, says the killings were part of why he decided to retire in 1989 after 22 years. The deaths still haunt him, he says.

"They'll probably say, 'He doesn't know what he's talking about,'" Hall said recently. "But then you look at all these names."

Eleven of the 13 victims were Indians. Most were born and raised on the reservation and abused alcohol.

Most of the bodies were found in remote areas where time, weather and animals wiped away evidence, Hall said.

Most of the victims were in their 20s. At least eight were mothers.

Some of the women were stabbed. Others were beaten or shot to death. Two drowned, and one apparently was run down by a

car or truck.

In some cases, authorities dealing with skeletal remains were unable to determine the cause of death.

Foul play in three of the deaths has been tentatively ruled out by some investigators, but not by others.

Hall believes alcohol is a key in the slayings.

"My own opinion is this guy sits at a tavern someplace and waits for an intoxicated woman and grabs her," he said.

The list of the 13 deaths was compiled by the Yakima Herald-Republic through news clippings, interviews with current and former law enforcement officers and records obtained through the federal Freedom of Information Act.

It could be incomplete. Two additional Indian women — Karen Louise Johnly and Daisey May Tallman, both in their late 20s — have been missing since 1987, the newspaper reports.

The Tribal Police Department refused interviews on the slayings. Tribal Police Chief Davis Washines has not returned phone calls.

The BIA's criminal investigator in Toppenish, Virgil Randall, refers questions to the FBI in Seattle and BIA offices in Portland, Ore.

The FBI, which has jurisdiction over homicide cases on Indian trust lands, referred most questions to its Washington, D.C., headquarters. FBI spokesman Dick Thurston in Seattle said all the deaths were investigated by federal agents. Except for the Elwell slaying, all the cases are closed, though they could be reopened if new information surfaced.

Hall complained that there has been a lack of coordinated effort

by law enforcement agencies.

"A lot of times we would call (the FBI) and they'd say, 'Just send us a report,'" he said. "They spent millions of dollars over there (on the Green River serial killings), and wouldn't spend anything over here."

State and King County officials spent \$15 million on the hunt for the Green River killer believed responsible for the deaths of 49 women between the summer of 1982 until early 1984.

The Yakima County Sheriff's Office has sought assistance in the reservation slayings from experts on serial killers: Detectives in 1988 asked the Green River Task Force for help in at least one of the deaths.

Sheriff's detectives also sent information to Bob Keppel in the state Attorney General's Office. Keppel heads up the state's central data base for unsolved homicides and sexual assaults.

Among the obstacles to solving the case is the lack of missing persons reports, said sheriff's Deputy Dave Johnson.

It is not unusual for tribal members to leave the area without informing relatives or friends, he said.

"It's kind of like the Green River" victims, many of whom were prostitutes, Johnson said. "You have individuals with no permanent address."

He said there has been speculation that the deaths could be connected.

Harry Smiakin, a former assistant Yakima tribal police chief and current tribal council vice chairman, agreed.

"The thought has crossed my mind," he said.

## Yakima Indians 'in crisis'

Tribal nation asks congressional aid.

The Associated Press

**WHITE SWAN** — Members of the Yakima Indian Nation have told their congressman their culture is in crisis, and also appealed for help in solving a string of mysterious deaths on the reservation.

Rep. Jay Inslee, D-Wash., whose district includes the reservation, was also told that federal agencies must be sensitized to Indian problems.

The comments were made Sunday during a meeting in this reservation town.

"We are hoping, Mr. Congressman, that something can be done," said Clifford Moses, a member of the Tribal Council.

"The belief of the Indian race of people is we never rest in our mind until we know where our loved one is, whether she was murdered or lost and gone forever," he said.

Since 1980, the remains of 13 women have been discovered on the reservation. Most were Indian and died violently. None of the cases has been solved.

The most recent was Shari Dee Sampson Elwell, 30, whose body was discovered in December near White Swan.

Indians said traditional values prohibit her family from speaking about her death, or even speaking her name. But several family members stood as tribal member Patricia Martin read a statement to Inslee.

Martin, a former Yakima Nation school superintendent who now works for the state superintendent of public instruction's office, told of tragedies that have struck her family.

Her sister is on the list of unsolved murders. A brother was recently shot to death on the reservation, and another recently drowned, she said.

She said Indians suffer at the hands of the "dominant society."

The loss of their traditional culture brings a multigenerational trauma that leads to social problems like drinking, apathy, self-hate, physical and sexual abuse, and suicide, she said.

Inslee was told the FBI, which has jurisdiction over much of the reservation, has not committed enough resources to the killings, and there is confusion involving jurisdiction of the Yakima County sheriff's office and tribal police.

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WY FEBRUARY 27 1995

THE BELLINGHAM HERALD

# COMMUNITY

OPINION **B**  
Inside: B4

## Lummi alleges rights violation

### Member of Business Council sues tribe, claiming she was unfairly tried

BY RACHEL PRENTICE  
THE BELLINGHAM HERALD

A Lummi Indian Business Council member has sued Lummi Nation, the council and her fellow council members over alleged violations of her civil rights.

Victoria Deardorff, 46, filed a lawsuit in U.S. District Court in Seattle, alleging council members violated her constitutional rights, including her right to free speech and her right to a fair trial.

Her charges stem from sanctions taken against her during a council meeting last May.

"When I tried to defend myself, they didn't hear it," Deardorff said.

Henry Caggy, council chairman, said the lawsuit violates the facts.

The suit names all 10 of Deardorff's fellow council members at the time, including seven current members and three former members.

The dispute stems from an altercation last May 20, when Deardorff argued at the tribal center with a woman who works for Lummi Nation.

Four days later, Lummi Tribal Court

#### Quotable

*"I felt like I was being lined up and there was a bunch of men standing up and shouting."*

Victoria Deardorff

charged Deardorff with assault and disturbing the peace. Those charges were later dropped.

That night, the council called Deardorff into a closed-door meeting to consider the court charges against her.

"I felt like I was being lined up and there was a bunch of men standing up and shouting," she said.

Council members found her guilty and sanctioned her, she said.

The penalties included:

- Suspending her from the council for two months and an evaluation in the third

#### Quotable

*"The total actions that the council took, the reprimand, were totally distorted by her and her attorneys."*

Henry Caggy

month. She was later reinstated.

■ Asking her to step down from her job as assistant to the Lummi executive director.

■ Asking her to receive alcohol, anger management and marriage counseling.

■ Removing her from the council's Law and Order Committee.

■ Writing letters of apology to the tribal workers who brought the allegations and to the Lummi community.

She also was required to post yellow flags around the Lummi Reservation. The flags prominently displayed the Lummi tribal

logo and said "council action" in bold type. They outlined the charges against Deardorff and the sanctions.

Deardorff claims the council imposed the sanctions without notifying her in advance so she could defend herself and without going through regular court proceedings.

She said the sanctions came as a result of work she had done to reform the tribal court system and an investigation she conducted into tribal financial dealings.

That's not true, Caggy said.

"Her conduct was being dealt with by the council and Victoria took that as retaliation against her," he said.

The court dropped the charges against her, ruling that punishing her twice for the same offense — through the council actions and the court — would be a violation of her rights.

The tribe has appealed that ruling, Caggy said. The appeal is pending.

Caggy said the council was dealing with the assault and other issues versus abuse.

"The total actions that the council took the reprimand, were totally distorted by her and her attorneys," he said.



# Gambling raises stakes for tribal membership

THE BELLINGHAM HERALD  
AND THE ASSOCIATED PRESS

With his blue eyes and sandy blond hair, Richard Snelding hardly resembles the classic American Indian of Hollywood films and history books. But he may be the Indian face of the future.

Snelding has one-sixty-fourth Kaw blood — enough for membership in Oklahoma's Kaw Nation tribe, if not for complete acceptance from Indian friends who call him "Casper" and "Wonder Bread."

There's more to being an

Indian than a pedigree, the 22-year-old says: "What you feel inside of you is what's important."

He doesn't have to look far for an argument. With gambling profits raising the stakes of tribal membership, deciding who is a "real" Indian has become one of the most divisive issues facing American Indians today.

Lummi Nation doesn't face the membership problems confronting tribes in Minnesota, Oklahoma and elsewhere, said Henry Cagney, chairman

See TRIBAL, Page A2, Col 1

## Tribal

Continued from Page A1

of the Lummi Indian Business Council.

The tribe's constitution requires at least one-fourth blood quantum for membership, he said.

There's more than limited gambling profits at stake for the tribe, Cagney said. Northwest tribes also generate money from natural resources such as timber holdings, he said: "It's more than gaming."

But many of the 554 federally recognized tribes are easing membership requirements just to survive, prompting worries that tribal traditions will fade along with blood.

Often, their Indian ancestry is unquestioned, but generations of intermarriage have crowded their family trees with non-Indians as well.

"If tribes aren't careful, they can turn into big business corporations that say to hell with culture," said Jerry Bread, a professor of Native American studies at the University of Oklahoma. "I'd like to see the physical traits of American Indians remain, but it's not happening."

One federal study estimated that the percentage of Indians who are full-blooded — 60 percent in 1980 — will fall to 34 percent by 2000 and to 0.3 percent by 2080.

But even as bloodlines thin, being Indian has never been so popular. The number of people identifying themselves as American Indian has

nearly tripled since 1970, rising from 827,000 to more than 2.2 million, census figures show.

A renaissance of Indian pride is partly responsible. So is an upturn in the fortunes of some tribes, notably those involved in gambling.

In Connecticut, the 395 members of the Mashantucket Pequot tribe share profits from a casino that clears more than \$1 million a day from slot machines alone.

The tribe gets about 50 calls a month from people who figure they must have Pequot blood in them. "Some of them can't even pronounce the name of the tribe," tribal spokesman Bruce McDonald said.

It's easy to brush off such wannabes. But when the Pequots looked at their own families, they realized many children and grandchildren wouldn't qualify for membership.

In November, the tribe dropped its eligibility requirement of one-sixteenth Pequot blood. Applicants now must prove only that they are descended from someone listed on the tribal census rolls of 1900 or 1910.

Of course, legal membership doesn't guarantee social acceptance. In some tribes, light-skinned members aren't invited to sacred ceremonies, said Bread, the University of Oklahoma professor. Some parents tell their children they'll disown them if they marry outside the tribe, even to other Indians.

But such purists are bucking the trend. With half of all Indians living off reservations, continued intermarriage is likely.

A member of the Lummi Indian Business Council, Sam Cagney, is quoted as saying "has people have no (U.S.) constitutional protection, only treaties" (Herald front page, May 13).

Cagney should be reminded that has people have been citizens of the United States of America since 1924. They

5/20/92  
m Herald, Letters/P.O. Box 1277

have the same constitutional protection as all other citizens of the United States and more.

The reservation Indians do not act or talk like U.S. citizens except when they can take advantage of the benefits of U.S. citizenship. Otherwise, they cling to the myth of "sovereign nations" and reap far more benefits, privileges, and protection than the average U.S. citizen enjoys.

Most "native Americans" have long since taken their place as full and productive citizens of these United States. Census figures show that there are 1,534,000 citizens of Indian ancestry; however, the reservation population in the entire U.S. numbers but 284,593 (see EPA report, March 4, 1988). In other words, 80 percent of our native Americans have become full-fledged and often successful American citizens.

It is that bare one-tenth of one percent of American citizens (the reservation Indians) who cling to the passe old treasies and take advantage of those benefits plus full U.S. constitutional protection. Cagney has all that on which to hang his hat.

Con B. Frieze  
Ferndale

AH #4



**Allottees Association and Affiliated Tribes  
of the Quinault Reservation (AA&ATe)**

35 South Broadway  
Tacoma, WA 98402-4100  
(253) 383-8907

April 20, 1998

Ben Nighthorse Campbell, Chairman  
Committee on Indian Affairs  
United States Senate  
Washington, DC

SUBJECT: Comments on S. 1691

I am Indian. I am a member of the Chinook Tribe. Due to my Chinook heritage I was allotted on the Quinault Reservation. I have never lived on a Reservation. I have served as Chairman of the Chinook Tribe. I have been a member and officer of the Quinault Allottees Committee, and a board member and Chair of The Allottees Association and Affiliated Tribes and Bands of the Quinault Reservation.

None of these positions have provided a salary, grant, or other income. Indeed, they have been performed at great sacrifice of personal time and money.

The Comments:

Section 1. (b) (4) "for more than a century, the Government of the United States and the States have dramatically scaled back the doctrine of sovereign immunity ... etc."

At the Seattle hearings on S. 1691 it was noted the United States has not completely lifted the cloak of sovereign immunity. The lifting of sovereign immunity for Indian Tribes should also be gradual. Sections 7, 4, and 5 of the proposed S. 1691 have merit and will be addressed in that order.

Section 7. Indian Civil Rights. YES. Indian Civil Rights are meaningless unless the individual Indian has recourse to the federal district court. Amendment of the Indian Civil Rights Act as noted in S. 1691 must be enacted immediately.

The individual Indian, their job, and their property are continually at risk from those in power at the Tribal level. All too frequently many of those in Tribal power are arbitrary, greedy, and sometimes vengeful.

Understand, I can only speak with knowledge in regard to the Quinault Tribe. If this section became law the Quinault Tribe would change their confiscatory attitude toward individually owned trust property. Property legally owned by individual members of the eight tribes of the Quinault Reservation.

Section 4. Indian Tribes as Defendants. YES, with reservations. The proposed amendment provides Federal district courts with jurisdiction in tort and contract cases and also matters arising under Constitution, laws, or treaties. The amendment should not become more than what it now says.

Section 5. Tort Claims Procedure. YES, with reservations. This section protects options and limits liability of the Tribes. The amendment should not become more than what it now says.

Section 3. Collection of State Taxes. NO. This obligates tribes and individuals to collect tax on goods and services sold to non-Indians. Testimony at the Seattle hearings indicated some Tribes now collect State Taxes of their own volition.

Section 6. Indian Tribes as Defendants with Respect to Claims under State Law. NO. Not ready for this NOW OR EVER. The state courts are much easier to use for frivolous lawsuits. The problems mentioned at the Seattle hearings can be resolved by the federal courts with the amendments mentioned above.

Last I would recommend that in all proposed legislation affecting the Quinault Reservation that this organization, the AA&AT, be consulted. We own the overwhelming majority of the trust property of the Quinault Reservation. We are members of the eight tribes for which the Quinault Reservation was formed. We are currently excluded from the decision making process that directly affects us. Understandably, we resent this.

Thank you for accepting our remarks.

Sincerely,



Carlton L. Rhoades, Chairman



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**THE SUQUAMISH TRIBE**

P.O. Box 498

Suquamish, Washington 98392

April 21, 1998

Sen. Ben Nighthorse Campbell  
Chairman, Senate Indian Affairs Committee  
Hart Senate Office Building, SH-838  
2nd & C Streets, N.E  
Washington, D.C. 20510

**RE: S. 1691, "American Indian Equal Justice Act"**

Dear Chairman Campbell:

Your Committee held a field hearing on April 7 concerning this legislation, which would broadly abrogate tribal sovereign immunity and subject tribes to suit as if they were mere private organizations. At the April 7 hearing, you indicated that the record would remain open for two weeks for additional, written testimony. The following is the testimony of the Suquamish Tribe.

On behalf of the Tribe, I wish to thank you and the Committee for holding a hearing in Seattle, a city named for a leader of our Tribe. In addition to his other accomplishments Chief Seattle is remembered among the Suquamish as one of the signatories to the Treaty of Point Elliott. When that Treaty was signed in 1855, the land, livelihood and laws of the Suquamish people were still intact. The western shores of Puget Sound were our land; the abundant waters of the Sound gave us our livelihood; and our laws were a clear set of social expectations, highly deferential to the individual, yet protective of the community as a whole and enforced through well-developed systems of restitution, mediation, and social disapproval.

The Treaty took most of our land; allotment and sale of our Reservation lands in violation of Treaty provisions took much of the rest. The marine livelihood which we agreed in the Treaty to share "in common" with non-Indians was also gradually usurped by them, and degraded by careless development. Lastly, our laws were suppressed by the Bureau of Indian Affairs, which substituted its own codes, courts, and police. One thing was never taken from us, however, and that is our sovereignty, our inherent right and power as a people to exercise collective control over ourselves, our destiny, and our territory. Whatever the Conqueror's courts or Congress may say, in the eyes of a just law that sovereignty can be taken from us only by consent. And we do not consent.

On the contrary, we as tribal leaders, and the dozens of tribal members who took time off from their jobs and families to attend the hearing in Seattle, object to S. 1691 in the strongest possible terms. We do not do so, as Senator Gorton suggests, because we remember the many wrongs



Letter to Sen. Ben Nighthorse Campbell

RE: S. 1691

April 21, 1998

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done us in the past and want restitution for them -- though we do remember and restitution would be only fair and honorable. Rather, we object because this bill would perpetrate a new wrong, and take away from us a part of our sovereignty that earlier leaders of the United States declined to take. We object not because the bill's proponents would ignore our history, but because they would repeat it.

The record generated by your Committee's hearings is clear: Tribes are not operating as "rogue nations," who claim immunities from suit unlike anything in the non-Indian world. The Founding Fathers of the United States recognized sovereign immunity as an indispensable prerogative of government. States and the United States today retain extensive immunity, and use it to protect scarce public resources against the costs of litigation, and to insulate key policy decisions from legal attack. It is equally clear that S. 1691 is a solution in search of a problem. Numerous witnesses reviewed the remedies available for persons injured by tribal government, including waivers of immunity in contracts and in liability insurance, immunity exceptions created by tribal statute and case law, coverage under the Federal Tort Claims Act, and suits against individual tribal officers under *Ex parte Young*.

In comparing tribal immunity to that of other governments, the relative vulnerability of tribal governments to the risks and costs of litigation must be taken into account. It was only in the past fifty years or so, as non-Indian governments grew in power and wealth, that their legislatures found these risks to be outweighed by the social benefits of broad immunity waivers, resulting in passage of the Federal Tort Claims Act and its state equivalents. A similar pattern could be expected of tribes, if they were permitted to expand their economic base and strengthen their governments, rather than facing constant legislative and judicial attack on their powers and legitimacy. Indeed the trend is already apparent, as many of the larger and more economically vibrant tribes have passed laws waiving their immunity for many claims. In the meantime, however, many tribal governments are like our own -- unable to fully fund needed governmental services, still developing governmental structures to replace those which the BIA destroyed, and surrounded by persons who either covet our resources or resent our rights, and who would like nothing better than to mire us in endless litigation. Indian nations ask no more of Congress than that we, as sovereign people, have the same right which the states and the United States have had, to balance for ourselves the individual versus the collective good, and to craft tribal sovereign immunity law to fit our own situations.

This modest request is under attack by people obsessed with fighting tribal rights and sovereignty. The witnesses who spoke in Seattle in support of S. 1691 exemplify this obsession. Mr. Alan Montgomery, President of United Property Owners of Washington, lamented the treaties which allow Indian shell fishing on his beaches, and condemned a rule of law that prevents him from suing tribes, should the individual harvesters damage his property. He showed no similar concern for the long denial of tribal property rights guaranteed under the

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RE: S. 1691

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treaties, and he made no similar call for the State to become liable for its fishers, or for the millions of others whom it licenses to, for example, drive automobiles. The animus against tribal authority is so extreme that the family of another UPOW Board member who lives on our Reservation turned away tribal police who responded to a "911" call from his home, seeking aid for a family member's apparent heart attack!

In short, it is not we Indian Tribes who are obstructionist or unreasonable, or who are mired in ideology or a quest to right past wrongs. We have, instead, accepted the problems generated by past failures in federal Indian policy, and set about to solve them. Thus, when the Supreme Court declared that our Tribe could not prosecute non-Indians whose crimes threatened our communities, we and many other tribes responded by seeking cross-deputization agreements with non-Indian police forces. When concerns were raised about the liability risks in cross-deputization, we increased our insurance coverage and sent our officers through the same police academies as state-commissioned officers. When a non-Indian drunk driver challenged our right to stop him and turn him over to the State for prosecution, we joined with our County Prosecutor and prevailed before the State Supreme Court. When the BIA failed to adequately fund our tribal court, we made judicial funding our highest priority, and between our own revenues and Congressional earmarks obtained the funding to hire law-trained judges and prosecutors and to acquire modern facilities and record-keeping systems. Most recently, we have stepped up our cooperation with local law enforcement through joint training, coordinated grant proposals, and programs to refer Indian youth offenders from the State courts to tribal rehabilitation programs.

While we have been at work building a fair, modern justice system, our tribal judges and staff have also sought to retain and reinvigorate the traditional dispute resolution structures destroyed over the years by the federal government, structures which emphasize non-adversarial, community based conflict resolution, and repair of damaged community ties rather than just payment of damages or incarceration. These structures, known as "restorative justice," have been widely praised in recent years by non-Indian legal practitioners as diverse as Attorney General Janet Reno and Justice Sandra Day O'Connor. It is ironic that, while distinguished jurists are praising tribal justice, Senator Gorton perceives it as a grave problem. It is still more ironic, and bitterly so, that Senator Gorton proposes to strip tribes of their immunity at the same time he votes to grant immunity to big tobacco companies and supports caps on product liability awards. Clearly, the Justice proposed for Indian tribes in this bill is anything but equal.

Finally, this legislation is of much broader scope than its findings would demand, and contains numerous ambiguities that will only increase the level of legal uncertainty in Indian Country. For example, §§ 4(d), 5(a) and 6(b) of S. 1691 establish tribal liability comparable to that of a "private individual or corporation" in like circumstances. Putting aside the fact that tribal governments are not comparable to either individuals or corporations, this language will sow confusion because it ignores the real legal distinctions between corporate and individual liability.

Letter to Sen. Ben Nighthorse Campbell

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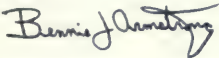
Similarly, the lack of parallelism between the broad grant of federal court jurisdictional over damage claims, in § 4(d), and the language in §§ 5(a) and 6(b) which specifically refer only to "tort claims," leaves tribes to wonder exactly what damage liability they will face in federal court. The Bill's inconsistent references to establishing liability under State law are also troubling, not merely because there is substantive tribal law that could be relied upon, but because of the risk that tribes would face claims under quasi-regulatory state laws that provide for private damage claims as an enforcement tool. Such an unprecedented abrogation of tribal law in favor of the states is simply not needed to provide redress to injured parties.

The simple sloppiness of the Bill is apparent from §5(a), which defines the term "employee of an Indian tribe" at great length, and then fails to use that term in any substantive provision. Presumably the intent is to impose vicarious liability on tribal employers comparable to that faced by private employers. If so, the definition is confusingly broad, as it encompasses not merely employees but any tribal agent, including independent contractors.

A final example of the harshness of this Bill is found in §6 (d), which prohibits removal of claims to federal court. There is simply no reason to deny to tribes the right which other defendants enjoy, to have claims against them under federal law be heard in a federal forum. Certainly the injured parties are not harmed by such removal. The only apparent reason for this provision is to gratuitously elevate state law and denigrate the status of the tribes.

In conclusion, we find this legislation to be unacceptable in both concept and execution. We urge Congress to recognize that much of the conflict between Indian and non-Indian people on and near our reservations arises from the very failure of the United States to abide by its earlier commitments to Indian Tribes, and the resulting creation of opposing claims to the resources and government of Indian Country. Indian Tribes are seeking to address those conflicts in responsible ways, while preserving our sovereignty and identity for future generations. We call upon Congress to remember its distinctive obligation of trust to Indian people, and not to break what remains of the promises made to us, nor to cut short the development of tribal governments and tribal communities by adopting this destructive and unnecessary legislation.

Respectfully,



Bennie J. Armstrong, Chairman  
Suquamish Tribal Council

BA:JS:lg

# OPPOSITION TO S. 1691 - "AMERICAN EQUAL JUSTICE ACT"

The Honorable Ben Nighthorse Campbell  
Chairman  
Senate Committee on Indian Affairs  
838 Hart Senate Building  
Washington, D.C. 20510

We, the undersigned, **adamantly oppose Senate Bill S. 1691**, entitled the American Equal Justice Act. If enacted, this bill would make it very difficult for Tribes to fulfill their Tribal governmental responsibilities and will extinguish hundreds of years of Federal Indian policy that protect the sovereign status of Tribal governments.

This attack on Indian Country comes when some Tribes are finally starting to emerge from poverty and neglect. S. 1691 puts Tribal Self-Governance and self-sufficiency at peril.

Congress should honor America's promise and **reject S. 1691**.

Date	Signature	Address
1/21/98	Cynthia M. Williams	1363 Thompson Rd Sequim, WA 98352
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4/21/98	Linda J. Sawyer	32 Martha Lane Sequim WA 98382



# OPPOSITION TO S. 1691 - "AMERICAN EQUAL JUSTICE ACT"

The Honorable Ben Nighthorse Campbell  
Chairman  
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Congress should honor America's promise and **reject S. 1691**.

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4/21/98	Sharon U. Coffey	990 W. 23rd St. Sequim, WA 98382
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4/21	Natasha McKee	2023 E. Sims Way #191 P.T. 98368
4/21	Joan Sadner	701 E 9th St. Port Angeles, WA 98362



## West Coast Seafood Processors Association

2130 SW 5th Ave., Suite 240, Portland, OR 97201

503-227-5076 / 503-227-0237 (fax)

*Serving the shore-based seafood processing industry in  
California, Oregon and Washington*

April 15, 1998

Honorable Ben Nighthorse Campbell  
Chairman, Committee on Indian Affairs  
U.S. Senate  
838 Hart Senate Building  
Washington, D.C. 20510

Dear Mr. Chairman:

We recently learned that your Committee is holding a series of hearings on legislation introduced by Senator Gorton that affects tribal sovereignty. We ask that the following comments be included in your Committee's record.

Our Association represents seafood processors and allied businesses located in Washington, Oregon, and California. A significant part of our members' livelihoods consists of processing Pacific groundfish of various species, including Pacific whiting. These fish are all managed under the authority of the Magnuson Stevens Fishery Conservation and Management Act (MSFCMA). Along with the commercial fishery for these species, there are tribal fisheries conducted in marine waters under federal regulations ostensibly deriving from Supreme Court rulings in U.S. v. Washington. The process by which tribal treaty rights to fish and the quantification (i.e., the amount of fish) involved in those rights was clearly established by the Supreme Court in that case.

In June, 1996, the U.S. Department of Commerce issued a regulation under the MSFCMA which described the process the Department would use in the future to allocate fish to Indian treaty tribes. In general terms, the Department stated that it would accept annual requests by treaty tribes for fishing allocations, would allow comment, and then would allocate types and amounts of fish to the tribes. Following publication of the regulation, our Association - along with the Midwater Trawlers Cooperative in Newport, OR; the Fishermen's Marketing Association in Eureka, CA; and the State of Oregon - filed suit in U.S. District Court in Eugene, OR, under the procedures specified in the MSFCMA. Our suit was filed against the Department of Commerce, not any Indian tribe; our primary contention was that the Department's regulation was illegal under the MSFCMA. A similar suit was nearly simultaneously filed in U.S. District Court for Western Washington in Seattle by the State of Washington and the State of Oregon.

It was at this point that we ran up against the laws (or at least a federal judge's interpretation of those laws) governing tribal sovereignty. Our lawsuit was transferred to U.S. District Court for Western Washington. The presiding judge in that court dismissed our lawsuit.

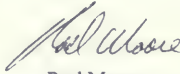
on the grounds that the tribes were indispensable parties and that - since they were not named as defendants - our suit could not proceed. We then moved to have our suit combined with the suit by the States, only to be told by the same judge that individuals have no power to sue tribes. Since the time period provided in the MSFCMA for filing suit had expired, we were effectively denied any ability to contest what we believe are illegal actions taken by the *federal* (not tribal) government. Our suit and the judge's rulings are currently on appeal in the 9<sup>th</sup> Circuit Court.

The point that we are trying to make is that the laws governing tribal sovereignty have been used by a court - with the full support of the U.S. Department of Justice - to deny aggrieved U.S. citizens their right to sue the *U.S. government*, even though those rights are clearly spelled out in federal law. If this precedent holds, then U.S. citizens will be prevented from exercising their rights on almost any occasion with even ancillary involvement of Indian tribes.

We have not tried to directly challenge tribal treaty rights, nor the process for acknowledging and quantifying those rights as clearly laid out by the Supreme Court. If anything, we would like to have that process followed. We have not analyzed Senator Gorton's bill, nor have we taken a position for or against it. However, if that bill provides an opportunity for the thousands of Washington, Oregon, and California residents involved in the Pacific groundfish fishery to get their day in court so that arguments can be heard on the merits of what we believe to be an illegal federal action, then we strongly support it.

As you continue your deliberations on Senator Gorton's bill and the issues of tribal sovereignty, we hope you will keep in mind the history surrounding our current situation and take appropriate action to ensure that citizens are not denied their rights to file suit against their own government.

Sincerely,



Rod Moore  
Executive Director

cc: Hon. Slade Gorton  
Hon. Gordon Smith

March 18, 1968

Dear Senator Campbell,

The American Indian Nations in Arizona are dismayed and shocked at the introduction by Senator Slade Gorton of S. 1691, with the offensive title of "American Indian Equal Justice Act".

This is to inform you that the 19 member tribes of the Inter Tribal Council of Arizona are requesting you to not only oppose the bill but refrain from entertaining any compromise language or substitute bill that attempts to soften the provisions of S. 1691. Any bill that attempts to destroy, undermine and further compromise tribal sovereignty is unacceptable.

The member tribes of the Inter Tribal Council consider S. 1691 an un-American expression of anti-Indian sentiment and a repugnant reminder of the forced assimilation and other destructive Indian policies of the 19th century.

As you know, tribes like other governments negotiate contracts that include limited waivers of sovereign immunity and utilize mechanisms by which disputes under these contracts are resolved. With regard to taxes, a number of states and tribes have agreements on the collection of taxes. The collection of sales and excise taxes from non-Indians doing business on Indian lands is complex and different in each state. States and tribes need to be free to determine how best to address each situation. A "one size fits all" approach by Congress will not work. The United States must honor its trust responsibilities and protect tribes and their resources from exhaustion and disenfranchisement.



We greatly appreciate your advocacy on behalf of tribes and especially your opposition to S. 1691. We ask that you also oppose any compromise legislation.

Thank you for your commitment and support of tribal governments.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "David Kwall". The script is cursive and fluid.

David Kwall  
President, Inter Tribal Council of Arizona  
Chairman, Yavapai-Apache Tribe

# TOM RICHARDSON

3005 Haxton Way, Bellingham, WA 98226

Phone: (360) 758-2441 FAX: 360 758-2627 e-Mail: tom@memes.com

March 27, 1998

Senator Ben Nighthorse Campbell, Chairman  
Senate Indian Affairs Committee  
Room: 838 Senate Hart Office  
Washington DC 20510  
stev\_learis@indian.senate.gov

## RE: Testimony concerning American Indian Equal Justice Act S.1691

Dear Senator Campbell and Members of the Committee,

My name is Tom Richardson. I live at 3005 Haxton Way, Bellingham, WA 98226 which is located deep within the Lummi Indian Reservation. I can not attend the scheduled hearing on the above referenced proposed legislation on April 7, in Seattle. However, I do feel strongly about the bill and would like to have this written testimony introduced into the record for your consideration.

### AN OVERVIEW:

I believe that the Pacific Northwest Indian peoples whose leaders signed the 1855 Treaty of Peace with the United States government still want that peace, on and off the reservations.

In contrast, a vocal faction of non-Indians (on and off of tribal reservations) is intent on winning the new Indian Wars. Mostly they want the land. Some only want the water. Others want to get even for court decisions that went against them. And, some just seeing "red" makes them want to attack their neighbors.

They are united in using powerful friends in high places. Friends with political position and power. Their friends are the new gattling guns in today's battles with Indian peoples. In today's politically correct climate, even the most ardent Indian fighters are loath to champion the old invitation to attack Indians.

Today's Indian fighters use the political language of calculated misdirection, the ruse of championing "rights and justice" -- not Indian rights and justice, but "ours" -- non-Indians. The **AMERICAN INDIAN EQUAL JUSTICE ACT** is not what it sounds like. "The only good Indian government is a dead Indian government," is the modern equivalent of the old war cry which won "us" the West (and the East and everyplace in-between).

Senate Bill 1691 is a deception, a ruse. It is a misuse of the good offices of our national legislature to support those non-Indians who want ever more of Indian Country for themselves. First, SB 1691 would unravel tribal sovereignty -- or else.

tribal funding. Thereafter, those of "us" who covet our neighbor's remaining land -- and water -- could bankrupt tribal governments with legal costs. And, unlike a rose which smells as sweet by any name, this ruse stinks.

If the United States Senate uses its big gun of legislation by right of superior might to unilaterally waive the sovereign immunity which gives some protection to Indian governments from an onslaught of unwarranted legal harassment, modern land grabbers will be both strengthened and emboldened to go after "legal titles" to the remaining scattered bits and pieces of Indian Country.

My wife and I bought our home (in fee simple) on the Lummi Indian Reservation in 1987. At that time, we were somewhat bewildered then pleasantly relieved when, at the conclusion of escrow, we were told that the property we were about to own was part of the Lummi Reservation -- but we could legitimately purchase it anyway. After all these years, however, we have come to appreciate the spurious history of events which lead inexorably to our opportunity to 'legitimately' own that property. It is a long and sad story of legally crafted ruse and trickery, innocence taken advantage of, and outright exploitation. I now add 'troubling' to our initial confusion. It is an absolute incongruity that non-Indians can own real property within the boundaries of lands which were wholly reserved by treaty for the Lummi people; a treaty which was approved, I needn't add, by the United States Senate and by Indian leaders, albeit with a gun to their heads.

What a hundred years ago was accepted as a sweet deal for this region's non-Indians is, after all, not sweet enough. Some of "us" want more yet of what "we the people" of the United States of America once gave our solemn vow would be reserved for Indians.

There is no honor among thieves -- even clever thieves who use bouquets of clever ruses, instead of regiments of armed Calvary, to get what they want. Some members of the United States Senate (especially one of my own) don't want to honor our treaties (or the other myriad of commitments made) with the Lummi Indians. "We" will have more Indian land -- and more Indian water -- for our enjoyment, or profit!

Admittedly, I am not about to abandon my personal claim to the piece of Lummi land my wife and I now serenely call home. So, uncomfortably, my wife and I too are linked to those government leaders who even today seek by this ruse or that to take back our nation's word to the Lummi people. There is, however, a notable difference (with some slightly redeeming quality) between those of "us" who want to continue to live within the Lummi Reservation and those with friends who want to deprive the Lummi (and other Indian peoples as well) of their remaining bits of land -- and water -- those who want to "finish the job" under a charade of right and just.

Instead, why don't "we the people" reclaim a measure of national honor? My wife and I, for two, would be content to live under the jurisdiction of the Lummi Tribal Council --to pay taxes to the Indian government, to receive police and other governmental services they provide in exchange, to be subject to zoning and other ordinances promulgated by that government -- and to have no representation, no voting rights concerning any of the affairs of reservation governance. By all that's right, we should have no more say in on-reservation governance than our Canadian friends enjoy when they purchased homes and businesses, and pay taxes, in our country.

The Lummi people are hospitable, fair, kind and generous. In short, they are far more neighborly with outsiders like ourselves than their history with our kind would lead anyone to imagine, let

alone to expect. Non-tribal residents within the Lummi Indian Reservation would be treated honorably under the sovereign jurisdiction of the Lummi Tribal government. That is as things should be.

However, that is not as my own Senator Gorton would have them be. If the land hungry and the powerful have their way with passage of Senate Bill 1691, our nation's honor will suffer yet another insult. It is time for the United States of America to deal with people who constitute America's First Nation's in a manner which asks for forgiveness for "our" unforgivable past, in a manner which respectfully recognizes their sovereignty and our obligations to true justice.

#### CONCERNING SB 1691:

In reviewing the **AMERICAN INDIAN EQUAL JUSTICE ACT**, I have found several issues with which I take exception -- besides the convoluted misuse of language expressed in the Bill's name. I would like the honorable members of the Senate to consider the following:

1. First and foremost, this proffered legislation (most ardently, I'm embarrassed to find, sponsored by one of my own state's Senators) misrepresents the fundamental nature of Tribal Governments as I understand them. They are not just another legal fiction, like a corporation for example. They are the embodiment of a people's natural claim to a right of self governance and self determination.
2. I find no honorable basis for the proposal that the United States Congress should by fiat waive certain legal immunities historically enjoyed by sovereign Indian tribal governments. Our shared long history of domination by the more powerful hardly makes legitimate the continuing notion of "might makes right." If Indian Nations are to govern themselves, they should freely consider what limitations they want to put on the sovereign immunities which they have, for more than a century, enjoyed. If those Nations are to cease to be, it should not be by fiat of the more powerful United States in contravention of its own approved Treaties of Peace, but by mutual agreements, respectfully negotiated win-win agreements which leave everyone better off. Do Indians believe that they will be better off with this kind of American Justice?
3. The remaining Tribal Governments within the continental boundaries of the United States are, and should be, considered and respected as other sovereign governments. And, not just other governments like cities or even member states of the Union, but as governments with whom the United States of America has formal treaties and ties; not less, but more intimate than with any other governments in the world. Our long and zealous history of genocide, cultural suppression, and racist domination vis a vis all of the Indian people's in our spheres of influence leaves "we the people" of the United States of America in a position to beg forgiveness. We should not at this point in our history be, once again, dictating the terms and conditions of how Indian peoples should be governed. Most pointedly when the real objective behind the name of this Bill is to make Indians more vulnerable to renewed exploitation by non-Indians.
4. Perhaps, the enumerated exceptions to sovereign immunity from legal claims cited in the Bill's 'findings' should be waived -- even to the same extent that they have been by the government of the United States. But, that is a determination to be made by each sovereign Tribal Government, not by Congressional decree. The arguments which proved persuasive to the United States Congress in leading to a modification of the absolute immunities our Nation once held dear, may well prove equally persuasive to the governing bodies of Tribal Governments. That, however, is their business to consider and decide, not ours.



5. The Bill rationalizes the need for such high handed interference into the affairs of sovereign tribal governance because of the "right to due process and legal remedy" of the "nearly half of the individuals residing on Indian reservations (who) are non-Indian" and of "the thousands of people of the United States, Indian and non-Indian, who interact with tribal governments everyday."

First, Congress (back in 1887) made it legal for non-Indians to buy themselves onto the Reservation. Now, some in Congress seek legislation which will encourage further increases in "our" legalized claims to reservation lands. By giving rapacious non-Indians with deep pockets the right to ever more legal harassment of Indian governments, "we" can surely get more and more of what we covet. But, handing yet another legal weapon to the Anti-Indian Movement in America would be yet another assault by the United States of America upon besieged Indian governments. Indian peoples everywhere are already struggling to keep from becoming subjugated minorities -- even in their own lands.

6. To the extent that tribal governments may want to encourage increased commerce and interactions either among their own citizens or with non-tribal members, those governments will, presently or in due course, consider the kinds of waivers of immunity such as those contemplated by SB 1691 as being in their own best interests. The point being, the principle of "buyer beware" may now, in fact, be inhibiting some social and economic intercourse between tribal governments and others. If such inhibitions are to be overcome in the interest of furthering interchange, let the tribal governments decide the when and how of it -- it is their business. And, it should be considered with a view to their best interests, not "ours." It should be their right to exercise (or not), just as with any other sovereign peoples.

#### SUGGESTED CONGRESSIONAL REMEDIES FOR WHAT AILS US:

I offer the following suggestions to satisfy those of "us" who wish to live respectfully in peace within the boundaries of Indian reservations:

- A. **A NATIONAL STATUTE THAT WOULD REQUIRE TITLE COMPANIES AND LANDLORDS TO FULLY INFORM FOLKS, AT THE OUTSET OF AN INVESTMENT IN INDIAN COUNTRY, TO PRECLUDE INNOCENT MISUNDERSTANDINGS DOWN THE ROAD.** "We" should be appraised of the facts concerning our limited rights and our guest responsibilities at the time of purchasing or renting property on reservations, so as to make informed decisions concerning potential legal or social conflicts.
- B. **A NATIONAL STATUTE ELIMINATING THE PRESENT RECOURSE TO OFF-RESERVATION GOVERNMENTS WHEN OUR OWN DESIRES ARE FRUSTRATED BY TRIBAL POLICY OR PRACTICE, WOULD BE FAIR, REASONABLE, AND RESPECTFUL OF TRIBAL SOVEREIGNTY.** If there were full knowledge of the rights, responsibilities, and legal risks associated with living within Indian Reservation boundaries, there would be no cause for "social tensions and turmoil inimical to social peace." For illustrative corollary, consider that local Canadian residents can not turn to their provincial or national governments to find ways around the laws, restrictions, or taxes imposed by the elected officials of Whatcom County or the City of Bellingham. On reservations, "we" should be fully subject to the jurisdiction of the tribal governments: paying them prescribed taxes and fees, forgoing representation in such governance -- as I have described earlier, in my overview.

- C. **THE SENATE COULD BE MUCH MORE CONSTRUCTIVE IN IMPROVING THE RELATIONSHIPS BETWEEN GOVERNMENTS AND AMONG ALL THE RESIDENTS ALIKE IF IT WOULD PUT ITS ENERGIES TOWARD PROVIDING FOR A NEGOTIATED END TO THE CONFUSION OF PATCHWORK GOVERNMENTAL JURISDICTIONS WITHIN RESERVATION BOUNDARIES.** Too often, the best intentions of federal, state, county, and tribal governments are frustrated by the present jumble of disparate jurisdictions. As a result, matters of great public concern (e.g. public safety, water use, environmental protections,...) frequently fall through the cracks between those disjointed jurisdictions. Therein lies the real basis for a greater portion of any yearnings for justice, of any provocation of tension and turmoil.

**IN CONCLUSION:**

If Senate Bill 1691 passes, our nation's honor will not be restored, rather it will suffer yet another assault as we continue attacking peoples and cultures which once occupied all the lands we now all call home. Americans are shamed by past abuses of First Nations people; but, also by today's misuse of political power to promulgate another land (and water) rush into Indian Country.

It is my hope that this stinking ruse, SB 1691, will not add further insult to our country's honor and further shame on me as one of "we the people."

Sincerely,



**Tom Richardson**

cc: Lummi Indian Tribal Council  
 Senator Slade Gorton  
 Senator Patty Murray

The Honorable U.S. Senator Ben Nighthorse Campbell: Chairman  
 Honorable Senators of the United States  
 Committee on Indian Affairs  
 SH - 838 Hart Senate Office Building  
 Washington D.C. 20510-6450

Dear Senators:

The Sandy Point Property Owners Committee (SPPOC) represents about 1100 owners of fee simple property within the geographic boundaries of the Lummi Indian Reservation in the area near Ferndale, Washington, generally known as "Sandy Point." The residents of Sandy Point comprise about half the fee land owners on the Lummi Reservation. As a group, fee land owners make up almost exactly half the total population of the reservation and well over half the voting age population.

SPPOC urges Congress to either pass Senate Bill 1691 - the American Indian Equal Justice Act - as currently written or, at the very least, arrive at some point of compromise. Residents of Sandy Point have been, we believe, subjected to unremitting violations of both property and civil rights in recent years. Any progress in the general direction taken by the bill would start allowing both tribal and non-tribal citizens to finally gain their right to due process. Harmful situations, such as those mentioned in our testimony as well as those presented to you during the Seattle hearings, threaten our civil rights and/or property rights. Those rights have been guaranteed to every citizen under the 5th Amendment to the United States Constitution, which states, "No person shall be deprived of life, liberty, or property without due process of law."

It is our belief that had adjustments in the doctrine of sovereign immunity like those contained in Senate Bill 1691 been in place for the past two decades, a good deal of acrimony between the Indian tribes and their non-Indian neighbors could have been avoided. Instead, by the desire of Congress, we are split, as a community, into "warring" factions seemingly at each other's throats over every issue because each side has been conditioned to believe that to give an inch is to lose a mile.

This is no way to live. Nearly 120 years ago, in 1879, Chief Joseph of the Nez Perce Tribe stated: "Treat all men alike, give them all the same law." We think Chief Joseph had it right and we are asking Congress to do just that; provide one law for every American citizen. It is imperative that Congress act now to give all United States citizens, tribal and non-tribal, their Constitutional rights to EQUAL JUSTICE and DUE PROCESS.

Thank you in advance for your support of Senate Bill 1691.

Respectfully submitted on behalf of: SANDY POINT PROPERTY OWNERS COMMITTEE  
 Earle Baker, Chairman  
 4175 Sucia Drive  
 Ferndale, WA 98248 Phone/Fax (360) 380-2343

cc : Senator Slade Gorton

## TESTIMONY ON SENATE BILL 1691 - THE AMERICAN INDIAN EQUAL JUSTICE ACT

PROVIDED BY: The Sandy Point Property Owners Committee (SPPOC)

## INTRODUCTION:

The Sandy Point Property Owners Committee (SPPOC) represents about 1100 owners of fee simple property within the geographic boundaries of the Lummi Indian Reservation near Ferndale, Washington, in the area generally known as "Sandy Point." The residents of Sandy Point comprise about half the fee land owners on the Lummi Reservation. As a group, fee land owners make up almost exactly half the total population of the reservation and well over half the voting age population.

**In recent decades the residents of Sandy Point have been subjected to unremitting civil rights and property rights violations. As a result of the doctrine of tribal sovereign immunity, we have been powerless to do anything about these violations. A sketch outline of some of those abuses is provided below.**

## SANDY POINT IN SPECIFIC:

To reduce the potential for exacerbating conflict, Sandy Point is simply going to list, with minimal commentary, some of the actions the tribe has taken that have resulted in harm to our civil rights and/or our property rights. This harm has come about, at least in significant part, as a result of tribal sovereign immunity. On some of these issues the tribe does not believe it has harmed our citizens. On some of them the tribe understands the harm it has done, but believes its actions are necessary to protect tribal interests. On other issues the tribe has not seemed to particularly care whether harm has been done or not.

**The point we would truly like the senators to understand and react to is that the two sides do disagree about the particulars of the following. In any other disagreement similar to those listed below between citizens and governments in the United States, there is recourse in neutral courts with separation of powers. Only in disagreements between tribes and the citizens they govern directly or attempt to govern indirectly is there no recourse. This means tribes are the only governments in America that can legally, and without possibility of punishment, abuse civil rights, break contracts, confiscate property, and ignore the Constitution of the United States as it applies to citizens.**

## POINTS OF CONTENTION BETWEEN THE LUMMI TRIBE AND SANDY POINT THAT HAVE RESULTED IN PROPERTY RIGHTS AND CIVIL RIGHTS VIOLATIONS IN RECENT YEARS:

- In 1993 the Lummi Tribe purchased fee land, with covenants attached to it, then drilled a public supply well on it with no State permits, in clear violation of state law, local legislation, and the covenants. The tribe ignored a stop-work order from Whatcom County to do this. Their well was located only 100' in the groundwater upstream of the well serving more than 650 homes at Sandy Point. Excessive withdrawals from the Lummi well had an immediate impact on the Sandy Point well causing water shortages



which imperiled the health and safety of Sandy Point residents. We are currently in water negotiations with the Lummi Indian Business Council, something that would not have happened without Congressional intervention.

- The tribe refuses to extend sewer service to most non-Indian applicants in Sandy Point despite a consent decree from the Ninth District Federal Court requiring non-discriminatory extensions of service. The tribe points to a lack of appeals under the order as proof that no one is oppressed. Individuals who have tried to appeal have met with stonewalling with the cost of following the process entirely through to conclusion estimated to be well into six figures, a cost no one can justify, especially as the tribe can simply ignore any final determination anyway, claiming sovereign immunity.
- The Lummi tribal chairperson has publicly threatened to block county owned roads leading to fee land owner's homes. The chair specifically referred to non-Indians as targets of the closure. The resulting atmosphere of fear and acrimony has terrified landowners, especially the elderly, and dramatically impacted the ability of residents to sell their homes and lots at fair prices.
- The tribe has refused to allow residents even to walk on tidelands and beaches in front of their homes even though there is no question at least some of the beaches are owned by residents while doubt exists about the right of the Lummi to forbid access to some tidelands. Again, the atmosphere of acrimony, distrust, and terror created severely degrades the quality of life residents experience in their own homes as well as their relationships with the tribal government and with individual tribal members..
- Numerous Lummi tribal documents used to regulate activities on the reservation contain explicit racial references aimed specifically at preventing non-Indian, fee land owners, from utilizing their land in ways that are permitted under state, federal, and local laws and that other fee land owners off the reservation are allowed to. Formal, negative, racial commentary in tribal government documents is intimidating and dramatically reduces a landowner's right to fully realize the potential of the property owned.
- While the tribe claims tribal laws are applicable to non-Indians, access to read the tribal laws has been refused to fee land owners asking on behalf of Sandy Point.

Many other confrontive situations, across the reservation, can be documented. **What is clear beyond a doubt is that systematic violations of basic human rights, and of law, have taken place on the Lummi Reservation. We believe that the majority of the violations would not even take place absent sovereign immunity. Individuals who know they will not be accountable for their actions often do things they would never do if they knew they could be held accountable.** A limitation or removal of sovereign immunity would assure that accountability.

ARE THESE EXCEPTIONS TO THE RULE?

In her testimony to the Senate Indian Affairs Committee the articulate and engaging attorney for a number of tribes, Susan Williams admitted that "...the proponents of this bill can produce some shocking stories about harms that were not redressed, and I would be less than credible were I to insist that none of these stories are true." Ms Williams then insisted that "...these stories are not truly representative of what's going on in Indian country today..."

**Ms Williams, in representing her clients, the tribes, is only half right. She agrees, correctly, that "shocking stories about harms that were not redressed" are not only widely available, but are, also, true. She is incorrect in saying they are not representative of what's going on in Indian country today. Because of sovereign immunity, tribes are able to unmercifully repress dissent on their own reservations. The stories Ms Williams discussed before you actually represent only the tip of the ice berg of tyranny. One need only refer to the Seattle testimony of the four civil rights witnesses to verify this essential point.**

It is equally important to notice that most of the testimony from the tribes included some agreement that the abuses pointed to by supporters of the equal rights legislation do, indeed, exist. The tribes do not even attempt to counter the testimony, they simply focus on their desire to retain sovereignty superior to that of the United States itself along with the accompanying power to continue the actions they are being called to task for.

Ms Williams' comments also point out a significant danger in the hearings process. People on one side put forward a litany of complaint, pointing to violations of civil and property rights, both real and perceived. The "other side" then belittles the testimony and makes counterclaims of their own. The whole process becomes a "he said, she said," contest in which you Senators are expected to sit as a sort of jury.

**The danger comes in that the hearings process becomes a competition and the fundamental point being addressed is overlooked. The central point addressed by S 1691 is that, in America, when it comes to their governments, citizens are not supposed to be able to routinely produce the "shocking stories about harms that were not redressed" Ms Williams remarks about in so disparaging a manner. Mechanisms for redress are supposed to be available to all Americans. That's what law is supposed to be all about.**

## CONCLUSION

Two important things would happen upon adoption of Senate Bill 1691.

First, American citizens, both Indian and non-Indian would have recourse for civil rights and property rights violations that even tribal representatives agree exist on the reservations. That recourse is a fundamental right and failure to grant it means that Congress is rejecting the fundamental philosophies that make America what it is.

Second, many of the actions tribes take that lead to antagonism would no longer be taken. If a tribal official knew he or she would be held accountable for their actions, they would generally not take actions they know in advance would result in unpleasant consequences. **Lack of any possible accountability is the primary reason these abuses exist in the first place.**

**MIDWATER TRAWLERS COOPERATIVE**

1626 N. COAST HIGHWAY • NEWPORT, OREGON 97365

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MTC

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April 22, 1998

**Lyle Yeck**  
 Vice President Alaska  
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Honorable Ben Nighthorse Campbell  
 Chairman, Committee on Indian Affairs  
 U.S. Senate  
 838 Hart Senate Building  
 Washington, D.C. 20510

**DIRECTORS**

Mark Cooper  
 Craig Cochran  
 Steve Drage  
 Gary Westman

Dear Mr. Chairman:

Recently your Committee received a letter from Mr. Rod Moore of the West Coast Seafood Processors Association. His letter is directed toward a series of hearings before your committee on legislation introduced by Senator Gorton R-WA that affects tribal sovereignty (copy of Mr. Moore's letter enclosed).

Midwater Trawlers Cooperative is an association of some 40 Trawlers from the states of Washington and Oregon. Our member vessels fish Whiting and Groundfish in the Pacific Northwest and various groundfish species in the Gulf of Alaska and the Bering Sea.

Our organization pioneered the fishery for Whiting in the Pacific Northwest and groundfish in the Bering Sea and Alaska by participation in joint ventures with foreign processors when we had no American markets for these species. The joint ventures proved to be the mechanism that broke foreign dominance of the groundfish species in the American EEZ. I was the lead captain in these fisheries. We also pioneered with strong support from the fish processing plants, a portion of these catches to be landed in coastal communities, thereby providing economic opportunities for shoreside workers and support-service workers.

Mr. Moore's letter is quite accurate in it's depiction of what the Department of Commerce has done to us. A large portion of

Page 2  
April 22, 1998

the Whiting fishery was taken away from us by an executive fiat from the Secretary of Commerce.

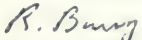
Further more we were also told by the government's lawyers and the district court judge that we are denied any ability to contest what we believe are illegal actions taken by the federal government.

Naturally we have appealed these rulings. It is inconceivable to me that we are, if the government is listened to, to be denied due process under law.

We agree with Mr. Moore that we are not trying to challenge tribal treaty rights. Senator Gorton's bill does afford relief in instances such as I and Mr. Moore have described.

As the hearings proceed on Senator Gorton's bill and the issues of tribal sovereignty, we hope you will keep in mind the facts that we pioneered a fishery some twenty years ago at considerable economic risk of bankruptcy if we failed and the results of that fishery proved to be the means by which we got rid of foreign fishing vessels in America's EEZ. We were then told "you're gonna lose a portion of it, because I, the Secretary of Commerce, say so and furthermore our lawyers say you have no right to protest it in court."

Sincerely yours,



R. Barry Fisher

cc: Senator Slade Gorton  
Senator Gordon Smith  
Senator Ron Wyden  
Representative Darlene Hooley  
MTC Directors





MILLE LACS BAND OF CHIPPEWA INDIANS  
Executive Branch of Tribal Government

May 13, 1998

The Honorable Ben Nighthorse Campbell  
Chairman  
Senate Indian Affairs Committee  
838 Hart Senate Office Building  
Washington, DC 20510

The Honorable Daniel K. Inouye  
Ranking Member  
Senate Indian Affairs Committee  
838 Hart Senate Office Building  
Washington, DC 20510

Dear Sirs:

Pursuant to the request of the Senate Indian Affairs Committee for information regarding the courts, legal structures, procedures and justice systems in Indian Country, I am enclosing the attached overview of the Mille Lacs Band of Ojibwe courts, laws and relationships with Minnesota courts, for the Committee record.

Thank you for your friendship, hard work, and willingness to serve the public interest by serving in public office.

Mii gwetch.

Sincerely,

A handwritten signature in cursive script that reads 'Marge Anderson'.

Marge Anderson  
Chief Executive

Enclosures

## COURT OF CENTRAL JURISDICTION OF THE MILLE LACS BAND OF OJIBWE

The Mille Lacs Band of Ojibwe Indians's government is organized on principles of separation of powers with separate executive, legislative and judicial branches. The judicial branch, called the Court of Central Jurisdiction, is comprised of a trial court and a court of appeals. The tribal court hears both civil and criminal cases. The trial court consists of one full-time judge who is required to be a licensed attorney, but not necessarily a Mille Lacs Band member. In fact, the current district judge is a non-Indian. Three justices comprise the court of appeals. The justices are required to be Mille Lacs Band members who are knowledgeable in the laws of the Band, but are not necessarily required to be attorneys. This structure was intentionally chosen in order to blend the need for legal expertise on the court with the values and culture of the Mille Lacs Band.

The district judge and justices of the court of appeals are appointed positions. The Chief Executive, the elected official who heads the executive branch of tribal government, nominates individuals for these positions. The nominees must be ratified by the Band Assembly, the elected legislative body of the Band. The term of office for the district judge and justices of the court of appeals is six years. By contrast, the term of office for all elected officials of the Band is four years. The choice to give a longer term of office for the judge and justices of the tribal court than that for elected officials was a conscious measure designed to help insulate the court from any attempted political influence of its decision making.

The district judge and justices of the tribal court may only be removed from office by a super-majority vote of a joint session of the Band Assembly, which would include the assembly members plus the Chief Executive. This is the same process as used to remove an elected official. The district judge and justices may only be removed for "just cause," a term defined under Band law as including malfeasance, misfeasance or nonfeasance of office, commission of a crime, and any other violation of the Band's code of ethics.

The Mille Lacs Band has a highly developed set of tribal laws that have been published in a two volume compilation available to Band members and the general public alike. See **Mille Lacs Band Statutes Annotated** (West Publishing 1996). The Band Statutes include a civil rights code that applies to Indians and non-Indians within the Band's reservation and which protects free speech, due process, equal protection, the right to counsel, the right to be free from self incrimination, and other basic rights. Our Band Statutes also include a broad variety of criminal and civil laws that apply within the reservation. The Band does not exercise criminal jurisdiction over non-Indians. However, in civil cases the court is available for use by both Indians and non-Indians, assuming that requirements of personal and subject matter jurisdiction are met.

On average, the tribal district judge hears approximately 450 cases per year. Of the civil caseload, approximately 230 cases involve non-Indians, either as plaintiffs or defendants. The civil caseload involves issues such as debt collection, child support, and child protection. The Mille Lacs Band Statutes also contain a full faith and credit provision which allows the tribal court to enforce wage garnishments and child support orders entered by other jurisdictions, including state courts. Over 40% of the tribal court's civil caseload are these full faith and credit actions enforcing orders from other jurisdictions. Non-Indians are winning approximately 50% of the civil cases that they are involved in. Criminal offenses committed by non-Indians are prosecuted in state court, not tribal court. For all types of cases, the tribal court typically hears and resolves cases within four months from filing through completion. In contrast, the state court in the surrounding community typically requires 12-18 months to resolve a case. The tribal court is also less formal than state court and allows lay person advocates, as well as attorneys, to represent parties. Many non-Indian individuals and businesses are choosing to bring civil suits against Band members with whom they have disputes directly in the tribal court in the first instance because these differences make it quicker and cheaper to use the tribal court rather than state court.

In Minnesota, a State-Tribal Courts Committee has been created to study issues of cooperation, understanding and training among the state court system and various tribal courts. The committee includes two Minnesota Supreme Court Justices (one of whom serves as the group's co-chair), several Minnesota Court of Appeals Judges, many Minnesota District Court Judges, a variety of tribal court judges from the different reservations in Minnesota, and tribal attorneys. The group is currently working on a draft rule to grant full faith and credit within state court for tribal court decisions. The committee is also working to educate state and tribal judges about each other's court systems and to sponsor other joint educational training for judges from both types of systems.

The Mille Lacs Band's Court of Central Jurisdiction, in conjunction with the Band's Office of the Solicitor General, has also worked to develop and utilize sentencing circles and healing circles to address crimes and other disputes arising on the reservation. The circle process is a traditional form of restorative justice that brings together community members when a crime has been committed or a dispute has arisen within the reservation to empower the community members to develop solutions to community problems. The tribal court at Mille Lacs has been inundated with requests to provide training for other entities interested in receiving training from us on how to develop their own circles. The circle process that originated on the Mille Lacs Reservation is now being used by several districts within the Minnesota state court system, various neighborhood groups within the cities of Minneapolis and St. Paul, and by several public schools in Minnesota to deal with conflicts that arise in both criminal and non-criminal settings.

**ROB KAVANAUGH**  
 6919 41st St SE  
 Olympia, WA 98503  
 (360) 456-6448



SEN. BEN NIGHTHORSE CAMPBELL  
 CHAIRMAN, INDIAN AFFAIRS COMM.  
 HART SENATE OFFICE BLDG.  
 WA.D.C. 20510

DEAR SEN. CAMPBELL & MEMBERS OF THE COMM.

WE ARE ENCOURAGED TO HEAR YOU WILL BE IN WA. STATE IN APR. TO LISTEN TO CITIZEN INPUT ON TRIBAL ISSUES. THIS LETTER CONSTITUTES MY TESTIMONY:

NOW IS A GOOD TIME TO REEVALUATE SOME OF THE CONDITIONS OF THE STEVENS TREATIES AS THEY APPLY TO PRESENT TIMES. ONE MAJOR PROBLEM RESIDENTS IN WA. ARE EXPERIENCING IS THERE IS NO MECHANISM FOR NON TRIBAL MEMBERS TO SETTLE DISPUTES WITH TRIBAL GVTS. NORMALLY HONEST DISAGREEMENTS COULD BE ARBITRATED, NEGOTIATED, OR LITIGATED BETWEEN THE PARTIES IN DISPUTE. BECAUSE OF THE SOVERIGNITY ISSUE NORMAL DEMOCRATIC METHOD OF CONFLICT RESOLUTION ARE DENIED TO OUR CITIZENS. THIS IS PATENTLY UNFAIR & CREATES HARD FEELINGS.

EXAMPLES OF THESE PROBLEMS INCLUDE TAXATION, GAMBLING, TRUST RESPONSIBILITY FULLFILLMENT, NATURAL RESOURCE ISSUES (WATER) AND OFF RESERVATION HUNTING. WE HAVE TWENTY SIX TREATY TRIBES HERE WITH SOMETIMES TWENTYSIX DIFFERING POSITIONS. THEY ASSERT NATIONAL GVT. SOVERIGNITY AND DO NOT SEEM INCLINED TO AGREE WITH STATE LAW & REGULATIONS ON SOME OF THE MAJOR ISSUES OF THE DAY. THIS IS EXACTLY AS ONE WOULD EXPECT. BUT WE HAVE NO FEDERAL MECHANISM TO HELP US WORK OUT OUR DIFFERENCES AND REACH AMICABLE RESOLUTION EXCEPT THRU THE CIRCUIT COURTS. THE OPEN & UNCLAIMED LANDS ISSUE REMAINS UNRESOLVED AS WELL.

I REALLY RESENT THE CONDESCENDING ATTITUDE SOME TAKE TOWARDS OUR TREATY TRIBES. SOME WOULD HAVE YOU BELIEVE THEY ARE INCAPABLE OF SELF GOVERNMENT. THEY PERPETUATE THE VIEW THAT TRIBES PEOPLE ARE PRIMITIVE WANDERING BANDS OF SUBSISTANCE HUNTERS & GATHERERS. OUR LARGER TRIBAL GVTS. TODAY ARE EQUAL TO ANY COUNTY OR LOCAL GVTS. IN SOPHTICATION AND EFFICIENCY. BUT MANY LACK TECHICAL SUPPORT OR ENFORCEMENT CAPABILITY. FEDERAL ENFORCEMENT OFFICERS ARE URGENTLY NEEDED TO ENFORCE OFF RESERVATION HUNTING.

TO THIS END I HAVE ASKED THE REGIONAL BIA OFFICE FOR HELP. THEY SEEM WILLING YET RELEUCTANT TO ACT WITHOUT CONGRESSIONAL DIRECTION? CAN YOU GIVE THIS DIRECTION TO THE BIA?

FOLLOWING THIS LINE OF REASONING WE ALSO NEED THE SUPORT OF THE CONGRESS & THE DEPT. OF THE INTERIOR TO SET UP AN ARBITRATION MECHANISM TO HELP STATE GVT. & TRIBAL GVTS. WORK OUT THEIR DIFFERENCES, REACH COMPPROMISE, AND LIVE TOGETHER AS EQUAL PARTNERS WITHOUT HAVING TO GO TO COURT EVERY OTHER WEEK.

SOME TRIBES ARE ENDANGERING PUBLIC SAFETY BY HUNTING ELK IN



THE ST. HELENS MONUMENT.STATE GVT.IS PARALYZED.CAN CONGRESS  
ACT TO HELP RESOLVE THESE ISSUES?

THERE ARE A SERIES OF ISSUES THAT NEED TO BE ADDRESSED BY YOUR  
COMMITTEE.THESE INCLUDE THE BROAD ISSUE OF SOVERIGNTY AND THE  
ROLE OF THE FEDERAL GVT.TO CARRY OUT THE TRUST RESPONSIBILITIES  
SUCH AS TECHNICAL, LEGAL, AND ENFORCEMENT RESOURCES AS THESE  
RELATE TO THE PRESENT TIMES & FUTURE TIMES.OTHER IMPORTANT ISSUES  
THAT NEED CONGRESSIONAL CLARIFICATION INCLUDE REGULATION OF  
TRIBAL GAMBLING & CORRUPTION,DEFINITION OF OPEN & UNCLAIMED  
LANDS,OFF RESERVATION TRIBAL HUNTING STATEWIDE,WATER RIGHTS  
ISSUES,AND THE ROLE OF THE BIA IN TRIBAL & NON TRIBAL CONFLICT  
RESOLUTION.

ONE LAST THOUGHT WITH RESPECT TO CREATING GOOD WILL BETWEEN  
OUR TWO COMMUNITIES DEALS WITH EDUCATION & LEADERSHIP.I FEEL  
CONGRESS COULD DO MUCH MORE TO SENSITIZE OUR TWO GROUPS ABOUT  
OUR COMMONLY SHARED GOALS WITH RESPECT TO HEALTH & EDUCATION  
ON OUR RESERVATIONS.SURELY WE DO HAVE A COMMON GOAL FOR WANTING  
TO IMPROVE & CREATE A BETTER HABITAT FOR OUR CITIZENS DO WE  
NOT!

SINCERELY,

  
ROB KAVANAUGH

2ATCH.

March 25, 1998

The Honorable Ben Nighthorse Campbell  
 Chairman, Senate Committee on Indian Affairs  
 838 Hart Senate Building  
 Washington, D.C. 20510

RE: Senator Slade Gorton's S.1691 Bill, "The American Indian  
 Equal Justice Act."

Dear Chairman Nighthorse Campbell,

Washington State Indian Nations as other Indian Nations have been repeatedly attacked by U.S. Senator Slade Gorton since he was the Washington State Attorney General. He has done everything but officially declare war on Indian Country. Why he has so much hate for Indians and their governments we do not understand?

Indian Reservations and communities are the lowest economic based and among the highest unemployment, high alcohol and drug abuse and high school drop-out rated people in the United States. Each time Indian Nations find an avenue to lower all of the above to improve their reservations or communities, they are strongly opposed by people who feel animosity toward Indians.

Senate Bill #1691, entitled "The American Indian Equal Justice Act" introduced by Senator Slade Gorton, of Washington State (a) would broadly waive tribal immunity, thus making tribal governments useless and open targets that will destroy tribal governments, (b) make state tax collectors out of Indians and tribal governments, (c) make tribal governments subject to lawsuits, while states, federal, counties and city government retain their immunity, (d) make tribal governments an individual or corporation, thus taking away the rights of protection that state, federal, counties and city governments have, (e) abolish treaties made between the United States Government and make them subject to state, (f) return to the days of old when a non-Indian told Indians how to be Indian.

The senate bill has a misleading title. Indian country has never had equal justices and has to fight hard just to remain a tribal government. the title is false!

As a tribal member of the Yakama Indian Nation, with the enrollment number of 2422, and a strong supporter of my tribal government, I hereby oppose Senate Bill #1691. I urge the members of the U.S. Senate and U.S. House of Representatives to oppose this bill and any similar bill that would remove the sovereign status of a tribal government that was made through the

treaties between the United States and Indian Tribes. Please honor the treaties or give the land ceded through these treaties back to the Indians that it was taken from.

Sincerely,

*Alvin B. Schuster*

Alvin B. Schuster  
461 Campbell Road  
Wapato, Washington 98951  
Ph. #509-877-6454  
Wk. #509-865-5121, ext. 529  
WK. FAX #509-865-7880

CC: Senate Committee on Indian Affairs Members  
Senate Committee on Appropriations  
Northwest U.S. Congressional Delegation

U.S. House of Representatives;  
Committee on Appropriations  
Interior and Related Agencies  
Native American and Insular Affairs

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Thursday, March 26, 1998 — 10A

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## Slade again

To the editor — I see by the paper that U.S. Sen. Slade Gorton is up to his old tricks again, wanting to sue Indian treaty tribes for phantom taxes that never were.

Slade Gorton and Ludlow Kramer, the "whiz kids," got into state office on the shirrtails of Gov. Dan Evans — "straight arrow."

As Washington state attorney general, "Broken Bow" Slade — "He who shoots many arrows that fall to the ground, short of target" — took Washington tribes to court on any pretext and lost every case, thus costing taxpayers a lot of money.

Now, he wants to do the same thing with our national resources. With his track record, he will lose again.

You hear people say, "Let's give the country back to the Indians." That might not be so simple. They might want it back in the same shape as when they relinquished it. Then what would Slade Gorton do? He and Sen. Jack Metcalf could throw darts at each other.

I am a loyal taxpaying United States citizen, but I am also a member of the Medicine Creek Nation, namely the Nisqually Tribe.

LUTHER SVINTH  
Tieton



**A14** Seattle Post-Intelligencer • Thursday, March 26, 1998

## **SLADE GORTON**

### **Washington's senior senator has forgotten U.S. history**

Slade Gorton (who gets many tax benefits) has taken his customary stand for suing and taxing Indian tribes. There is striking irony in his statement: "I find it astounding ... that there should be governments that claim the right to be able to wrong other people and do so with impunity," when we are the ones who drove Indians from their hunting and fishing grounds to unproductive reservations, imposed our religion and culture, gave them our diseases, broke treaties and have since treated them as if they had violated our country.

And now there are those who are trying to curtail their profitable ventures by subjecting the tribes to all our laws with no dispensations for past wrongs and their sovereignty.

It is time for the senator to end his war with Indian tribes and summon some of the justice our government is supposed to represent.

**Mary Thompson Reed**  
Seattle



April 1, 1998

Senator Ben Nighthorse Campbell  
United States Senate  
380 Russell Senate Office Bldg.  
Washington, DC 20510-0605

Dear Senator Campbell:

The Church Council of Greater Seattle has had a long history of standing in solidarity with Native Americans and their tribal governments in efforts to protect their rights as established and secured by treaties with the United States. The legal doctrine of Tribal Sovereign Immunity has been an important principle in protecting tribal governments from litigation and from claims of damages through law suits which could result in the loss of assets held in common for Native American people now and in the future.

We are deeply concerned that the principle of Tribal Sovereign Immunity is being severely threatened by S. 1691 which has been introduced by Senator Slade Gorton. Enclosed is a copy of a resolution approved on March 26, 1998, by the Executive Committee of the Church Council which opposes S. 1691 and all similar efforts to limit or diminish the powers of self government by Native American peoples.

We encourage you to use your influence and your vote to oppose S. 1691.

Cordially,

Thomas H. Quigley  
President-Director



### Resolution in Support of Tribal Sovereign Immunity

Approved by the Executive Committee of the Board of Directors  
March 26, 1998

The Church Council of Greater Seattle is committed to building a genuine human community characterized by compassion, justice, reconciliation and unity. The Church Council envisions a just community that secures and guarantees the well-being, freedom and dignity of all persons and that celebrates differences as a gift of God intended for the entire community. The Church Council seeks to be an effective agent of reconciliation in healing divisions among the racial, ethnic, cultural and religious communities of the greater Seattle area, our state, the nation and the world.

Whereas the Church Council of Greater Seattle has had a long history of standing in solidarity with Native Americans and their tribal governments in efforts to protect their rights which have been established and secured by treaties with the United States; and

Whereas it is essential for people of faith and all people of good will who believe in liberty and justice for all to continue to stand in solidarity with Native Americans and their tribal governments, in light of the continuing efforts by some to break treaty agreements and to eliminate the rights of Native Americans to determine their future and govern their own tribal communities; and

Whereas the legal doctrine of Tribal Sovereign Immunity has been an important principle in protecting tribal governments from litigation and from claims of damages through law suits which could result in the loss of assets held in common for Native American people now and in the future; and

Whereas the United States Senate is considering a bill (S. 1691) which has been introduced by Senator Slade Gorton and is known as the "American Indian Equal Justice Act" that would enact broad waivers of Tribal Sovereign Immunity and subject tribal governments to virtually any type of law suit in both federal and state courts, making it very difficult for tribal governments to carry out basic governmental functions and jeopardizing the resources and future of tribal governments; and

Whereas maintaining Tribal Sovereign Immunity is crucial to maintaining tribal self-government and to encouraging self-determination within the Native American community;

Therefore be it resolved, that the Executive Committee of the Church Council of Greater Seattle expresses its opposition to all efforts designed to diminish the rights and responsibilities of tribal governments to govern effectively; and

Be it further resolved that the Executive Committee specifically opposes S. 1691 and calls upon members of the United States Senate to oppose this legislation and all similar efforts to limit or diminish the powers of self government by Native American people; and

Be it further resolved that copies of this resolution be forwarded to United States Senators Slade Gorton, Patty Murray, Ben Nighthorse Campbell and Daniel Inouye.

# ROBERT N. CLINTON

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Wiley B. Rutledge Professor of Law  
 Chief Justice, Winnebago Supreme Court  
 Associate Justice, Cheyenne River Sioux Tribal Court of Appeals

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*Bar Admissions:*  
 Illinois (since 1971)  
 Iowa (since 1973)

March 30, 1998

The Honorable Senator Ben Nighthorse Campbell, Chairman  
 Indian Affairs Committee  
 United States Senate  
 Washington DC 20510

Dear Senator Campbell:

I write in my individual capacity to express my strong opposition to Senate Bill 1691 as an unwarranted, unnecessary, inequitable and heavy-handed federal intrusion on the sovereignty and governmental autonomy of Indian tribes. For information purposes, please note that while the views I express in this letter are solely my own personal perspectives and not those of any of my employers, I serve as the Wiley B. Rutledge Professor of Law at the University of Iowa College of Law, the Chief Justice of the Winnebago Supreme Court, and an Associate Justice of the Cheyenne River Sioux Court of Appeals. During my 25 year academic career, most of my legal scholarship has been in the field of Indian law and I have had long practical experience with tribal affairs.

My opposition to S. 1691 stems from two observations. First, the proposed bill is totally unnecessary since many tribes already waive or limit sovereign immunity for suits in their own courts and provide very fair forums for the enforcement of civil rights and other claims brought by both tribal members and nonmembers. Second, the proposed legislation, insofar as it purports to waive sovereign immunity for litigation in forums other than tribal courts, represents a novel, unwarranted and totally unfair intrusion into the governmental autonomy of Indian tribes, of a type which has not been and would not be permitted for federal or state governments. Indeed, just two years ago, in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1116, 134 L.Ed.2d 252 (1996), the United States Supreme Court declared unconstitutional a similar federal statutory effort to waive state sovereign immunity to permit Indian tribes to sue states in federal courts under the Indian Gaming Regulatory Act.

While proponents of S. 1691 claim that Indian tribes do not waive or limit tribal sovereign immunity for enforcement of civil rights under the Indian Civil Rights Act and for other claims, this assertion is simply factually incorrect. Any fair and systematic reading of



Letter to the Honorable Senator Ben Nighthorse Campbell  
 March 30, 1998  
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the recent decisions from tribal courts in the *Indian Law Reporter*, the major source for publication of tribal court opinions, reflects that tribal courts regularly entertain Indian Civil Rights Act claims against tribal officials and reject sovereign immunity defenses to such claims. For example, in *Moran v. Council of the Confederated Salish & Kootenai Tribes*, 22 Indian Law Repr. 6149 (C.S. & K. T. Ct. App. 1996), the Confederated Salish & Kootenai Tribes Court of Appeals held that the members of the tribal council could be sued notwithstanding claims of tribal sovereign immunity. In *Thompson v. Cheyenne River Sioux Board of Police Commissioners*, 23 Indian Law Repr. 6045 (Chy. Rv. Sx. Tr. Ct. App. 1996), the Cheyenne River Sioux Tribal Court of Appeals, on which I sit, held that the members of the Cheyenne River Sioux Board of Police Commissioners and the agency itself could be sued on an Indian Civil Rights Act claims, notwithstanding assertions of tribal sovereign immunity. This position at Cheyenne River is longstanding. See e.g. *Dupree v. Cheyenne River Housing Authority*, 11 Indian Law Rep. 6106 (Chy. Riv. Sx. Tr. Ct. App. 1988). The *Thompson* case is significant in that the tribal court's opinion went beyond existing federal and state law on sovereign immunity and permitted a tribal agency to be sued in a civil rights case in agency name without an express tribal ordinance permitting such suits, an approach most states and the federal government would not permit under their respective doctrines of sovereign immunity. Recently, in *Rave v. Reynolds*, 23 Indian Law Repr. 6150 (Winn. Sup. Ct. 1996), the Winnebago Supreme Court, where I serve as Chief Justice, surveyed the tribal court cases on sovereign immunity and concluded that the clear trend in the recent tribal court cases rejects tribal sovereign immunity claims where governmental officials are sued to enforce the Indian Civil Rights Act, thereby affording precisely the same approach to sovereign immunity for cases involving civil rights enforcement as in cases where federal or state officials are sued in nontribal courts. See also, *Bordeaux v. Wilkinson*, 21 Indian Law Repr. 6131 (Ft. Berth. Tr. Ct. 1995), *Simplot v. Ho-Chunk Nation Department of Health*, 23 Indian Law Repr. 6235, 6239 (Ho-Chunk Tr. Ct. 1996). Indeed, in *Rave*, the Winnebago Supreme Court noted that the Indian Civil Rights Act had been adopted by and made part of tribal law through inclusion by amendment in the Constitution of the Winnebago Tribe of Nebraska as a separate bill of rights enforceable as a matter of tribal law. While the plaintiffs may not always prevail in such suits, just as they do not always prevail in federal or state courts, the important point is that a competent, fair, and available forum already exists for such cases in tribal courts.

When the United States Commission on Civil Rights undertook extensive hearings on this question in 1986-88, that agency concluded that the problem was not tribal sovereign immunity, it was, rather, the inadequacy of funding of tribal courts. While Congress has passed the Tribal Justice Act of 1995 to authorize such funding, it has never seen fit to fund that program and therefore provide tribal courts the badly needed resources necessary to address this problem. There is therefore no need to displace these tribal court efforts to enforce the Indian Civil Rights Act by creating a new forum in state and federal courts, as proposed in S. 1691. The real need is for full funding of the Tribal Justice Act of 1995.

Letter to the Honorable Senator Ben Nighthorse Campbell  
 March 30, 1998  
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Proponents of S. 1691 also seem to incorrectly assume, perhaps out of their own racial prejudices, that nonmembers will not be treated fairly in tribal courts or that tribal forums will not provide an adequate remedy for their grievances. My experience in tribal courts and my review of the cases suggests that nothing could be further from the truth. In fact, nonmembers tend to be treated more fairly in tribal forums than Indians are treated in state or, sometimes, federal forums. For example, in *Schwab v. CTEC Construction, Inc.* 21 Indian Law Reprtr. 6027 Colv. Admin. Ct. 1994), the Colville Administrative Court held that a non-Indian employee of a tribal contractor was improperly fired in a misguided effort to comply with the tribe's tribal employment rights ordinance (TERO), which required tribal preference, by creating open positions for tribal members. The court held that the TERO ordinance only applied to new hires and not existing employees. See also, *Clown v. Coast to Coast*, 23 Indian Law Reprtr. 6055 (Chy. R. Sx. Tr. Ct. App. 1993) (non-Indian creditor afforded forum to collection of debt against former tribal council member).

Additionally, it is truly ironic that the proponents of S. 1691 falsely claim that the federal government and the states generally have waived sovereign immunity claims for property actions brought against them and seek to involuntarily impose such a waiver on the Indian tribes. Much of the land area of the United States originally was Indian land and some of it was illegally taken from Indian tribes by the federal government. Yet, when Indian tribes seek to enforce their possessory claims to property against the United States or a state, there is usually no statutory waiver of sovereign immunity which they can use to get their property claims into federal or state court. In this area, federal and state sovereign immunity frequently is used as a defensive shield against tribal property claims. S. 1691 therefore seeks to create the totally inequitable situation of permitting tribes to be sued on property claims in federal or state courts without permitting tribes to sue the federal or state governments to regain possession of lands they claim were wrongly taken from them. A more blatant example of a marked return to the colonialism which long characterized relations between the federal government and the tribes is hard to imagine.

Second, the real vice of S. 1691 is not merely that it invades tribal sovereignty by arrogating to the federal government the tribe's sovereign right to decide when and under what terms it will be sued, it is, rather, that the statute purports to waive sovereign immunity for suits in federal and state courts, not tribal courts. Under the guise of making Indian tribes like all other sovereigns in the United States, the bill actually creates a totally unique situation by permitting the tribes to be sued *in forums other than their own*. While federal and state governments frequently have partially waived sovereign immunity, such waivers invariably permit suit only in the courts of that sovereign. I know of no federal or state statute that gives blanket waiver of sovereign immunity of the type that S. 1691 unfairly seeks to impose on tribal governments for suits in the courts of another sovereign. Indeed, whenever Congress

Letter to the Honorable Senator Ben Nighthorse Campbell  
March 30, 1998  
page 4

tries to pass legislation making states amenable to suit in federal court, the states strongly object to such an invasion of their sovereignty. For example, when Congress passed an extraordinarily limited waiver of state sovereign immunity permitting suits in federal court by Indian tribes against states in federal court under the Indian Gaming Regulatory Act of 1988, the states strenuously objected to such a compelled federal waiver of sovereign immunity for suits in another forum and the Supreme Court declared it unconstitutional in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1116, 134 L.Ed.2d 252 (1996). Most sovereigns are not generally amenable to suits in the courts of another sovereign without their consent. They can be sued, if at all, only in their own courts. S. 1691 would uniquely and unfairly change that aspect of sovereignty for Indian tribes.

In short, since S. 1691 is both unnecessary and totally inequitable, I strongly urge the Senate Indian Affairs Committee to reject this misguided bill. I would appreciate your including this letter in the hearing record on the proposed legislation.

Sincerely,

*Robert N. Clinton*

Robert N. Clinton

# AK-CHIN INDIAN COMMUNITY

## Community Government

42507 West Peters & Nali Road · Maricopa, Arizona 85239 · Telephone: 520.568.2618 · Fax: 602.254.6133



Senator Ben Nighthorse Campbell  
Chairman - Senate Committee on Indian Affairs  
838 Senate Hart Office Building  
Washington, D.C. 20515

March 20, 1998

*Re: Senate Bill 1691*

Dear Senator Ben Nighthorse Campbell:

Please allow me a moment of your valuable time as I address a matter of utmost critical importance to the Ak-Chin Indian Community, as its Chairman. Our Community is located thirty miles south of Phoenix, Arizona.

Like the other 500+ recognized Indian Tribes in America, we are alarmed by the substance of the legislation recently introduced by Senator Gorton, specifically Senate Bill 1691. Senate Bill 1691 attempts to provide a blanket, one-size-fits-all solution to problems which, by and large, do not exist in our Community, and which I believe are not likely present in most other Native American communities.

### STATE TAXES

For example, we dutifully pay state sales and other taxes from transactions which take place on our reservation by non-Indians. Although businesses which sell cigarettes, gasoline or other taxable items to non-Indians on our reservation are few, we have developed sophisticated means to calculate those taxes and we have always cooperated in the payment of those taxes to the state of Arizona. Thus there is no problem here which needs to be remedied by legislation which tends to reduce our government to the status of private individuals and organizations.

If states were obligated to pay taxes to Tribes for some reason, would Congress provide a broad waiver of state sovereign immunity in order that Tribes may collect those taxes in Tribal courts? Not likely, as federal courts have on three recent occasions denied the ability of Tribes to sue states to enforce their rights under federal laws in federal court.

### CONTRACT REMEDIES

In business contracts, our attorneys regularly provide an express, limited waiver of our own immunity to an extent that is agreeable by all parties at interest, on a case by case basis. I do not see how a blanket waiver of our immunity, which subjects us to an unfriendly, unfamiliar and often hostile state court, will enhance business relationships in our Community.



Our Community waives its immunity on many different levels. Sometimes we agree to state court jurisdiction under state laws; more often we agree to arbitration and waive our immunity to enter an award of arbitration in our Tribal court, federal district courts, federal courts of appeal, and the United States Supreme Court; and sometimes we insist on resolution in the court of appropriate jurisdiction (our court, and pursuant to its laws). No parties rights are compromised in this negotiated process (as our business associates agree, otherwise they would not agree to do business with us). Our law and order code directs our courts to rely on Arizona state law when Tribal legislation is not comprehensive to remedy a matter.

#### **TORT REMEDIES**

Our Community contracts under P.L. 93-638, the Indian Self-Determination Act. As you know, the Federal Tort Claims Act extends to Tribal governments when we contract under this federal law. Therefore an adequate remedy is available in federal courts for any party asserting a tort claim which may occur on our reservation. Fortunately, no party has ever had occasion to assert such a claim against our Community. We maintain very comprehensive liability, accident, and property insurance policies should such an unfortunate incident arise.

#### **CIVIL RIGHTS REMEDIES**

None of our Tribal members has ever asserted a claim under the Indian Civil Rights Act against our Community government. Should any member ever assert such a claim, our judges have discretion to entertain that claim, regardless of Tribal sovereign immunity. Sovereign immunity exists only to the extent that our judges actually exercise it. These are intramural matters which belong within the jurisdiction of our courts, and not in federal courts.

#### **CONCLUSION**

Most of the matters that Senate Bill 1691 proposes to address are in fact matters for states and Tribes in the course of their government-to-government relationships to address. Many Tribes, such as ours, are not causing nor experiencing the supposed problems that Senate Bill 1691 proposes to address.

I urge you to think carefully before *your name* becomes entered in the record of *American history* as promoting and effecting a federal policy which mirrors the former federal *Termination* policy to the extent that it will destroy Tribal government communities and the lives and culture of the historic original people of America.

Respectfully,



Leona M. Kakar  
Chairman

TELEPHONE (360) 734-6450

**McEvoy Oil Company**

4040 IRONGATE ROAD  
P.O. BOX 638  
BELLINGHAM, WASHINGTON 98227



April 1, 1998

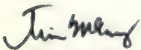
Senator Ben Nighthorse Campbell  
Chairman  
Senate Committee on Indian Affairs  
Washington, D.C. 20510-6450

Dear Senator Campbell:

Our company, McEvoy Oil Co., has done business with the Lummi Nation for several years. We supply fuel to the Lummi Mini Mart and the Fisherman's Cove Marina. Both of these businesses are owned and operated by the Lummi Nation.

The Lummi Nation has entered into a compact with the State of Washington regarding the collection of Washington State Fuel Tax on sales of fuel to non-tribal members. We presently (as the fuel supplier) collect state taxes on all fuel purchased by the Lummi Tribe. The Lummi Tribe then receives a refund from the State of Washington for the tax that was charged on gallons sold to their tribal members. We feel that this has been an equitable solution where all parties benefit. We feel that the Lummi Nation has acted with integrity in all of their dealings regarding fuel tax matters. All of the issues regarding fuel tax have been in compliance with the agreement between the State of Washington and the Lummi Nation.

Sincerely,



Tim McEvoy  
McEvoy Oil Co.

**BOB MATSON**  
**INSURANCE**  
ESTABLISHED 1953  
*A Generation of Commitment*

April 2, 1998

Senator Ben Nighthorse Campbell  
 Chairman  
 Senate Committee on Indian Affairs  
 Washington, D. C. 20510-6450

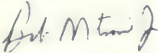
Dear Senator Campbell:

Our company, Bob Matson Insurance, currently services the insurance needs of 24 Tribal Governments and their related entities in Western Washington.

I strongly urge you to support the Tribe's Sovereign Immunity rights because the loss of Sovereign Immunity could cripple the Tribe's ability to govern themselves and could jeopardize business ventures and relationships with vendors doing business with Tribes.

I strongly urge you to support Tribe's Sovereign Immunity rights so we can continue our business relationship with the Tribes.

Sincerely,



Robert L. Matson, Jr., CPIA, CIC, AAI

RLM/clc

# LOWER ELWHA TRIBAL COUNCIL

2851 LOWER ELWHA ROAD  
PORT ANGELES, WA 98363

(206) 452-8471  
FAX (206) 452-3428



March 30, 1998

The Honorable Ben Nighthorse Campbell  
Chairman  
Senate Committee on Indian Affairs  
838 HART Senate Office Building  
Washington, DC 20510

**RE: SB 1691 -- THE AMERICAN INDIAN EQUAL JUSTICE ACT**

Dear Chairman Nighthorse Campbell:

The Lower Elwha Klallam Tribe adamantly opposes Senate Bill S. 1691, entitled the "American Equal Justice Act". If enacted, this bill would make it very difficult for tribes to fulfill their tribal governmental responsibilities. By treating tribal governments no differently than any private individual or organization will extinguish hundreds of years of Federal Indian policy that protects the sovereign status of Tribal Governments.

This attack on Indian Country - America's Third World -- comes when some Tribes are finally starting to emerge from poverty and neglect. S. 1691 puts Tribal self -- governance and self -- sufficiency at peril.

The 20<sup>th</sup> century should not end as another Century of dishonor. Congress should honor America's promise, and reject S. 1691.

I can be reached at (360) 452-8471, extension 107. I appreciate your consideration of my request.

Sincerely,

*Lorria J. Mike*

Lorria J. Mike,  
Chairperson





5318 Chief Brown Lane  
Darrington, Washington 98241

(360) 436-0131  
(360) 435-8366  
FAX (360) 436-1511

April 1, 1998

The Honorable Ben Nighthorse Campbell,  
Chairman  
Senate Committee on Indian Affairs  
838 HART Senate Office Building  
Washington, DC 20510

Re: SB 1691-The American Equal Justice Act

Dear Chairman Nighthorse Campbell:

The Sauk-Suiattle Indian Tribe adamantly opposes Senate Bill S. 1691, entitled the American Equal Justice Act. If enacted, this bill would make it very difficult for tribes to fulfill their tribal governmental responsibilities. By treating tribal governments no differently than any private individual or organization will extinguish hundreds of years of federal Indian policy that protects the sovereign status of tribal governments.

This attack on Indian Country – American's Third World – comes when some tribes are finally starting to emerge from poverty and neglect. Senate Bill S. 1691 puts tribal self-governance and self-sufficiency at peril.

The 20<sup>th</sup> century should not end as another Century of dishonor. Congress should honor American's promise, and reject S. 1691.

I can be reached at (360) 436-0131. I appreciate your consideration of my request.

Sincerely,

A handwritten signature in black ink, reading "Joseph E. Buechele", is written over the typed name and title.

Joseph E. Buechele  
General Manager  
Sauc-Suiattle Indian Tribe

**RUBIN, HAY & GOULD, P.C.**

ATTORNEYS AT LAW

MEREE S. RUBIN  
KIMATHAN M. HAY  
BENNETT L. GOULD  
CHRISTY S. HARRINGTON

OF COUNSEL  
RICHARD A. GOREN

CHRISTOPHER J. MAHONEY  
LISA A. TREMPER  
ROBERT C. MUELLER

\* ALSO ADMITTED IN NY & DC  
† ALSO ADMITTED IN IL  
‡ ALSO ADMITTED IN NY

205 Newbury Street P.O. Box 786 Framingham, MA 01701  
(508) 875-5222 FAX (508) 879-6803 (617) 426-0100

April 3, 1998

VIA FEDERAL EXPRESS

Senator Ben Nighthorse Campbell  
Chairman of the Committee on Indian Affairs  
Senate Russell Office Building, Room 380  
Washington DC 20510-0605

Re: Hearings on Tribal Sovereign Immunity; Mashantucket Pequot Tribal Nation of  
Connecticut; Debra Bassett Litigation

Dear Senator Campbell:

At the suggestion of Paul Moorehead, Chief Counsel to your committee, I write to renew my request to testify at the hearings before the committee concerning tribal sovereign immunity about the litigation of my client now pending with the Mashantucket Pequot Tribe, the owner/operator of the Foxwoods Gambling Casino in Connecticut. The Mashantucket Pequot Tribe involved in commercial activity off its reservation in the interstate marketplace is alleged by the plaintiff to have infringed her federally protected copyrighted materials as well as to have tortiously interfered with her contracts with third parties. Despite the allegations of wrongdoing completely off the reservation, the tribe asserts that under the doctrine of tribal immunity both it and its agents are not subject to suit. The testimony would also explain our view of the state of the law of tribal sovereign immunity and respectfully urge enactment of legislation denying immunity for off reservation commercial activities conducted by Indian tribes.

Very truly yours,

Richard A. Goren

RAG:jcy

cc: Mr. Todd Young, Legis. Asst.  
Ms. Mia Ellis, Deputy Dir. - Special Projects  
Ms. Debra Bassett

47-901

BOSTON OFFICE: 294 Washington Street, Boston, Massachusetts 02108



# THE NAVAJO NATION

P.O. BOX 9000 • WINDOW ROCK, ARIZONA 86515 • TEL. (520) 871-6353 • FAX. (520) 871-4025

THOMAS E. ATCITTY  
PRESIDENT

MILTON BLUEHOUSE, SR.  
VICE-PRESIDENT

April 2, 1998

The Honorable Ben Nighthorse Campbell  
United States Senate  
380 Senate Russell Building  
Washington, DC 20510

Dear Senator Campbell:

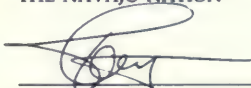
The Navajo Nation, along with other Indian Nations across the country, is deeply concerned about the sovereign issues raised by Senator Gorton's proposed legislation, S. 1691. We understand Senate hearings are scheduled for Seattle, Washington and Billings, Montana on the matter. We and other Indian leaders in the Southwest agree that on an issue of such critical importance to Indian Country, our people should be allowed to voice their input and concerns. The Navajo understands that at this time it is not yet on the list of those Indian Nations who will be able to testify at those hearings. We would greatly appreciate the opportunity to testify regarding this matter and respectfully request your assistance in that regard.

In addition, since there is a large population of Native Americans in the Southwestern United States and California, we strongly recommend that similar hearings be held in Phoenix, Arizona or Albuquerque, New Mexico.

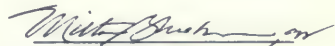
It is our hope that you may be able to consider our recommendation and provide us with an opportunity to be heard on this very crucial issue facing Indian Nations.

Sincerely,

THE NAVAJO NATION

  
\_\_\_\_\_  
Thomas E. Atcitty  
President

  
\_\_\_\_\_  
Kelsey A. Begaye, Speaker  
Navajo Nation Council

  
\_\_\_\_\_  
Milton Bluehouse, Sr.  
Vice President

  
\_\_\_\_\_  
Robert Yazzie, Chief Justice  
Judicial Branch



## LOWER ELWHA TRIBAL COUNCIL

2851 LOWER ELWHA ROAD  
PORT ANGELES, WA 98363

(206) 452-8471  
FAX (206) 452-3428

March 30, 1998

The Honorable Ben Nighthorse Campbell  
Chairman  
Senate Committee on Indian Affairs  
838 HART Senate Office Building  
Washington, DC 20510

RE: SB 1691 - THE AMERICAN INDIAN EQUAL JUSTICE ACT

Dear Chairman Nighthorse Campbell:

The Lower Elwha Klallam Tribe adamantly opposes Senate Bill S. 1691, entitled the "American Equal Justice Act". If enacted, this bill would make it very difficult for tribes to fulfill their tribal governmental responsibilities. By treating tribal governments no differently than any private individual or organization will extinguish hundreds of years of Federal Indian policy that protects the sovereign status of Tribal Governments.

This attack on Indian Country - America's Third World - comes when some Tribes are finally starting to emerge from poverty and neglect. S. 1691 puts Tribal self - governance and self - sufficiency at peril.

The 20<sup>th</sup> century should not end as another Century of dishonor. Congress should honor America's promise, and reject S. 1691.

I can be reached at (360) 452-8471, extension 107. I appreciate your consideration of my request.

Sincerely,

*Linda J. Mike*

Linda J. Mike,  
Chairperson



cc: Senator Patty Murray

Muxine Keesling  
 15241 NE 153rd Street  
 Woodinville, WA 98072  
 (425) 483-8523

April 6, 1998

TO: Senator Ben Nighthorse Campbell, Chair, and  
 All members of the Senate Indian Affairs Committee

RE: TRIBAL SOVEREIGN IMMUNITY

Give an inch and you will lost a mile.

The most important - and overlooked - aspect of the tribal sovereignty issue is the extension of tribal sovereignty on reservations to land use control over non-tribal land.

King County (in which Seattle is located) prides itself on "leading the nation" in environmental preservation. King County includes tribal representatives on both official and unofficial advisory committees that control every aspect of land use in unincorporated King County. And since the tribes' philosophy is "back to pre-European conditions", with pastures re-planted to forests, we rural landowners are hit literally with land lockup, ranging from recording 65% of our ownerships in untouchable native vegetation as a condition of obtaining a building permit, to restoring native vegetation to areas converted to "European" vegetation.

The truly appalling aspect is that the rules the tribes make for OUR land do not affect reservation land. According to state statistics, in 1993 alone the Muckleshoots applied to the State Department of Natural Resources to log 2,419 acres of forest on their own land, compared to King County's rural-area logging of 2,304 acres in the 4 years between 1987 and 1991.

Another example is in New Mexico where 1987 amendments to the Clean Water Act enabled tribes to dictate higher-than-natural water standards for the Rio Grande. If upheld, the City of Albuquerque could be spending more than \$300 million for unnecessary sewage plant upgrades and \$20 million a year to operate, all to meet the unrealistically-high tribal standards.

As to the more-recognized injustice done by non-Indians' being unable to sue the tribes except through biased, create-their-own-rules tribal courts, the case of the woman whose \$330,000 slot machine win was completely dependent upon the tribes' dispute resolution process is similar to cases of automobile accidents attributable to poor road maintenance on reservations. Once the tribes' judicial system gives a negative verdict, no matter how obviously unjust, there's no higher appeal.

The system must change, both as to the judicial system and as to tribal jurisdiction over off-reservation land use.

Sincerely,



March 31, 1998

The Honorable Senator Ben Nighthorse Campbell  
Senate Committee on Indian Affairs  
838 Hart Senate Office Building  
Washington D.C. 20510

RE: S 1691 THE AMERICAN EQUAL JUSTICE ACT

Honorable Senator

The Yakama Indian Nation adamantly opposes Senate Bill S. 1691, entitled, "The American Equal Justice Act." If enacted, this bill would make it very difficult for tribes to fulfill their tribal governmental responsibilities. By treating Tribal Governments no differently than any private individual or organization will extinguish hundreds of years of Federal Indian Policy that protects the sovereign status of Tribal Governments.

This attack on Indian Country – "America's Third World" – comes when some tribes are finally starting to emerge from poverty and neglect. S.1691 puts tribal self-determination at peril.

The 20<sup>th</sup> Century should not end as another century of dishonor. Congress should honor America's promise, and reject S.1691.

If you would like further comments on my objections to S.1691 I may be reached at  
509-865-5121.

Sincerely,

Elizabeth Mason  
123 Couch Lane  
Wapato, WA 98951

REX OIL COMPANY, INC.  
5671 TEJON STREET  
DENVER, COLORADO  
80221

March 30, 1998

The Honorable Ben Nighthorse Campbell  
United States Senate  
Room SR-380  
Washington, DC 20510-0605

Dear Senator Campbell:

I am writing to urge your CO-sponsorship for legislation which was recently introduced by Senator Slade Gorton (R-WA), S. 1691, which would help stem the problem of tax evasion. The legislation would enable states to collect excise taxes (which the courts have ruled the states have the right to assess on sales to non-Native Americans) on goods sold to non-Native Americans by Native Americans. In addition, the bill would allow non-Indians to bring civil actions against Indian tribes in federal court if their rights have been infringed upon.

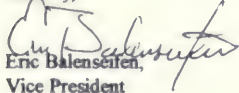
Native Americans reservations are sovereign and thus exempt from state and local laws, including excise and sales taxes. However, non-Indians purchase goods on reservations, and this exemption is being extended to them as well. Since taxes make up such a large portion of the price, this provides reservation retailers with an unfair competitive edge over retailers who collect and remit state and local taxes. Meanwhile, states are losing millions of dollars each year in revenue from these tax-free sales.

A significant problem in the petroleum marketing industry is the problem of tribes not collecting state taxes from truck drivers or non-Native Americans. Supreme Court decisions make it clear that these parties must pay the tax. However, the failure of the tribe to collect the tax makes it impossible for businesses competing with the tribe to compete. With taxes of \$.20 to \$.30 per gallon, the tribes who do not pay the tax have an advantage that cannot be overcome. Making this problem worse is the fact that some federal agencies are now financing the construction of truckstops or gas stations that will be operated by Native Americans. Thus, a truckstop will be built with taxpayer funding, only to be operated without payment of state taxes. This will lead to a deterioration of roads and highways, as states are robbed of the funds that they need to pay for highway development.

By requiring tribes to waive sovereign immunity in certain circumstances, Congress will ensure that the federal government compliments states' efforts to negotiate, without further disrupting the free market. I urge your CO-sponsorship of the S. 1691 to help curb existing tax evasion which states have little leverage to stop.

I feel that the above-mentioned approach is a reasonable, measured response that would ensure that taxes that are owed by non-Indians are collected. I look forward to hearing from you on this important issue.

Sincerely,

  
Eric Balensiefen,  
Vice President

Ivan J. George  
6019 East D. St.  
Tacoma, WA 98404  
430-98

S. 1691  
/

Senator **BEN HIGHTHORSE CAMPBELL**  
Washington D.C.

Dear Senator **CAMPBELL**

My name is Ivan George and I am an enrolled member of the Nooksack Indian Tribe. My family is writing to urgently ask you to help stop Senator Slade Gorton's attack on Indian sovereignty. We ask that you please work to defeat Senate Bill 1691.

This bill is another blatant attempt by Senator Gorton to violate Indian Treaties. A Tribe's right of sovereign immunity is a basic government right shared by cities, counties, states and federal government. It protects our tribe from frivolous lawsuits that could bankrupt our limited financial resources. That would mean less resources our tribe would need to help needy families just at the time when programs like welfare reform are forcing Tribes to pick up where federal and state programs leave off.

Please don't allow this bill to throw out 222 years of federal promises to Indian people. STOP SENATE BILL 1691. Thank You.

Sincerely,

*Ivan J. George*



**Roland Morris, Sr.**

221 Round Butte Rd.  
Ronan, MT 59864  
406-676-2403  
morris@ronan.net  
<http://www.ronan.net/~morris>

Honorable Senator Nighthorse Campbell;

On April 7, 1998, I testified in before you in Seattle, Washington concerning S.1691- The American Equal Justice Act. Please allow me the opportunity to again discuss with you Tribal Sovereign immunity and its effects upon the civil rights of tribal members. It is my hope you will discern the truthfulness of my message by examining both my heart, as well as my words.

As you remember, I am a full-blooded Anishinabe American citizen. Originally from Minnesota, I now live in Montana. I am also a board member of the Citizens Equal Rights Alliance, a grassroots, multi-racial group dedicated to the promotion of equal rights for all citizens within Indian Country.

I will be in Washington DC again June 5 to June 11, 1998. Would it be possible to meet with you during this time?

Sincerely;

A handwritten signature in cursive script, appearing to read "Roland Morris".

Roland Morris

March 23, 1998

Honorable Ben Nighthorse Campbell  
380 Russell Senate Office Building  
Washington DC 20510

The Honorable Ben Nighthorse Campbell:

As a Native American, I respectfully request your help in defeating Sen. Slade Gorton's Senate Bill No. 1691.

I think that the issue of tribal sovereign immunity should be maintained and upheld.

Please continue to fight for our sovereign immunity.

Thank you.

Sincerely,

*Christine Ulster-Steele*

*P.S. Please keep us secure the future  
for our young and old. How much  
more should we be expected to  
surrender?*

DATE 3-24-98

The Honorable Ben Nighthorse Campbell  
 Chairman  
 Senate Committee on Indian Affairs  
 838 HART Senate Office Building  
 Washington, DC 20510

Re: SB1691- The American Equal Justice Act

Dear Chairman Nighthorse Campbell:

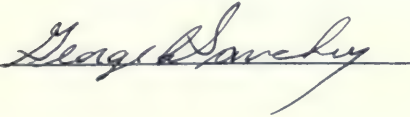
The Yakama Indian Nation adamantly opposes Senate Bill S. 1691, entitled the American Equal Justice Act. If enacted, this bill would make it very difficult for tribes to fulfill their tribal governmental responsibilities. By treating tribal governments no differently than any private individual or organization will extinguish hundreds of years of federal Indian policy that protects the sovereign status of tribal governments.

This attack on Indian Country - America's Third World - comes when some tribes are finally starting to emerge from poverty and neglect. S. 1691 puts tribal self-governance and self-sufficiency at peril.

The 20<sup>th</sup> century should not end as another Century of dishonor. Congress should honor America's promise, and reject S. 1691.

I can be reached at <sup>Home</sup> 509-364-3438. I appreciate your consideration of my request.  
<sup>work</sup> 509 364-3327

Sincerely,





T. M. B. Jacob  
764 Ashue Rd.  
Wapato, WA 98951

DATE 4-6-98

The Honorable Ben Nighthorse Campbell  
Chairman  
Senate Committee on Indian Affairs  
838 HART Senate Office Building  
Washington, DC 20510

Re: SB1691- The American Equal Justice Act

Dear Chairman Nighthorse Campbell:

The YAKAMA Indian Nation adamantly opposes Senate Bill S. 1691, entitled the American Equal Justice Act. If enacted, this bill would make it very difficult for tribes to fulfill their tribal governmental responsibilities. By treating tribal governments no differently than any private individual or organization will extinguish hundreds of years of federal Indian policy that protects the sovereign status of tribal governments.

This attack on Indian Country - America's Third World - comes when some tribes are finally starting to emerge from poverty and neglect. S. 1691 puts tribal self-governance and self-sufficiency at peril.

The 20<sup>th</sup> century should not end as another Century of dishonor. Congress should honor America's promise, and reject S. 1691.

I can be reached at (509) 877-3072. I appreciate your consideration of my request.

Sincerely, T. M. B. Jacob

T. M. B. Jacob



DATE 4/1/98

The Honorable Ben Nighthorse Campbell  
Chairman  
Senate Committee on Indian Affairs  
838 HART Senate Office Building  
Washington, DC 20510

Re: SB1691- The American Equal Justice Act

Dear Chairman Nighthorse Campbell:

The Warm Springs Indian Nation adamantly opposes Senate Bill S. 1691, entitled the American Equal Justice Act. If enacted, this bill would make it very difficult for tribes to fulfill their tribal governmental responsibilities. By treating tribal governments no differently than any private individual or organization will extinguish hundreds of years of federal Indian policy that protects the sovereign status of tribal governments.

This attack on Indian Country - America's Third World - comes when some tribes are finally starting to emerge from poverty and neglect. S. 1691 puts tribal self-governance and self-sufficiency at peril.

The 20<sup>th</sup> century should not end as another Century of dishonor. Congress should honor America's promise, and reject S. 1691.

I can be reached at 865-3494. I appreciate your consideration of my request.

Sincerely,

Penny C King

DATE April 6, 1998

The Honorable Ben Nighthorse Campbell  
Chairman  
Senate Committee on Indian Affairs  
338 HART Senate Office Building  
Washington, DC 20510

Re: SB1691- The American Equal Justice Act

Dear Chairman Nighthorse Campbell:

The Yakama Indian Nation adamantly opposes Senate Bill S. 1691, entitled the American Equal Justice Act. If enacted, this bill would make it very difficult for tribes to fulfill their tribal governmental responsibilities. By treating tribal governments no differently than any private individual or organization will extinguish hundreds of years of federal Indian policy that protects the sovereign status of tribal governments.

This attack on Indian Country - America's Third World - comes when some tribes are finally starting to emerge from poverty and neglect. S. 1691 puts tribal self-governance and self-sufficiency at peril.

The 20<sup>th</sup> century should not end as another Century of dishonor. Congress should honor America's promise, and reject S. 1691.

I can be reached at 865-6753. I appreciate your consideration of my request.

Sincerely,

Anna Hogan

DATE 4/1/98

The Honorable Ben Nighthorse Campbell  
 Chairman  
 Senate Committee on Indian Affairs  
 838 HART Senate Office Building  
 Washington, DC 20510

Re: SB1691- The American Equal Justice Act

Dear Chairman Nighthorse Campbell:

The Yakama Indian Nation adamantly opposes Senate Bill S. 1691, entitled the American Equal Justice Act. If enacted, this bill would make it very difficult for tribes to fulfill their tribal governmental responsibilities. By treating tribal governments no differently than any private individual or organization will extinguish hundreds of years of federal Indian policy that protects the sovereign status of tribal governments.

This attack on Indian Country - America's Third World - comes when some tribes are finally starting to emerge from poverty and neglect. S. 1691 puts tribal self-governance and self-sufficiency at peril.

The 20<sup>th</sup> century should not end as another Century of dishonor. Congress should honor America's promise, and reject S. 1691.

I can be reached at 865-6753 or I appreciate your consideration of my request.

Sincerely,

865-6753

Annette King

**BLACK HILLS DANCER**

PO Box 1196  
Murphysboro IL 62966  
◆  
(800) 736-1804 PIN 1223  
Email DECORA40@man.com

March 30, 1998

Senator Campbell,

Greetings:

I am not a constituent but, people in Indian country are saying that Sen. Gortons Bill, No. 1691, would  
**NOT BE GOOD FOR NATIVES!**

I realize it may be hard to accomplish some things in Washington however, anything you can do will  
be appreciated. I am also going to write to my Senator, Carol Mosely Braun,

I am a member of the HoChunk Nation, a Wisconsin Indian Nation. My wife and Grand daughter and  
I are going to the Pow-Wow in Winnebago NE this year. This is one of the oldest continuous Pow-wows  
in the U.S.

Thank you,

*Ben Decorah*

Black Hills Dancer  
(Ben Decorah)



5281 West Mercer Way  
Mercer Island, WA 98040

April 1. 1998

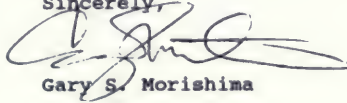
The Honorable Ben Nighthorse Campbell  
Chairman, Senate Indian Affairs Committee  
United States Senate, SR-380  
Washington, D.C. 20510

Dear Senator,

I am writing to express my grave concern over S. 1691, a bill introduced by Senator Gorton from Washington State. This bill is ill-advised and based on misleading and false premises regarding the sovereign immunity that inures to Indian tribes by virtue of their status as governments.

I urge you to work to defeat S. 1691.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Morishima', written over a horizontal line.

Gary S. Morishima

Members of the U.S. Senate Indian Affairs Committee  
April 21, 1998

Dear Senator Campbell:

I am a Yakama tribal member and very concerned about the reprehensible Gorton S.B. 1691. Senator Gorton's continual attack on tribal people is a direct attack on tribal sovereignty guaranteed by federal treaties made with the tribes during the 1800s. Had it not been for the wisdom of our tribal leaders back then, we would not even exist as a people today. For Gorton to say that he should not be held accountable for what happened back then is his tactic for settling non-tribal people's personal agenda against tribes. Is this how the American government is going to use the (fiduciary obligation), trust responsibility guaranteed in the treaties?

I am now the seventh generation since the treaty signing and I understand and know they were talking and planning for me. It is my continued duty as a tribal member to assure future generations our way of life, culture, religion and tribal government. Most non-tribal people today do not understand who we are simply because this portion of history is not required in any public schools thus a continued misunderstanding of tribal nations.

Because of the foresight of our tribal forefathers, we are here today. We still practice our specific rights through the treaty. If Gorton's bill were to be passed it would be the obliteration of tribal people, nations and governments. Will this be the repetition of 'The Trail of Tears' and 50s termination era? I believe this to be the wrong approach of dealing with sovereign nations. Gorton would not attack Canada, or any other nation and its leaders this way. He also says he should not have to apologize for what his ancestors did to the tribes, yet he would be to doing the same with one stroke of a pen.

I urge you as a public official to denounce this bill and support tribal nations in this ongoing effort of attacking tribes through written legislation.

Respectfully submitted I am,

*Carol Craig*

Carol Craig  
Yakama Tribal member, Washington State

cc: Frank Murkowski, R-Alaska  
John McCain, R-Arizona  
Slade Gorton, R-Washington  
Pete Domenici, R-New Mexico  
Craig Thomas, R-Wyoming  
Orrin Hatch, R-Utah  
James Inhofe, R-Oklahoma  
Daniel Inouye, D-Hawaii  
Kent Conrad, D-North Dakota

Harry Reid, D-Nevada  
Daniel Akaka, D-Hawaii  
Paul Wellstone, D-Minnesota  
Byron Dorgan, D-North Dakota  
Staff: Gary Bohnee-majority  
Pat Zell-Minority  
Patty Murray, D-Washington  
President William Clinton



COPY

**Olympia Office:**  
 110 Insitutions Building  
 P.O. Box 40482  
 Olympia, WA 98504-0482  
 (360) 786-7650  
 Toll Free Hotline: 1-800-562-6000  
**February 12, 1998**

## Washington State Senate

**Senator Bob Oke**  
 26th Legislative District

**District Office:**  
 5125 50th Street, NW, Suite 100  
 Gig Harbor, WA 98458  
 (253) 884-5111  
 Toll Free: 1-800-782-2933  
 FAX: (253) 866-5627  
 e-mail: sen@ok26leg.wa.gov

The Honorable Slade Gorton  
 United States Senate  
 730 Hart Senate Office Bldg.  
 Washington, D.C. 20510

**Mailing Address:**  
 P.O. Box 186  
 Port Orchard, WA 98366

RE: Washington State's Elk Herd

Dear Slade:

As you know, Washington's wildlife resources are now under increasing threat from off reservation Tribal hunting. Elk herds in the Nooksack, White, Yakima, Cowlitz, Quinalt, Toutle, and Skokomish River Basins are experiencing new threats by tribes hunting off reservation. Habitat changes and non Tribal poaching are also serious factors.

Our state attempted to reach off reservation hunting agreements with eighteen of the twenty-seven treaty and/or executive order Tribes. These Tribes are considered sovereign nations and are not required to abide by Washington wildlife policy or state game codes. Now some tribes are asserting treaty rights to hunt in other Tribes ceded areas. We have Nooksack Tribal members killing elk at the Department of Wildlife elk feeding areas at the Oak Creek Game Range. This is in an area ceded by the Yakima Indian Nation. The Yakimas have not agreed to other Tribes hunting there. The State filed a lawsuit but it was overturned on appeal. The case will be reviewed by our State Supreme Court soon (State vs Buchanan, 1996).

I believe that now is the right time for our Congressional Delegation to come to our assistance to insure protection of our State's elk resources. We request you ask the Bureau of Indian Affairs to mediate with the Washington State Tribes to reach agreements on where they can legally hunt (Crow Tribe vs Repsis). Please also request that the Bureau of Indian Affairs assist in reaching elk management agreements between the Tribes and the Washington State Department of Fish and Wildlife to ensure protection of Washington's elk herds. At the present time twelve Tribes have hunting agreements with our State. Two have recently canceled earlier agreements.

I support the establishment of eight or ten elk reserves where no Tribal or non-Tribal hunting will occur until herd management agreements can be reached between the Tribes and the State of Washington. Federal enforcement assistance will be needed from the United States Fish and Wildlife Service, since we are dealing with Tribal members with Sovereign Nation status. I feel that Federal Courts will uphold the sanctity of these reserves, since the reserves can not be considered open and unclaimed lands, and they are created for the express purpose of conservation (Idaho vs Culter, 1984).

COPY

The Honorable Slade Gorton  
February 12, 1998  
Page 2

I request that Congressional sanctions be enacted to withhold Federal appropriations that are discretionary in nature and not required by treaty trust obligations, since many tribes may not cooperate with conservation.

I feel that with the support of our Congressional Delegation, Washington States interests in protecting our elk resources will be greatly strengthened. There is the expectation that many of our Indian Nations will actively participate with the Bureau of Indian Affairs to insure the herds in their ceded areas are properly managed and safeguarded. The establishment of elk reserves for conservation purposes would put to rest the issue of open and unclaimed lands (Idaho vs Culter)

Recent Tenth Circuit rulings (Crow Tribe vs Repsis) further support my view that Federal and State Forests are not open and unclaimed, since they are not open for settlement. Lastly, some form of Federal sanction must be available where reason and compromises prove unobtainable. Federal Enforcement Officers will be needed to assist in elk herd protection, when dealing with treaty Tribal members.

Please let me know if you will assist us in resolving this issue. The bottom line is we must all work together to save Washington State's elk herds.

Sincerely,

BOB OKE  
State Senator

REO:js:sj  
Enclosure: Washington State Attorney General's letter of 1-26-98, with enclosures.  
cc Governor Gary Locke  
Washington State Fish and Wildlife Commissioners  
Bern Shanks, Director of the Department of Fish and Wildlife  
Bob Mottram, Tacoma News Tribune



425  
TO FAX 206) 451 0234

April 7, 1998

From FAX 360) 275-2757

The Honorable Senator Slade Gorton,  
United States Senator for Washington

Charles H. and Margaret G. Bennett  
11651 NE North Shore Road  
Belfair, WA. 98528

We thank you for your efforts to equalize the mutual legal rights of Indian and non-Indian citizens. The Summary of The American Indian Equal Justice Act, S. 1691 which your Office made available to us by FAX, illustrated the un-balance. The rally today outside the hearing chambers also illustrated by the numerical numbers the power wielded in civil disputes.

The refusal of Indian vendors of taxable goods to cooperate with our State's collecting taxing machinery for sales to non-Indian consumers further illustrates the unwillingness to cooperate in a legal manner. The other instances your Summary has illustrated, unfortunately, also illustrates that legal action must be pursued to protect and balance the rights of our citizenry.

We should be striving for uniform laws and treatment for all our citizens, rather than pursuing segmented, hyphenated, conglomerated nomenclature to bring this great country of ours together, working for the good of all, rather than seeking and maintaining a schism where there should and could be unity!

Our North Shore of Hood Canal has many retirees and pensioners, who think as we do, and look forward to a peaceful, well-governed "old age" without the hassles regurgitating from one hundred and fifty years ago in a hands-on totally different era.

Please keep us on your information list - we are interested!

*Charles H. Bennett*  
*Margaret G. Bennett*

David & Virginia Caley  
P.O. Box 179  
Indianola, WA 98342

April 07, 1998

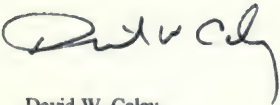
Senator Slade Gorton and  
Senator Ben Nighthorse Campbell  
U. S. Senate  
Washington, D. C.

Dear Senators,

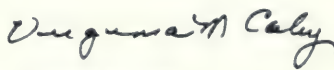
We applaud your hearing our pleas to end Tribal Sovereign Immunity. It is unfair to us as property owners on land previously on an Indian Reservation. The Tribe can sue us at no cost to them, the Federal Government pays their legal fees. We on the other hand must defend our property rights with our fixed retirement incomes.

Hopefully our society can move beyond the past to a time when we are all equal and if there is dispute, it be resolved on a level playing field. Society, civilization, and technology have progressed so rapidly in our life time that new methods need to be developed to allay our fears of Tribal autocracy.

Sincerely,



David W. Caley



Virginia M. Caley

13 APR 1998

David and Virginia Caley  
 P. O. Box 179  
 9101 N. E. Shore Drive  
 Indianola, WA 98342

Mr. Kory Kelly  
 Sen. Gorton's Office  
 10900 NE 4th Suite 2110  
 Bellevue, WA 98004

Dear Mr. Kelly,

As a result of our phone conversation of April 1, 1998, this is a resume of the events leading up to the April 1st meeting between residents of Indianola and the CENCOM (911) Board.

We live in the small town of Indianola on the North Kitsap peninsula which is situated within the original boundaries of the Port Madison Indian Reservation (Suquamish Tribe). Our property which has been fee-patent (simple) since early in this century is located on the beach near the Indianola dock. The beach in front of our house is owned by the Indianola Beach Improvement Club. We own only down to the mean high tide line.

On Sept. 2, 1997 a group of non-Tribal people were setting off fireworks. The tide was very high and the wind was very brisk. The fireworks were not only annoying, illegal according to Kitsap Co. laws, but blowing back toward our house. We called 911 and were told that they had contacted the Suquamish (Tribal) Police who informed CENCOM that we were "on the Port Madison Indian Reservation and therefore under Tribal jurisdiction". Since according to the Tribal Police fireworks are legal 365 days per year, they would not be responding to our call. When David asked to speak to a Kitsap Co., Sheriff's Deputy, the Deputy told him that according to the CENCOM computer, we were on the reservation, so they would not be responding to our call. No damage was done. No one answered our call. The offenders left.

In subsequent days we talked to the Kitsap Co. Sheriff, Pat Jones, to our local Fire Chief, Paul Nichol and to the Director of CENCOM, Ron McAfee. All agreed that we are not "on the reservation" and are **not** "under Tribal jurisdiction", but it has long been the policy to dispatch both Sheriff and Tribal Police on calls to this area. The reason for this is that there seems to be no way to distinguish who among the residents is Tribal and who non-Tribal. There are, in fact, probably no more than 35-40 Tribal residents in this community of 1500+ people. Kitsap County certainly has no trouble deciding who gets tax statements each year!

Page 2 - Caley

In discussing our problem with CENCOM and the Assessor's office we were told that when asked which were Tribal properties, the Tribe (Suquamish) was uncooperative and stated that their jurisdiction covered everything from Suquamish east to Jefferson Head (the boundaries of the original Port Madison Indian Reservation).

Historically, in 1886 the Suquamish Tribe was given the choice of Trust lands or Allotments to individual Indians, choosing the latter. After 1911, following the end of the 25 year restriction placed on these lands, the great majority of these allotments were sold to non-Tribal people.

On Jan. 20, 1998 we called CENCOM for reassurance that our properties were no longer going to be listed as "on the reservation". We were told by Ron McAfee, the Executive Director, that the sorting out of who was non-Tribal was proving to be very time consuming, but was progressing. They were trying not to step on anyone's civil rights. "But don't worry, it will all work out."

At the CENCOM Board meeting on March 4, 1998 we were informed that the Board had asked for an opinion from the Deputy County Attorney, Jon Walker. They would not discuss what was asked, nor what his opinion was. We were led to believe it would be released at the April 1st Board meeting. "But I think you will be pleased."

At the April Board meeting, we were surprised to learn that the Tribal attorney, Scott Weed, and the Asst. Chief of the Suquamish Tribal Police, Ron Blake, both had been invited to attend the meeting. Mr. Weed expressed the opinion that the 1886 Allotment system was "flawed and needs to be addressed". The CENCOM Board, on advice of their attorney, refused to release either their memo or Mr. Walker's opinion, citing attorney-client privilege. However, they would like our attorney to enter an opinion at the May meeting of the Board. (Difficult, when you don't know the subject.) In the meantime, CENCOM will continue to list the fee-patent properties as "on the reservation, also call Suquamish Police". In a call today to one of the CENCOM Board members we did learn the general content of the "secret" opinion: that while our properties are within the boundaries of the old reservation, they are in fact fee-patent lands and the Tribal Police have no jurisdiction over us, just as the Sheriff has no jurisdiction over Tribal members. The Tribal Police may be involved if needed to keep the peace until the Sheriff arrives.

It is our understanding that the absolute rights of non-tribal fee-patent property owners to be free of jurisdiction by any Tribe has been settled in many courts, including the U.S. Supreme Court (Oliphant vs the Suquamish Indian Tribe, 1977) and the U.S. Ninth Circuit Court (Tidelands, 1989). According to South Dakota vs Yankton Sioux p. 26 "....area



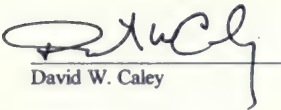
Page 3 - Caley

predominantly populated by non-Indians with only a few surviving pockets of Indian allotments....signify a diminished reservation." and p. 27 "...diminished reservation no longer constitutes Indian country and thus the state has primary jurisdiction."

As fee-patent landowners, we want any reference on CENCOM's screens to "on the reservation, also call Suquamish police" deleted. We want to be treated the same as any fee-patent landowner in non-Indian Kitsap County. We are looking for answers as to why we must constantly fight this matter. Why do our duly elected County, State and Federal officials not seem to be taking OUR interests to the forefront nor looking out for OUR rights, services and protections. We pay our taxes, vote in all elections and have to hire our own attorneys to keep our property and ultimately have to pay for the legal help for those who would happily take our property from us. This does not seem fair.

All of the non-Tribal property owners in Indianola will truly appreciate any assistance you can give us. This constant battle is getting very wearing on everyone.

Most sincerely,



David W. Caley



Virginia M. Caley

Enclosures (2)

PORT MADISON TIME LINE

- 1855 Point Elliot Treaty -- creating the Port Madison Reservation  
" - for the present use and occupation of" the Suquamish Tribe
- 1864 Additional land added to the reservation by Secretarial Order  
(Secretary of the Interior). This is all the reservation land  
lying easterly of Millers Bay.
- 1885 Assignment of land prior to allotment.
- 1886 Allotment of almost all reservation land. Restrictions were  
made that required legislative approval before sale.
- 1887 The Dawes Act sets 25 year limit on fee patent restrictions.
- 1905 Land transfer. Lots 4 & 5 Sec. 21 and lots 1 & 2 Sec. 28 are  
transferred from the Department of Interior to the War  
Department to form a military reservation.
- 1909 First land sale approved by congress
- 1911 Restrictions on fee patents pass the 25 year limit.
- 1920 The War Department leases its lands to private parties.
- 1926 The federal government completes the sale of all War Department  
holdings and jurisdiction passes to the State.
- 1926+ Since this time there appears to be only 36 acres of land still  
held by the Federal Government in reserve status.
- 1950 Tribal Chairman Mary Howard acknowledges in a March 14 meeting  
with State officials that the "reservation is not much bigger  
than the room (they were meeting in)".

Within the original boundaries of the Port Madison Indian Reservation there are two types of land title;  
Reserved land the title to which lies with the Federal Government.  
Fee Patent (or fee simple) land the title to which lies with individual or group owners.

Alienable titles are those fee patents that are subject to sale but have not been sold out of Federal Government supervision. These titles may include some restricted fee patents which require legislative approval prior to their sale. These lands are under partial State jurisdiction.

Alienated titles are those fee patents that have been sold and no longer are subject to either Federal set-a-side or Federal supervision. These lands are now under State jurisdiction.

Allotments; Fee patent parcels of land created out of diminished Indian reservations.

Trust lands; Fee patent lands that are held in trust by the federal government for the Indian owners. These are alienable titles and may include allotments.

Indian country; Reserved lands (US title) or lands held in trust for individual Indian owners under Federal Government supervision and Federal set-a-side requirements.

Any land that does not meet the requirements of Indian country is under State jurisdiction.

## LUMMI INDIAN TRIBE v. WHATCOM COUNTY

The county has jurisdiction over all alienable fee lands including allotments and they are subject to assessment and forced sale for taxes.

---

## SOUTH DAKOTA v. YANKTON SIOUX

SOLEM, *supra*

pg 26 area predominantly populated by non-Indians with only a few surviving pockets of Indian allotments ... signify a diminished reservation.

The States assumption of jurisdiction over the territory continuing virtually unchallenged to the present day, further reinforces our holding (diminished reservation).

pg 27 diminished reservation no longer constitutes Indian country and thus the state has primary jurisdiction.

---

Since the Tribal Bingo Hall and Casino etc. are on alienated land and are dependent predominantly on non-Indian clientele the case for Health district regulation is very defensible and should be pursued to protect your non-Indian constituents from obvious health hazards.



## COURT CASES ON INDIAN LAW

ALASKA v. NATIVE VILLAGE....

U.S. v. PELICAN

pg 7 we (have) found that "Indian Allotments - parcels of land created out of diminished Indian reservations and held in trust by the Federal Government for the benefit of individual Indians - were "Indian country".

After the reservations diminishment, the allotments continued to be Indian country, as the lands remained Indian lands set apart for Indians under governmental care;

DONNELLY v. U.S.

Indian reservations are Indian country

U.S. v. MCGOWAN

land can be Indian country without being reservation

Opinion of the Supreme Court prior to 1948 and codified by Congress in 1948 18 U.S.C.

pg 4 "Indian country" is currently defined at 118 U.S.C.~ 1151. In relevant part, the statute provides:

"The term "Indian country"... means

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government...

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (the court has never applied this distinction and says it refers only to land that is neither reservation nor allotment)

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

U.S. v. SANDOVAL

Indian country requires both federal set-aside and federal superintendence

HAGEN v. UTAH

"by diminishing a reservation and opening the diminished lands to settlement by non-Indians, Congress has extinguished Indian country on the diminished lands.

pg 13 Tribal self determination has not altered requirements for federal superintendence.

BREDALE v. CONFEDERATED YAKIMA NATION

The county can assert land use and regulatory authority over fee lands owned by non-tribal members.

YAKIMA v. YAKIMA INDIAN NATION

The county has authority to impose ad valorem taxes on fee land owned by the tribe or its members under the General Allotment Act

Catherine L. Tyus  
2216 S. Meridian St. A-202  
Puyallup, WA 98371  
(253) 841-8930

April 8, 1998

United States Senator  
Slade Gordon  
10900 NE 4<sup>th</sup>  
Bellevue, WA 98004

RE: Indian Tribal Sovereignty

Senator Gordon:

I am an American citizen working for an Indian Tribe in the State of Washington. I have been employed since October 14, 1996. When I first became employed with the Tribe I felt that it would be a great opportunity for someone my age and economic status at the time to be able to take care of myself after my marriage of 12 yrs. dissolved. I did understand when I was hired that there was Indian Preference. But I had no idea how much discrimination would be shown. I have never been a racist person, but believe me I now know how minority people feel. The treatment of non-Indian employees is the worst I have ever seen.

I will give you a short synopsis of my employment with the Tribe. I started in the Administration Office, I set up their entire mail system, did data entry, answered telephones, work processing, and many errands in my own vehicle without the knowledge that if something were to have happened while I was in my own vehicle that my insurance would not have covered me. I put in an enormous amount of over time hours helping to set up this new organization. After about 3 months with the Administration Office, I transferred to another department. The department that I transferred to expanded shortly after I transferred. With the expansion I was promoted to a Lead, shortly there after I was promoted to a dual rate Lead/Supervisor. I worked at that capacity for twelve months with only one write up in some 15 months of employment. On March 3, 1998 I was summoned to the office of Sue Jordan a Human Resources Representative. This was a meeting between my Manager, Sue Jordan and myself. I had no idea what this meeting was pertaining to, but I knew that it probably wasn't in my best interest. I was right with feeling that way. They proceeded to tell me that they had several confidential statements about me that my co-workers had written against me concerning unprofessional conduct. They would not tell me any of the statements that were made against me or statements that I was to have made. I was not allowed to see anything written against me nor was I

told who made these statements. I had no way of defending myself because I did not know what I was defending myself against. At this meeting they proceeded to tell me that I was being demoted to a writer/runner, with a 90 day probation. In the 18 months that I have worked for the Tribe I have been written up one time and that has to have been almost a year ago. They have set procedures for disciplinary actions that were not follow in this case. I never received a warning or a write up on this offense no did I receive a suspension, they just decided to demote me with no explanation except that I was unprofessional and that my work quality was unsatisfactory. I do not believe that I was ever anything but professional at anytime while in my position with the Tribe.

I was informed about the bill you are sponsoring in the Senate to end Indian Sovereignty. I do not know exactly what the answer is in this situation, but I do know as an American citizen (non-Indian) I have no recourse for what they have done to me. I really feel that we were not told in the beginning that we as non-Indian employees would have no way of protecting our jobs or our integrity as professionals if the need were to arise. We were told that any problems we had could be taken to Human Resources and a resolution would be found. I for one did not know that as non-Indian workers that they could take away our human and civil rights and degrade us without our having anyway to protect ourselves. I feel that non-Indian employees should know from the beginning that we have no protection under any laws either State or Federal when we are employed by Tribes. We are all Americans and as Americans I feel that the laws that govern should be the same for everyone. If your bill does not pass the Senate then I feel that Tribes should have to let their potential employee's that are not Native American know that they have no rights concerning how they are judged and treated when employed by Tribes.

I have always been a Native American supporter but after working under the conditions I have been subjected to I now find that I have very mixed feelings about what Indians have been given in this country. I do not feel that they will lose their culture if they have to live with the same laws that the rest of American's live under. Their are many different ethnic groups in our great country and they have not lost their cultures.

I am sending you a copy of the paper work on the disciplinary action taken against me. I wish I could do more to help bring about this change, but given my status as of now I need to keep my job for I am my sole support. I am striving to locate another job, but so far I have not had any luck. It is not an easy thing to do in this day and time.

Thank you for your time in allowing me to tell you my observation on this matter. Good luck in your endeavor to get this double standard in our country rectified.

Sincerely,



Catherine Tyus

Enclosure: 3



# PERFORMANCE ACTION PLAN

Employee Catherine Tys Department Keno Position Lead Writer/Supervisor Date March 3, 1998

## Specify in detail what action is needed:

Represent the Emerald Queen Casino professionally at all times. Due to activities as listed in confidential documents, demotion to writer/runner is obligatory. It is important for Catherine to realize the level of professionalism required in a lead and supervisory position.

## Steps/Actions to be taken: Immediate improvement is required in the following areas:

- Treat all employees and guests fairly and with respect. Specifically, keep personal employee issues not involving the department away from the work place. Catherine's opinions and observations are to be limited to employees' work performance issues. These issues are to be dealt with solely in a professional manner. Individual opinions and observations are not to reflect in the performance of her job duties, nor her interactions with co-workers or guests. Catherine must learn to be a team member and positively promote her environment, refraining from any negative behavior.
- Improve attitude towards all co-workers. Talking with co-workers about other employees in a negative, non-productive manner behind their backs is an express violation of the Emerald Queen's Employee Relations Policy. Catherine's employee evaluation stated that she needed to "work on maintaining a more professional image by reducing the amount of gossip", a statement with which she concurred. Since that evaluation she has shown little or no improvement in that area. Catherine must minimize socializing during work and while on break, and must not make inappropriate, negative, and unprofessional remarks to any employee or guest.

## Timeline for Performance Action Plan

- Ninety day review (Monday, June 1, 1998) If immediate improvement is not made and maintained, Catherine will be subject to further disciplinary action up to and including termination.

## Supervisor Comments:

Catherine has a good command of the job skills, but needs to be discreet when there are issues among co-workers. Catherine needs to confine her opinions of her co-workers to professional levels. She is to deal with those issues in accordance with the policies and procedures as set forth within the Human Resource Manual. When situations arise which Catherine determines to be inappropriate for the work place, she needs to not react inappropriately by talking negatively about the employee, but use effective problem solving and communication skills. Her feelings need to be more contained, not expressed so openly with little regard as to how guests and co-workers will be affected by her behavior. Catherine must not initiate or participate in any gossip or inappropriate conversations while working or on break. She must focus on being a team member with all employees to affect the working environment in a positive manner. I have had Catherine review the Employee Relations Policy and expect her to abide by the rules set forth on that document.

Employee Comments: *I am truly sorry for any comment or judgement I may have given that was unprofessional. I will accept this as it is written. I do wish that I were given the opportunity to see the remarks attributed to me.*





### EMPLOYEE RELATIONS

All employees of the Puyallup Tribe's Emerald Queen Casino are required to respect each others basic human rights and human dignity, and must work cooperatively with each other to support the Casino's goal of superior guest service. In doing so, each employee will meet the following standards:

- Employees will respectfully address issues or concerns in a non-public area.
- Employees will express their work and personal differences of opinion respectfully.
- Employees will cooperate with or support other employees in the performance of their duties, and respond positively when other employees ask for cooperation or assistance when it does not adversely affect their own work performance.
- Employees will share relevant work-related information with fellow employees to ensure smooth Casino operations.
- Employees will be personally accountable for the appropriateness of their work-related and personal behaviors.

*I understand the Employee Relations Policy as written above and that I will be held responsible for my actions.*

	Employee	Witness	Date
Signature	<i>Patricia Lopez</i>	<i>Seal</i>	8/3/98



# EMPLOYEE DISCIPLINARY WARNING NOTICE

Please Print  
Employee Name Catherine Tyus  
Department Keno

Date of Warning 3-3-98  
Position Lead Writer/Supervisor

## REASON FOR NOTICE

- ☐ Attendance  
☐ No Call / No Show  
☐ Late / Tardy  
☐ Attitude  
☒ Unsatisfactory Work Quality  
☐ Insubordination  
☐ Violation of Safety Guidelines  
☐ Inattentiveness While On Duty  
☒ Violation of Employee Relations Policy

- ☐ Carelessness  
☒ Failure to Follow Instructions  
☒ Violation of Casino Policies  
☒ Violation of Department Procedures/Policies  
☐ Shortage / Overage Variance  
☐ Willful Damage of Material or Equipment  
☐ Rude or Discourteous Guest Service  
☐ Other:

## DISCIPLINARY ACTION THIS NOTICE

- ☐ Verbal ☐ Day Suspension - Return on        ☐ Day Disciplinary Probation ☐ EAP Referral 1-800-523-5688  
☒ Written ☒ 90 Day Performance Probation ☐ Termination ☐ Mandatory ☐ Recommended  
☒ Other, explain: Demotion to Writer/Runner

## PREVIOUS RELATED NOTICES ISSUED

	Type of Action	Date	Comments
First Warning	<input checked="" type="checkbox"/> Verbal <input type="checkbox"/> Written <input type="checkbox"/> Suspension <input type="checkbox"/> Probation	/ /	
Second Warning	<input type="checkbox"/> Verbal <input type="checkbox"/> Written <input type="checkbox"/> Suspension <input type="checkbox"/> Probation	/ /	
Third Warning	<input type="checkbox"/> Verbal <input type="checkbox"/> Written <input type="checkbox"/> Suspension <input type="checkbox"/> Probation	/ /	
Other:			

## NEXT DISCIPLINARY ACTION NOTICE

- ☐ Verbal ☒ 3-5 Day Suspension Laptop including ☒ Termination  
☒ Written ☐ Day Performance Probation ☐ EAP Referral 1-800-523-5688  
☐ Other, explain: ☐ Day Disciplinary Probation ☐ Mandatory ☐ Recommended

## EMPLOYER STATEMENT

Date of Incident: numerous incidents over last 2-3 months AM PM  
Statement: Confidential Documentations revealed serious violations of Employee Relations Policy & unprofessional and inappropriate action by letting a Lead Writer/Supervisor

☐ See Attached

## EMPLOYEE STATEMENT

Please Check One: ☐ I agree with the Employer's Statement OR ☒ I disagree with the Employer's Statement

Statement: They will not allow me to see the statements made against me. I will accept this action, because I feel I have no other choice and will strive to improve.

I've read this Employee Disciplinary Warning Notice and understand it.

Catherine Tyus 3-3-98 Lauren Davis 3-3-98  
SIGNATURE OF EMPLOYEE DATE SIGNATURE OF EMPLOYEE DATE

Commissioners  
 Spencer W. Higby  
 Dave Schulz  
 Edwin E. Thiele

**Okanogan County  
 Commissioners' Office**

237 Fourth North - Administration Building

Admin. Coordinator  
 Dan Powers  
Clerk of the Board  
 Brenda J. White

April 7, 1998

The Honorable Slade Gorton  
 United States Senate  
 SH730 Hart Senate Office Building  
 Washington, D.C. 20510-4701

The Honorable Ben Nighthorse Campbell  
 United States Senate  
 380 Russell Senate Office  
 Washington, D.C. 20510-0605

Dear Sirs,

Thank you for having a hearing on "Tribal Sovereign Immunity". It is with regret that I cannot attend, but would hope that this letter be included in the testimony before your committee.

The American people have a penchant towards a collective guilt complex for wrongs of the past, real or imagined. We then assuage that guilt by throwing money and/or perceived needed rights at the group we may have offended. Consequently, we have gone far beyond minority "affirmative action" in the cause celebre of the American Indian. They have achieved 'sovereign nation' status, but with the full financial, social, and health care benefits available to ordinary U.S. citizens. In addition, tribal governments received taxpayers money to purchase lands and remove them from the tax rolls of local government, their members hunt and fish with impunity upon public lands, and they are given many tax breaks; i.e., sales, tobacco, motor vehicle excise tax, and property tax if property returned to trust status.

Finally, to the subject of your hearing which is tribal government immunity from lawsuits resulting in their actions upon non-tribal citizens living upon fee lands within the boundaries of a reservation. Any citizen or resident under the authority of an existing government should be able to hold that governmental entity accountable under the law. The right to be heard before a court and to appeal the actions of government is not only upheld in the Sixth and Fourteenth Amendments to the Constitution, but was a basic tenet utilized by the founding fathers in writing the Constitution of the United States. I applaud your efforts to restore civil and property rights to non-tribal members under the jurisdiction of any tribal government.

Phone (509) 422-7100

P.O. Box 791, Okanogan, Washington 98840  
 (800) 833-6388 for TTY/Voice use

FAX (509) 422-7106

It is my opinion that the U.S. Senate should exercise the power, authority, and responsibility to ratify, reject, or abrogate treaties. Repeal the treaties of all the Indian Tribes in the United States and allow their members to be free and equal with all the rights and benefits of all citizens of our nation. No other racial, religious, or ethnic group has the elevated status and benefits of extra privileges than the American Indian.

In the interim, this hearing is a step closer to equality. Proceed with due diligence and appropriate haste.

Respectfully Submitted.

  
 Spence Higby  
 Okanogan County Commissioner





**Citizens  
Committee on Fisheries**

Post Office Box 2263  
Sequim, Washington 98382



February 13, 1998

THE HONORABLE SENATOR SLADE GORTON  
730 HART SENATE BUILDING  
WASHINGTON, D.C. 20510-4703

Dear Slade:

Please accept our profound thanks for your commitment to solving the inherent problems created by tribal sovereign immunity.

SB 1691 will go a long way towards equity for non-Indians and Indians alike.

If we look back to the 94th congress regarding "Indian law enforcement improvement act of 1975", we can see that the problems then have only accelerated and worsened today.

On March 4th and 5th 1976 hearings were held before the Subcommittee on indian affairs. The Honorable Senator James Abourezk SD as chair.

We were especially moved by the testimony of Father Kenneth Vavrina, St. Augustine's Indian Mission, Winnebago, NE. "Bullets & broken treaties were not the death blow to the Indian. The death blow which the white man used to bring the Indian to his knees a century ago and which he has repeatedly used to keep him on his knees at the present time is the social system called the welfare state."

It must be obvious to everyone concerned that there is very little justice on the reservations for individual tribal members, even homicide goes unpunished.

8 P.M. June 15, 1984, a case in point occurred on the Salt River Pima-Maricopa Reservation near Scottsdale AZ.

"We Support Equal Rights"

Continued on next page

continued ...

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Committee on Fisheries**  
Post Office Box 2263  
Sequim, Washington 98382



A thirty year old Cahuilla Indian from California named Albert Duro who for the past 3 years was living with a local woman. After drinking and arguing about cars with local tribal members Duro retrieved a 30-30 caliber rifle from his car and began shooting. He then chose a target, 14 year old Buiscuit Brown riding his bicycle, Duro shot the boy to death in front of witnesses. The FBI refused to pursue the case. Their excuse a lack of evidence.

The Tribe decided to prosecute Duro charging "unlawful discharge of firearms" however, Duro's court appointed lawyer filed a writ of Habeas Corpus in federal court, arguing that since Indian Tribes were sovereign entities, like nations, no tribe had inherent legal jurisdiction over a member of another tribe. The court agreed and so did the U.S. Supreme Court.

We recommend that all law enforcement for tribal members on and off the reservations including hunting and fishing be remanded to the County Sheriff and County Prosecutors with federal funding provided to defray costs.

No responsibility is more fundamental than obeying the law. It is not racist to insist that every American do so.

Yours truly,

A handwritten signature in cursive script, appearing to read "Stan Goers".

Stan Goers, Chairman  
Citizen's Committee on Fisheries

"We Support Equal Rights"



1000 LAUREL STREET  
MILTON, WASHINGTON 98354-8852  
FAX (206) 922-2385

April 4, 1998

The Honorable Slade Gorton, Senator  
c/o Mr. Todd Young  
730 Hart Senate Office Building  
Washington, D.C. 20510-4701

Re: Submission to the record regarding SB1691

Dear Senator:

Your progress on legislation to waive tribal sovereign immunity is encouraging. As the mayor of Milton, Washington, I am astonished at the great impacts tribal immunity causes to our cities, and the stumbling blocks to good neighborism that result.

In terms of land use, tribal sovereign immunity has a major impact on all of us. As cities, we do our best to be good stewards of the land we are responsible for by creating and applying land use policies that follow the GMA in letter and spirit, and that reflect good planning and environmental policy. The tribes, however, apparently have no such inclinations. Some examples:

- A billboard was built in a wetland in Milton, as the Tribe thumbed their nose at our environmental laws and the Highway Beautification Act. And there are plans in the works to build another billboard in a wetland next to a salmonid stream — especially egregious during this time when salmon restoration is a major priority of government at all levels. This flies in the face of reason, impacts our environment greatly, and serves to drive the wedge deeper between tribes and non-tribal people and entities.
- Tribes appear to adhere to no water quality or habitat preservation standards. Without storm water drainage infrastructure, for example, tribes are dumping pollutants into the very waterways in which we are trying to restore salmon.
- Tribal sovereign immunity allows for land use that could be highly detrimental to the

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WORKS  
922-8738

MILTON CITY HALL  
ADMINISTRATION  
922-8733



1000 LAUREL STREET  
MILTON, WASHINGTON 98354-8852  
FAX (206) 922-2385

Page 2 of 2


aesthetics and community spirit of our city. To illustrate: Milton was addressing a land use issue relating to substandard building lots. When discussions were not going his way, one citizen made a proposal to the tribes to donate them his property in the center of town. Had this occurred, the City of Milton would have no jurisdiction over that property and could impose no zoning requirements or other land use controls. Tribes would have the freedom to do whatever they wished with that property, regardless of the impact to our community or environment.

- The Microdome, a dance hall on tribal trust land on State Highway 99, has a projected capacity of 1200 with parking for no more than 200. This will cause major traffic safety concerns, not to mention impacts on police, fire and emergency services.

From a public safety perspective, cities such as Milton again come up short. We have no jurisdiction over the islands of sovereign tribal territory within our corporate boundaries, but often bear the burdens associated with public safety situations originating on tribal land. This unfunded impact puts an undue burden on our city.

Senator, thank you for addressing this issue. Tribal sovereign immunity is one of the most glaring injustices in our country. I hope you can find an approach that is workable for all concerned. If I can help or support you in this effort, I can be reached at 253-922-8733.

Sincerely,

  
John Williams  
Mayor

cc: Councilmembers  
Directors  
file

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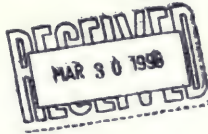




## Police Department

James M. Paulson, Chief

3737 PACIFIC HIGHWAY EAST, FIFE, WASHINGTON 98424-2681  
(253) 922-8633 • FAX: (253) 922-1220



March 26, 1998

Honorable Senator Slade Gorton  
United States Senate  
11120 Gravelly Lake Drive SW  
Lakewood, Washington 98499

Dear Senator Gorton:

RE: Indian Country Affairs

I am sending you this letter in support of your position that a nation within a nation is not just. The recent articles which have appeared on the editorial page of the Tacoma News Tribune were right on point regarding Indian rights, land issues, voting, taxation or lack of and their sovereign nations.

I have been with the City of Fife Police Department since 1988 and police chief since 1977. Over my thirty-year law enforcement career, I, as well as my officers, have dealt with the Puyallup Indian Tribe on many occasions. All too frequently these contacts were unfriendly and the tribal member displayed a hostile attitude that we were on *their* land and within *their* sovereign nation. The issues of tribal trust land and enforcement of our laws are numerous, to say the least. Local police officers do not have enforcement powers on tribal trust lands except, of course, in the case of a fresh criminal pursuit. I'm sure most of the public is not aware that we cannot enforce non-criminal traffic code on Indians within our jurisdiction. In many cases, this means the tribal member refuses to stop for the officer and hastens to tribal trust land where they may order any law enforcement official off their property, and in some cases it has been done with a firearm.

The City of Fife Police Department is faced with numerous parcels of tribal trust lands within our city limits, however, we receive little or no cooperation from the Puyallup Tribal Police in spite of our unsuccessfully attempting to work out a cross-commission/inter-local agreement for more than 12 years. Most often tribal police are not available, or if they do respond to our request, they are not equipped or refuse to handle the matter. We handle incidents of assault, narcotics and meth labs, traffic infractions, criminal traffic, game violations, liquor and cigarette cases, all under the two-nations theory (Puyallup Tribal Sovereign Nation).

Honorable Senator Slade Gorton  
United States Senate

March 26, 1998  
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I want to assure you that the Fife Police Department supports you in your efforts to have a strong America - one nation strong.

Sincerely,



James M. Paulson  
Chief of Police  
Director of Emergency Services

c: Mayor Marian Martelli Wetsch  
Councilmember G. Spies, Police Liaison  
Sergeant R. Larsen-Operations  
Officer S. Farnworth, Police Guild President  
File/Chief

April 1, 1998

TO: Senator ~~Slade~~ Gorton

RE: Legislation to Waive Sovereign Immunity

Dear Senator Gorton and Members of the Senate Indian Affairs Committee:

# **I. FACTUAL BACKGROUND**

The Treaty with the Duwamish, Suquamish entered into on January 22, 1855, ratified March 8, 1859 and proclaimed April 11, 1859 set forth the terms between the Northwest Washington Tribes and the United States of America. One of the requirements of that Treaty was that the Tribes were to preserve friendly relations. In Article 9 of the Treaty:

"The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities."

The Snee-Oosh Land Company ("Land Company") is a community of sixty (60) residences and the Hope Island Inn, located along the shore of Skagit Bay within the geographic boundaries of the Swinomish Indian Reservation. The approximately 120 acres is owned in fee simple, purchased in 1925 from individual Indians and the sales sanctioned by the Department of the Interior. The Land Company has a water system dependent on ground water wells. The Land Company's water rights were granted by the State of Washington in 1935 and renewed in 1953. However, the Land Company owners are not the only fee simple land holders within the reservation boundaries; non-tribal residents are numerically significant, constituting a majority of residents on the reservation, owning more than 70 percent of the land.

## **II. SOVEREIGN IMMUNITY ISSUES**

We have been asked to help illustrate how tribal sovereign immunity has impacted the Land Company and other non-tribal members who own property in fee located within the exterior boundaries of the Swinomish Indian Reservation.

Snee-Oosh - Tribal Sovereign Immunity Matter - 1.

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In approximately 1982, the Swinomish Tribe ("Tribe") tried to charge a \$200 "Bulk Head Permit" to every beachfront property owner in the area and it was only after area people organized into the "Civil and Equal Rights for All" (CERFA) group and confronted the Tribe with a refusal to pay did the Tribe relent. Sovereign immunity allows tribal officers to pass and attempt to enforce laws and harass non-tribal members at will with no threat of accountability or judicial recourse.

In the early 1990's, the Tribe attempted to take over Skagit County Sewer District No. 1 ("SCSD No. 1"). During negotiations to send sewage from SCSD No. 1, through the public road right-of-way (through the Reservation) to the LaConner Treatment Plant, the tribal officials demanded that SCSD No. 1 be disbanded and reformed as a tribal sewer district. It was only with the intervention of Land Company that the tribal demand was denied. The threat of sovereign immunity causes county and state agencies to submit to the Tribe's demands despite the deleterious effect on non-tribal landowners.

In 1990 and again in 1995, the Tribe passed two versions of a "Swinomish Water Ordinance." Each version claimed that the Tribe owns all water resources - regardless of the underlying ownership of land and without regard to state issued water rights, and the ordinance actually stated that if any conflicts arise, that the Swinomish Water Commission (Tribal Senate appointees) is directed to find in favor of tribal or tribal members' uses. Each version of the ordinance attempted to lump non-tribal landowners under the direction of tribal law and subject their land to inspection by tribal officers. Further, the only appeal of rates was through the Tribe. It is only because the Department of the Interior has not approved these ordinances that the Tribe has not attempted to enforce them. If the Department of the Interior ever approves any of these ordinances, the tribal entities will utilize the concept of sovereign immunity in order to enforce this ordinance and avoid any meaningful judicial review of its unfair and unconstitutional requirements.

The Tribe has attempted to zone non-tribal fee land. In addition to being subject to Skagit County zoning, the Tribe has attempted to require owners of non-tribal fee land to comply with tribal zoning; threatening not to furnish water (which it gets from the City of Anacortes water system) or not allow any other water purveyor to supply water to the property. County agencies are afraid to challenge the Tribe due to sovereign immunity.

The Tribe has attempted to require tribal forestry permits to harvest trees on non-tribal fee land. In addition to obtaining permits from the Department of Natural Resources (DNR) the Tribe requires a permit which, in turn, requires the submission of the applicant to tribal law. Additionally, foresters and loggers are subjected to threats of non-consideration for tribal projects if they do not agree to tribal demands on non-tribal projects. Even though state agencies attempt to avoid confrontation with the Tribe due to sovereign immunity, the process is expensive and time consuming and without recourse. For example, even though the Tribe submitted written opposition against the select cut of an Eighty (80) acre parcel owned in fee by the Land Company, the DNR



approved the permit. Then after the DNR permit was issued the Tribe officials placed two (2) stop work orders on the project and threatened to use force to stop the logging, unless the Land Company submitted to the Tribe's permit process, which required the Land Company to submit to tribal jurisdiction.

The Tribe has attempted to require compliance of non-tribal members to comply with building code requirements on fee land. This is an additional requirement to owners having to obtain Skagit County building permits. Sometimes permits are delayed for months because the County will fail to support non-tribal members due to sovereign immunity and the threat of litigation.

The tribal police with official police cars, lights, sirens, uniforms and guns stop many cars each day (even on State Highway 20) and issue routine traffic tickets to non-tribal members. These tickets require reporting to and paying the Tribe for breaking tribal traffic law -- even though it is legally well established that tribal police only have jurisdiction over tribal people in these minor traffic areas.

The Tribe sees no problem with charging renters/leaseholders for capital improvements (water/sewer lines) within the Reservation, and not charging the Indian/Tribal landowners for the same improvements. So far, the tribal agencies have not been held accountable in a state or federal court due to sovereign immunity.

There are several occasions when the Tribe has failed to pay for sewer service to the City of LaConner and for water service provided by the City of Anacortes -- utilizing "sovereign immunity" -- in order to negotiate a reduced price or not pay at all.

Whenever the Tribe simply wants to accomplish a project, they "spot zone" the area and give themselves all necessary permits - even if the project involves non-tribal fee land, and should customarily fall under county and state agencies for permitting.

These are just a few of the most recent issues involving the effect of sovereign immunity on non-tribal fee landowners.

Overall, tribal sovereign immunity denies remedies for violations of legal rights. It is an anachronism in today's world. Although tribes may sue a citizen or governments at any level, non-Indians and state governments may not seek justice in an impartial court when they have a dispute with tribal governments.

What we ask is tribal responsibility and accountability for tribal actions. The doctrine of sovereign immunity frees tribes from these twin burdens which all other citizens and the federal, state and local governments must bear. Immunity from civil suit is not "guaranteed" in any treaty with any tribe not is it a constitutionally guaranteed. Sovereign immunity of Indian tribes is a judicially created doctrine; it is also a doctrine

Snee-Oosh - Tribal Sovereign Immunity Matter - 3.

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that the Supreme Court has explicitly stated that Congress retains the absolute right to define, limit or eliminate.

Self-sufficiency and self-governance come with a price tag -- responsibility and accountability. The waiving of tribal sovereign immunity would enable those harassed or threatened by the Tribe or tribal officer's actions to have recourse in the state or federal court systems. If we are truly a nation of laws, all should be governed equally by these laws.

Respectfully submitted,

SNEE-OOSH LAND COMPANY

By   
MITCH GINNETT  
Its President

**GEORGIA MANOR WATER ASSOCIATION**

P.O. Box 1268  
Ferndale, WA 98248

March 31, 1998

Honorable Senator Slade Gorton  
United States Senate  
Washington, DC 20510-4701

Re: Support the American Equal Justice Act to finally guarantee to all American citizens that "no person shall be deprived of life, liberty, or property without due process of law."

Dear Senator Gorton:

Please enact the American Indian Equal Justice Act to 1) allow the U.S. district courts to have original jurisdiction in a civil action which "arises under the Constitution, laws, or treaties of the United States" and 2) waive tribal immunity, so that all American citizens can finally achieve due process on the level playing field within the district court system.

We are a small, 38 member water association, composed of fee land owners. We were sued by the Lummi Indian Tribe in tribal court in 1993. We had received a state permit to drill a replacement well on our fee land well site within our association, which was sixteen feet distant from our old well. Our well was failing because of its construction. We were drawing only 7.5 gallons of our 20 gpm state water right. The Lummis sued us in tribal court, claiming that the replacement well would impact their aquifer. (In the one partial deposition we were able to take, a tribal expert claimed that even one additional gallon per minute draw on the aquifer would severely impact the tribe.)

We planned to respond in federal district court, if the Lummis really felt they had a case. We were advised by our attorney, however, that recent cases which had ignored tribal court and had gone on to federal district court had been told at that level to return to tribal court to exhaust all remedies before appearing in federal court. Because we are small, and we are without any funding from the federal government or any funding from a tribal casino for lawsuits, we agreed.

We believe our excursion into tribal court to have been an expensive travesty. There was a pre-trial hearing, in which six hours of testimony was given, much of which we believe was damaging to the Lummi case. The Lummis said that they had no funds for a court reporter, but that we would receive a copy of the tapes (three double sided) of the hearing. After weeks of our requests for the tapes being put off, the tribal court clerk eventually told us that the tapes were blank. We asked for a hearing before the tribal judge as to how this had happened. The Lummis informed the judge that the "record" button on the tape recorder had evidently never been pushed for all three tapes.

We asked for depositions from several tribal witnesses. Only one partial deposition was actually taken. Scheduling was always a "problem". We asked for documents from the tribe which were promised, but never sent. Finally, our attorney went again to the Lummi judge and presented our difficulties in getting information from the tribe. The tribal court judge told the Lummi attorney that she could see no reason why we were not entitled to the requested information. That night the Lummi tribal council met and the case was dismissed the next day. The separation of powers in tribal governments (judges are appointed and fired at will by the Lummi tribal council) is often nonexistent.

The Indian Citizenship Act of 1924 should have put all Americans on equal status under the law, but retention of tribal immunity and subjecting non-Indians to tribal courts often makes mockery of any equality in the American justice system. For those tribes who are presently accountable for their actions, this change in law (removal of immunity) should have no adverse effect. For the victims of those tribes who hide frivolous, irresponsible, or corrupt actions behind immunity, or who bring lawsuits against non-Indians in tribal court, this change would bring welcome relief.

Congress now has the chance to actually make equality under the law true for a significant number of Americans who are presently unable to fairly and equally access the American justice system when tribal immunity is invoked and access to federal court, where all parties are equal, is initially denied.

Please support waiving immunity and make tribes subject to the federal court system. All American citizens deserve equal access and a level playing field under American law.

Sincerely,

Bruce Wonder  
President



## NOTICE AND REMINDER OF POLITICAL AGREEMENT

### April 7, 1998

US Senate Committee on Indian Affairs  
 Senator Slade Gorton Committee Member

Gentlemen and Ladies,

This notice is to call to the attention of the US Government, the US Executive Branch, the US Congress and the US Judiciary to certain political agreements that took place between the Indigenous Nations and Peoples and those immigrant peoples who laid the foundation and formed the government of the United States of America, namely:

1. The Constitution of the United States of America
  - A. Commerce Clause Article 1 Section 8-Powers of Congress
    3. "To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.  
 (The Kuiu Kwaan, one of the thirty-two Tlingit speaking Tribes of Alaska and Canada note that a "government to government" relationship exists between the United States of America and the Indigenous Nations. This has been recently re-affirmed the US House and Senate Joint Resolution 76.)
  - B. Income Tax Authorized - Article XVI  
 "The Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several states and without regard to any census or enumeration."  
 (Indigenous Nations and their peoples are not included in the Income Tax Amendment. One nation cannot impose its tax laws upon the citizens of another nation.)
  - C. Just Compensation - Article V  
 "nor shall private property be taken for public use without just compensation."
2. Northwest Ordinance of 1787  
 Enacted August 7, 1789 (1 Stat. 50), Article 3:  
 "...The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken without their consent; and, in their property, rights and liberty, they shall never be invaded or disturbed..."
3. Address by President George Washington  
 (the United States) "...will never consent to your being defrauded, but it will protect you in all your just rights... But your great object seems to be, the



security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in the future, you cannot be defrauded of your lands..."

4. 177. Purchases or Grants of Lands from Indians (The Indian Trade and Intercourse Act R.S. 2116 was from Act June 30, 1834 (25 USC ss 177.)  
 "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution..."

Certain facts stand out, namely:

The USA and the Indigenous Nations are separate independent entities, in the same sense as Spain, Russia and the United Kingdom are independent of each other.

The government of the USA, including Congress, the Executive Branch and the Judiciary, cannot enact laws, rules and regulations that affect the Indigenous Nations without the full participation and consent of the Indigenous Nations.

The US Judiciary has no power over the Indigenous Nations.

The US Congress has no governing power over the Indigenous Nations and Peoples, unless the same freely give their consent.

The US Executive Branch has no power over the Indigenous Peoples and Nations. Like other nations of the world, these two entities may treat with one another.

The political agreement between the Indigenous Nations and the fledgling USA Government that took place over two-hundred years ago is the only basis of interaction that legally exists between the Indigenous Nations and the United States of America. All political actions between the Indigenous Nations and the USA that do not employ these criteria are not legal.

Yours in Brotherhood,

The Kuiu Kwaan  
 The Kuiu Tlingit Nation of Alaska

*Thlau Goo Yailth Thlee*

Thlau Goo Yailth Thlee Rudy James

Spokesman for the Tribal Council

ph # 1-800-976  
 5848

Research Office  
 P.O. Box 1546

# Corson County, South Dakota

## McINTOSH, SOUTH DAKOTA 57641

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**SHERIFF**

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Phone: 273-4210

**STATES ATTORNEY**

Andrew Fergal  
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Phone: 273-4210

**TREASURER**

Joan Bauer  
PO Box 285  
Phone: 273-4552

January 23, 1998

Mr. Gary Carlson  
EPA Region 8, Mail Code P2-W-MS  
999 18th Street, Suit 500  
Denver, CO 80202-2466

Dear Mr. Carlson:

Thank you for the informational meeting you held in McLaughlin, South Dakota on December 11, 1997. The Corson County Commissioners and People for Corson County are concerned about the EPA's proposal to transfer primary jurisdiction over municipal water systems to the Standing Rock Environmental Quality Commission (SREQC). Due to the national scope of Federal Indian Policy, over 370,000 non-members on reservations and millions of others near reservations are threatened by this and other similar proposals. We have the following basic concerns about the proposal.

The right to vote in government is one of the most basic rights in our country. In Article IV, Section (4) the Constitution says, "The United States shall guarantee to every State in this Union a Republican Form of Government." A law dictionary defines a republican government as, "a government of the people; a government by representatives chosen by the people."

The Supreme Court has said, "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, national and state, have been limited by written Constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities." The Court went on to say that governmental powers "must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law" (Duncan v. McCall).

Having limited representation on the SREQC, as proposed by the Standing Rock Sioux Tribal Council (SRSTC), is helpful but doesn't provide any real protection because the decisions of the Commission could be overruled by the tribal council. Therefore, we still object to the SRSTC proposal because it would subject non-members of the tribe to tribal jurisdiction even though we are excluded from equal participation in tribal government because of our race and ancestry.

If the tribe exercised their environmental powers

under the EPA's proposal and cited one of our non-member communities for a violation, the community would be forced to either pay the fine or enter into the tribe's court system. We object to being subject to the tribal court system because we are excluded from having any voice in the structure, rules or personnel of the tribal court. We are excluded from having a part in selecting the judge or serving on any jury that might or might not be involved. The EPA's proposal effectively denies us access to constitutional courts and the right to a jury of our peers.

The long term experience of tribal members in the tribal system is also not encouraging for us. The present tribal governments were established after the Indian Reorganization Act of 1934. After over sixty years, Indians on reservations are still not protected by either the state or the federal constitutions. Minnesota Appeals Court Judge R. A. (Jim) Randall has clarified this problem very well in the *Cohen v. Little Six* legal opinion:

"It is not known to all reading this opinion that the following list of state and federal constitutional guarantees and rights are not in place for Minnesota Indians domiciled on a reservation: There is no guarantee that the Minnesota Constitution, the United States Constitution and its precious Bill of Rights will control. There are no guarantees that Civil Rights Acts, federal or state legislation against age discrimination, gender discrimination, etc. will be honored. There are no guarantees of the Veterans Preference Act, no civil service classification to protect tribal government employees, no guarantees of OSHA, no guarantees of the Americans with Disabilities Act (1990), no guarantees of the right to unionize, no right to Minnesota's teacher tenure laws, no right to the benefit of federal and state "whistleblower" statutes, no guarantees against blatant nepotism, no guarantees of a fair and orderly process concerning access to reservation housing, and no freedom of the press and no freedom of speech.

"In other words, all the basic human rights we take for granted, that allow us to live in dignity with our neighbors, are not guaranteed on Indian reservations under the present version of sovereignty."

The EPA proposal will require tribal members who live in the affected communities to be subject to tribally enforced EPA regulations without the same constitutional protections that other Americans enjoy. If this is the status of tribal members, what protection can non-members expect from tribal government when we have even fewer rights and less influence in tribal government than tribal members? Frankly, we don't know and we doubt if anyone else does either.

Another concern is the tribe's legal ability to discriminate against non-members. The tribe's ability to exclude non-members from voting is only the beginning of this discrimination. Tribal law demonstrates examples of employment discrimination, land lease discrimination, and tax discrimination. The entire tribal system is based on exclusion and discrimination. Non-members are also

excluded from equal access to tribal government information.

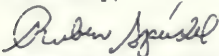
At the informational meeting it was stated that any fees or fines that may be levied (a power the SREQC will have) will be paid to the SREQC itself. In contrast, fees or fines levied by the EPA are payable to the U. S. Treasury. Paying fines to the SREQC would be like paying traffic fines to the traffic officer. The conflict of interest and incentive to levy fines are obvious.

These concerns threaten our communities with the potential of many legal problems, conflicts and financial strains. In contrast, tribal governments have more immunity from lawsuits than any other government in the country. Even if tribal actions some day prove to be totally negligent, arbitrary or unconstitutional, the tribe is completely protected from any unwanted lawsuit by the legal concept of tribal sovereign immunity.

Your proposal forces us, without our consent, under the jurisdiction of a government that excludes us because of our race and ancestry, subjects us to a court system that is not responsible to us, is not bound by either our state or federal constitutions, has a legal right to discriminate against us and is protected from any challenge from us by its sovereign immunity. These realities mean that you are subjecting us to a jurisdiction that is almost completely unaccountable to us. How can you pretend that we will have the equal protection of the law that we are guaranteed by the Fourteenth Amendment?

We would like you to explain, simply and specifically, where you are getting the authority to do these things. Is Congress mandating or allowing these actions? Where does the EPA, Congress or the Courts get the authority to violate our human rights against our will and without our consent? Most agencies of the federal government are prohibited from discriminating on the basis of race. Please send us the basis of your anti-discrimination regulations.

Sincerely,



Ruben Speidel, Chairman  
Corson County Commissioner

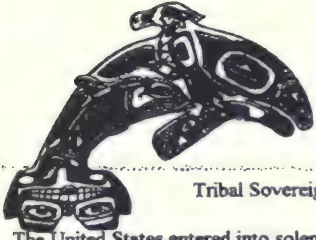


Jim Petik, President  
People for Corson County  
HC 1, Box 53A,  
Keldron, SD 57634  
(605) 374-5836

cc: North and South Dakota Congressional Delegation  
South Dakota Governor William Janklow  
North Dakota Governor Edward T. Schafer  
South Dakota Attorney General Mark Barnett  
North Dakota Attorney General Heidi Heitkamp  
South Dakota State Legislators  
Media



## SQUAXIN ISLAND TRIBE



March 25, 1998

**Tribal Sovereignty: A necessity for our existence.**

The United States entered into solemn agreements with more than three hundred Tribes in the last five hundred years.

Those agreements in the form of treaties guaranteed the protection of the United States.

Senate Bill 1691 flies in the face of these agreements and continues the unsavory practice of genocide resulting in the extermination of millions of Indians since the advent of European contact in the 15th Century.

Sovereignty in practice allows Tribes to waive Sovereign Immunity when necessary: A practice common to other governments.

Tribal Courts protect the rights of tribal members and non-members alike. An example is the employment court at Squaxin Island, available to all employees of the tribe.


Individuals and their private property are protected by appropriate insurance coverage carried by the tribes for liability and other claims.

States collect taxes from tribes on goods purchased from wholesalers. None of which is redistributed to tribes. Cities and counties receive funds based on taxes paid to the state.

Tribes are separate and apart from state government, and are exempt from the practice of collecting taxes for states. Tribes collect tribal taxes on goods sold and businesses operated.

Proposed Senate Bill 1691 should be defeated before it sees the light of day on the Senate floor of the 105th Congress of the United States. Seen without the camouflage of legal terminology, the bill is a ruthless attack on our communities in an attempt to wipe out our culture and identity. The passage of this proposed bill would reduce tribal governments to social organizations, defiling solemn centuries old agreements between the U.S. and Tribal Governments.

In the name of all that is honorable, this proposed bill must be defeated.

  
Dave Whitener Sr. Chair,  
Squaxin Island Tribe

April 9, 1997

### Who Reads the Constitution?

The U.S. Constitution was written a long time ago. We always speak of 1776, but the late 1700's are close enough.

Who would have suspected that Indian Treaty rights would have been protected by the Constitution?

Nonetheless, the sixth article reads in part: "... all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land...

The Senators and Representatives... and the members of the several legislatures, and all executives and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution..."

Upholding the constitution is honorable. Politicians representing the citizens of the United States have an awesome responsibility regarding the U.S. Constitution.

As a member of a small tribe in Washington and a member of the faculty (Emeritus) at the Evergreen State College, I find the actions of a few state and congressional legislatures to be short on responsibility in this regard.

Attacks through legislation that threaten the existence of tribes and of treaties do no respect treaties as the supreme law of the land.

Logically speaking then, one must necessarily conclude that such actions are unconstitutional. If Senators and Representatives do not abide by their oath what is it called? Is it a violation of an oath? Is a violation of an oath a crime? If so what should be the consequence?

David Whitener, Chairman  
Squaxin Island Tribe

1842 E Lola Beach Lane  
Oak Harbor, WA 98277  
20 April 1998

Senate Committee on Indian Affairs  
838 Hart Senate Office Building  
Washington, D.C.

In your deliberations about Senate bill 1691, please consider the following:

The general public seems to misunderstand "sovereign immunity" as it applies to S1691 because some Indian groups attempt to garner support by stating that this bill takes away their right of self-governance. It does not! Actually, it should improve tribal governments.

S1691 simply allows an aggrieved party, Indian or non-Indian, to seek redress in federal or, in some cases, state court. Right now tribal governments can refuse to be sued at all for any reason, or they can require that any suit they do allow must be heard in tribal court. This deprives an aggrieved person of his constitutional right to a fair and impartial hearing. In effect basic rights under the U S Constitution and Bill of Rights are denied if the tribal government chooses to hide behind sovereign immunity.

S1691 does not take away a right the Indians had before the white man came. Sovereign immunity is not an Indian concept; they started claiming it only within the last fifty years or so. It is a European concept relating to kings that was brought to this continent by the European settlers. Since sovereign immunity was never indigenous to the tribes, it is certainly not a "right" they can justifiably claim. Self-government, yes; but not sovereign immunity.

The federal government, state, county and local governments have not claimed sovereign immunity from law suits for many years. It certainly does not make sense for tribal governments to do so.

The absence of sovereign immunity would not impair the function of tribal government. Federal, state, county and local governments are not impaired without it; nor is litigation excessive or insurance coverage too costly.

Hiding behind sovereign immunity is an open invitation for abuse and excesses and even for corruption, because a tribal government cannot be held accountable for its actions. The Senate hearing on S1691 held in Seattle recently, which we attended, brought forth some real horror stories told by tribal Indians, as well as non-Indians, on these very issues.

Tribal governments have nothing to fear from the absence of sovereign immunity, at least not **GOOD** tribal governments. Only corrupt or abusive governments need be afraid, because then tribal governments **CAN** be held accountable for their actions.

What will the tribes gain with the lose of sovereign immunity? Better--more accountable, more responsible, and more open--tribal government. In the interest of good government, we strongly urge the passage of S1691, **THE AMERICAN INDIAN EQUAL JUSTICE ACT**.

Sincerely,

*Anita W Johnston*

Anita W Johnston  
Part Indian Ancestry

*James K. Johnston*

James K Johnston, EdD

## FREEDOM OF INFORMATION ACT REQUEST

MR. BOB WILLIAMS  
N.W. REGIONAL SUPERVISOR  
U.S. FOREST SERVICE  
PORTLAND, OR.

12 MAR. 1998

## GREETINGS:

CITIZENS VISITING THE MT. SAINT HELENS NATIONAL MONUMENT ARE BEING PLACED AT RISK BY OFF RESERVATION TREATY TRIBAL HUNTING. WE ASSERT THAT THE PRIMARY RESPONSIBILITY OF THE FOREST SERVICE IS TO INSURE & PROTECT PUBLIC SAFETY WITHIN THE BOUNDARIES OF THE MONUMENT. INDISCRIMINANT HIGH POWERED RIFLE FIRE IS NOT COMPATIBLE WITH THE EDUCATIONAL & RECREATIONAL PURPOSE OF THE MONUMENT. WE ASK YOU TO ENFORCE AGAINST SHOOTING IN THE MONUMENT.

WHILE THE STEVENS TREATY DOES GIVE TREATY TRIBES THE PRIVILEGE TO HUNT IN OPEN & UNCLAIMED LANDS THE MT. ST. HELENS MONUMENT NO LONGER IS OPEN & UNCLAIMED. EACH YEAR THOUSANDS OF PEOPLE TRAVEL ABOUT HERE ON THE ESTABLISHED TRAILS & ROADS. OTHER AREAS ARE COMPLETELY OFF LIMITS TO PREVENT CONTAMINATION & DISRUPTION OF THE NATURAL REGENERATION PROCESSES. THE EDUCATIONAL ASPECTS OF BIG GAME WILDLIFE VIEWING ARE AN INTEGRAL PART OF THIS EXPERIENCE. THE INTRODUCTION OF HIGH POWERED RIFLE SHOOTING WITHIN AREAS OF HIGH VISITOR USE IS A SERIOUS SAFETY THREAT TO THE MONUMENT VISITORS. THE MAX. RANGE OF THESE WEAPONS EXTENDS FOR MILES. A 30-06 BULLET CAN KILL A HUMAN AT 2000 METERS.

CLEARLY THE UNITED STATES GOVT. NEVER INTENDED THE PROVISIONS OF THE TREATIES TO BE SO FAR REACHING AND ALL INCOMPASSING AS TO PUT CITIZENS AT RISK WHEN LAND USE CONDITIONS CHANGED FROM OPEN & UNCLAIMED TO RECREATIONAL & EDUCATIONAL. FURTHER THE INDIAN CLAIMS COMMISSIONS REPORTS SHOW NO HISTORICAL USE OF THIS AREA BY THE TUALLIP, SQUAIXIN, OR NISQUALLY TRIBES AT THE TIME OF THE SIGNING OF THE MEDICINE CR. TREATY. THE COWLITZ TRIBE DID USE THIS AREA BUT THEY ARE NOT A RECOGNIZED TREATY TRIBE AND THEREFORE HAVE NO CLAIM TO HUNTING PRIVILEGES EITHER. YET THESE TRIBAL GROUPS ALL CLAIM PRIVILEGES TO HUNT IN THE MONUMENT IRREGARDLESS OF PUBLIC SAFETY. THIS IS AN INTOLERABLE SITUATION.

THE WA. DEPT. OF FISH & WILDLIFE ASSERTS THAT THERE ARE SOME AREAS OF THE STATE WHERE HUNTING IS NOT AN AUTHORIZED USE OF PUBLIC LANDS. NATIONAL PARKS, CAMPGROUNDS, MONUMENTS, NATURAL AREA PRESERVES, AND REFUGES ALL FALL WITHIN THIS PARAMETER. THE JUSTIFICATION FOR THIS IS EITHER CONSERVATION, PRESERVATION OR PUBLIC SAFETY. THE PUBLIC SAFETY ISSUE IS ALWAYS OVERRIDING AS IT MUST BE WITHIN THE MT. ST. HELENS MONUMENT.

RECENT CONFLICTING TESTIMONY BY MONUMENT MANAGERS ARE HIGHLY CONTROVERSIAL & CONFLICTING WITH RESPECT TO PUBLIC SAFETY WITHIN THE BOUNDARIES OF THE MONUMENT. THE MONUMENT MANAGER ASSERTS



TRIBAL TREATY RIGHTS TO HUNT IN THE MONUMENT ON A CHANNEL 2 TV INTERVIEW.YET ON A CHANNEL 5 TV INTERVIEW SHE VOICES GRAVE CONCERNS OVER PUBLIC SAFETY?WHICH IS THE M.NUMENTS TRUE POSITION? THE GIFFORD PINCHOLTSUPV. STATES PRIVATELY TRIBAL HUNTING IS INCOMPATIBLE WITH PUBLIC SAFETY YET THE PIO STATES TRIBAL HUNTINGIS ALLOWED UNABAITED?WHAT IS THE TRUE SITUATION?THE SUPV. STATES HE WILL ENFORCE AGAINST ALL HUNTING OR SHOOTING WITHIN THE MONUMENT.HE STATES HE WILL HAVE THE USFS TRIBAL LNO NOTIFY ALLTHE TRIBES OF HIS DECISION TO BAN SHOOTING.YET YOUR PIO REFUTES THIS IS TRUE WHEN HE DISCUSSES THE ISSUE WITH KING 5 TV MGR. ED WHITE.

APPROVED USFS & MONUMENT MGT. PLANS CLEARLY STATE NO HUNTING & OR FIREARMS FIRING IS TO BE ALLOWED WITHIN THE BOUNDARIES OF THE MONUMENT USED BY VISITORS.THE GMU IS ALSO CLOSED TO HUNTING BY THE WDF&W.CLEARLY THE INTENT OF THESE REGUALTIONS IS TO INSURE THE PUBLIC SAFETY.WE REQUEST YOU CLARIFY YOUR POSITON AND SPELL OUT WHAT SAFETY MEASURES YOU ARE ENFORCING AT THIS TIME WITH RESPECT TO PROTECTING MONUMENT VISITORS FROM INDISCRIMINATE TREATY TRIBAL RIFLE FIRE DURING THEIR HUNTING ACTIVITIES.ADDITIONALLY,WE REQUEST A COPY OF ALL RECORDS,DOCUMENTS,MEMOS,& REGUATIONS WITHIN YOUR FILES PERTAINING TO THE ISSUE OF NATIVE AMERICAN TRIBAL HUNTING IN THE MONUMENT.

WE ARE ESPECIALLY INTERESTED IN AND CONCERNED TO SEE DOCUMENTS & CORRESPONDENCE GENERATED BY MR.STUBBLEFIELD,MRS.BROWN,YOUR PIO,THE ENFORCEMENT CHIEF,AND THE USFS TRIBAL LNO STAFF. THIS IS A FREEDOM OF INFORMATION ACT REQUEST.PRIOR TO SUBMITTING THESE DOCUMENTS PLEASE PROVIDE A DATE & TIME WHERE WE CAN REVIEW THEM AT YOUR VANCOUVER OFFICE. YOU WILL HAVE TWENTYONE DAYS TO RESPOND TO THIS REQUEST.

SINCERELY,

ROB KAVANAUGH

C.CONGRESSWOMAN LINDA SMITH  
SR.A.AG.ROB COSTELLO  
U.S. ATTORNEY SUSAN ROWE  
NISQUALLY TRIBAL COUNCIL  
MR. ED WHITE ,KING 5 TV.

March 6, 1995

*To: (see attached list)*

We urge you to initiate legislation to rectify the Indian treaty situation. The most recent federal court decision and the tribes intransigent positions on most issues, especially fisheries and gambling, points to the need for abrogating the special rights and privileges accorded them under those treaties and subsequent federal actions. It all flies in the face of our constitution!

It's especially galling to know their legal costs are funded by the federal government. As suggested by the lawyer for the shellfish growers (see enclosed clipping, congress ought to at least look at the appropriation which funds their lawsuits against the rest of us citizens. The continuing threat to private property as a result of those lawsuits is another trampling of rights supposedly guaranteed by the constitution!

Your recent letter to the Department of Justice was a start. We thank you for the effort which hopefully will stem the tide momentarily. However, congressional action to set a new agenda is of utmost importance. Past attempts by congress, several administrations and the judiciary have merely complicated an already sorry situation. Please try to get at the roots of the problems this time. An excellent reference is "A Study of Public Policy in Washington State" entitled "Salmon at Risk" by Robert M. Crittenden. He's with Crittenden Biometrical, 1001 Cooper Pt. W. SW, Suite 140-189, Olympia, WA, 98502, (206) 705 - 3774.

Your continued interest and support will be appreciated.

Sincerely yours,

*Frank E. Lewis*

FRANK E. LEWIS

*Geraldine W. Lewis*

GERALDINE W. LEWIS

E. 51 Howard Cove Lane  
Shelton, WA, 98584  
(360) 426 - 4120

**PLEASE CALL AND/OR FAX TO VOICE YOUR CONCERNS ON THE SHELLFISH ISSUE!!!!!!**

**Speaker of the House Newt Gingrich**

Phone: (202) 225-4501

Fax: (202) 225-4656

**Congressman Rick White**

Phone: (202) 225-6311

Fax: (202) 225-3524

**Congressman Jack Metcalf**

Phone: (202) 225-2605

Fax: (202) 225-4420

**Congresswoman Linda Smith**

Phone: (202) 225-3536

Fax: (202) 225-3478

**Congresswoman Jennifer Dunn**

Phone: (202) 225-7761

Fax: (202) 225-8673

**Congressman Randy Tate**

Phone: (202) 225-8901

Fax: (202) 225-3484

**Senator Slade Gorton**

Phone: (202) 224-3441

Fax: (202) 224-9393

**Senator Patty Murray**

Phone: (202) 224-2621

Fax: (202) 224-0238

**Congressman Doc Hastings**

Phone: (202) 225-5816

Fax: (202) 225-3251

**Congressman George Netherault**

Phone: (202) 225-2006

Fax: (202) 225-3392

**Congressman Norm Dicks**

Phone: (202) 225-5916

Fax: (202) 226-1176

**Congressman Jim McDermott**

Phone: (202) 225-3106

Fax: (202) 225-6197

9-20-96

Dear Senator:

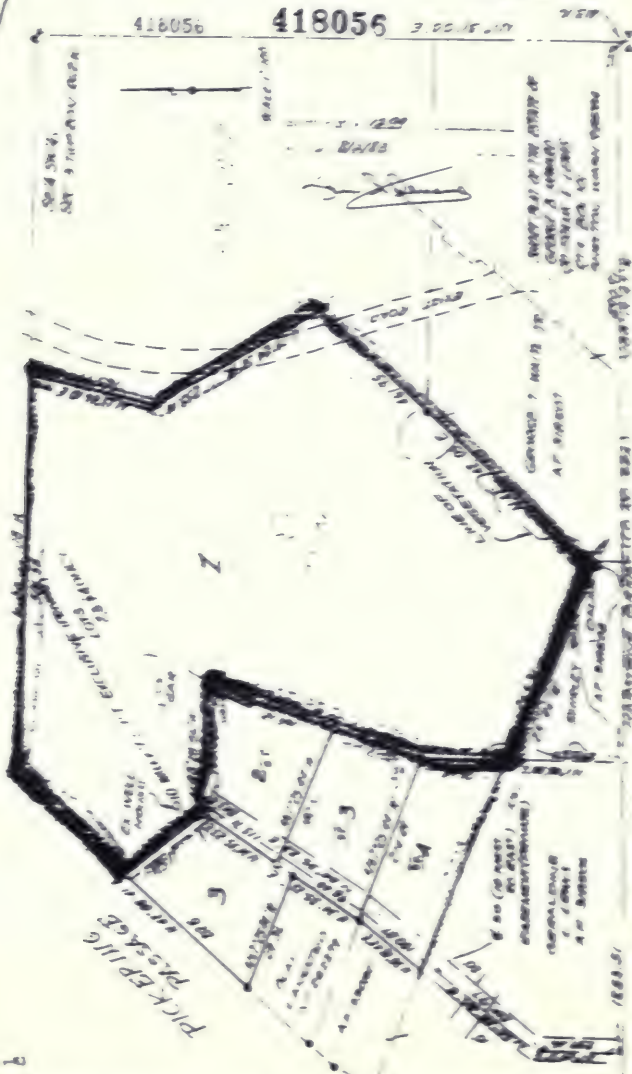
I urge you and the other members of the Committee on Indian Affairs to waive "Sovereign Immunity" for All Tribes. No government should be exempt from accountability for their actions, or those of their tribal members.

As Trustee for the George B. Howard Trust (see attached map) I have an obligation to the members and beneficiaries of the trust to protect their interests. Repeated trespasses and trashing of the trust property by local alleged tribal members engaged in netting fish has gone on for years. Neither the county sheriff nor the tribal police seem to be able or inclined to stop such violations of private property. It has been posted and signed to no avail. The trust lands, uplands and tidelands were originally part of a railroad grant dating from 1890.

Please take some action to rectify this situation and the alleged treaty rights further complicated by recent federal court decisions.

*Frank A. Lucin*  
E. 51 Howard Avenue Lane  
Shelton, WA, 98584





Boundary of Geo. B. Howard Trust

TO: THE COLVILLE CONFEDERATED TRIBES OF WASHINGTON

RE: PROPOSED COLVILLE CONFEDERATED TRIBES SHORELINE  
MANAGEMENT ACT

This letter is to notify you that we, Kevin W. Smith and Janelle M. Smith, property owners of 50 acres of land on Omak Lake which 1200 feet is shoreline, hereby declare that we oppose and reject the proposed shoreline management plan in full.

This is a blatant disregard to our State and County jurisdictional authority and rights.

We do not recognize the Colville Confederated Tribes jurisdiction or authority regarding our land use and zoning.

That any "Public Access" by your members for their enhancement of recreational activities on our land is trespassing and will be treated as such.

That this plan is designed with control of property as a priority rather than water quality. The plan provides no scientific data to support the need for such restrictions.

There is total disregard for the property rights of tribal members as well as those of descendants and non-members. Landowners already have to comply with state shoreline plans and under them have the right to develop their property as long as they are in compliance. The proposed plan would strip members and non-members of these rights.

The plan would institute apartheid government over non-members and their descendants which clearly denies them the right to representative government. It would in effect create a form of political slavery for all future descendants and non-members as well as those currently living on the reservation.

Your proposed plan has not addressed the liability exposure to private property owners when put at risk by members receiving bodily injuries incurred while on our land. Are the Tribes prepared under the proposed plan to assume all liabilities and claims of members against private property owners?

Under this plan property owners could not put in new gardens, expand existing gardens, plant fruit trees, or any other agricultural activity that would allow them to support or even feed their families. A person could be subject to fine if they did so and if they did not have the ability to pay fines or refused to pay fines, due to lack of agreed jurisdiction, the Tribes would have the option of seeking a judgment that may result in having peoples property actually seized and turned over to the Tribe. How does this benefit WATER QUALITY?

Concerning our property at Omak Lake specifically, the entire lake is held in Trust for the Colville Tribes except for our land. We are the only non-tribal property owners. There is limited development around the lake, held in trust. As a matter of fact, many cabins, at one time surrounded the lake. Several years ago the Tribes reclaimed the leases and burned down the cabins without compensation to the leased property owners for their cabins. At the same time, our cabin was seriously vandalized. Isn't that a coincidence? You claim that Omak Lake is sacred to your members. Well it's sacred to us to. But yet the Tribal Council declined to purchase the property 5 years ago when it went up for sale. We bought Mr. Fowler's share and hold an undivided interest with the Morris's, who are family members.

Our property has been family owned for 20 years. In which time we have "put up" with the Tribes continued harassment to us and to our guests. The stalking behavior of your Tribal authorities by parking on the upper road and neighboring property watching us throughout the day. The trespassing of Tribal authorities by boat and car onto our land without permission.

Tribal authorities directing non-tribal members to our land to camp out and use our beach property at will, so you don't have to tolerate non-tribal members on your beach. We remember that it wasn't that long ago that you completely closed down the lake to all non-tribal members. You actually placed a locked gate to the access of the beaches. Then you decided that you could make some money off the non-members, so you granted access to the lake for recreation but you charged people to enter the lake. Your policies are acted out

without "thought" and "consequences". The truth is, the local non-tribal members with their families rarely come to Omak Lake these days, because they are harassed by your tribal authorities the moment they get out of their cars. These restrictions were placed on the lake because of your own members behavior. Not of that of the non-members. We were camping on our lake property the year that your tribal members burned down the outhouses. If you can't control your own members behavior on their own land, in reality, how are you going to regulate their behavior on private property. Will we be subject to our property being "burned down", because of their disregard to private property owners rights? Who will enforce the daylight access hours? We have witnessed first hand the frustration of littering by native Americans. Will the Tribes be sending litter patrols to every property owners beach to pick up the litter?

The ticket for drinking alcohol on our shoreline property is insane. Upon going to tribal court to defend our rights as property owners, that drinking alcohol on ones private shoreline property is still afforded to Americans, we lost without "due process". On this issue, there is much confusion and concern. Tribal government states that we must follow their rules, or pay the fine. We have recently tried to obtain copies of the Resolutions regarding the rules on Omak Lake. The following is taken from a sign at Baines Beach Campground at Omak Lake:

**Notice to Public:**

It is unlawful to possess alcohol and or firearms on/ or near Omak Lake. All vehicles entering beach/Lake area will be subject to search pursuant to CCT Resolution 92-355 and 92-356

Tribal members, their family and invited guest only.

On February 17, 1998, we tried to obtain a copy of these Resolutions. So we could have an understanding. We were told by CeAnn at the Colville Tribes Office that a landowner who is not a tribal member has no right to receive this information and that they will not forward me a copy, per Joe. We can not understand how the people, County and Tribal authorities are going to have a relationship over jurisdiction issues to a part of a tribal government who does not recognize the voice of a non-member, especially when we are not wanted there anyway. We can't even get copies of rules and regulations unless being a tribal member. How are we going to work thru these issues, if we don't know what the issues are? Currently, we have no way of finding out except by Tribal courts thru violations. We are very concerned with these Resolutions. The right to bear arms is a constitutional right on ones private land. But yet according to your



Resolutions, we as private property owners on Omak Lake have lost our constitutional right to bear arms. Under what situation are the Tribes "searching vehicles"? According to your Resolution on the sign posted on Baines Beach, you reserve the right to search any car for any reason that comes near or on Omak Lake. What is "near", specifically the distance you classify in order to search vehicles?

25 USC Sec. 1302 Constitutional rights states that: No Indian tribe in exercising powers of self-government shall- (parts taken)

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(5) take any private property for a public use without just compensation;

(8) deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law;

It appears to us that the Tribes position is to clearly violate each and every one of these rights.

Several years ago we received a letter from EPA directed from the Colville Tribes about the removal of 100's of tires stored in a pit at Omak Lake. We can see how "CONCERNED" you are with the environment at Omak Lake. You stated in a letter thru EPA's letter, that we were creating a extreme hazard and that the Tribes will be issuing us a fine if the tires were not removed within 10 days. However, upon review, it was determined that the tires in question were being stored on the Tribes property not ours like the Tribes had thought. How predicable of the Tribes, that those "extremely hazardous" tires are still there.

The Tribes have also damaged our property. To date, there is a mammoth hole in our land. It's called the gravel pit. Back in the 1980's, Dennis Morris received a telephone call that the Tribes road department was on our land removing gravel. Before he could come to the site to stop it, the road department of the Colville Tribes had removed approximately 20,000 yards of gravel without our permission and without compensation which damaged the natural slope and lay of our land. The environmental impacts are yet to be determined creating the gravel pit which you see today that is located within 200 feet of our shoreline.

We are continually harassed by tribal members when we and

our guests are at our land. Tribal members use profanities and threaten us with physical confrontation. This will only escalate the problem if the members gain "public access" to our land. Your people are carrying a "CHIP" on their shoulders against non-members. It is clear that by your actions you are creating the confusion. The people are influenced and shaped by your indoctrination. The point is, the 1800's were long ago. We are nearing the year 2000. We don't need any more rules and regulations. What we need is to understand those that we already have. We need strong leadership to lead us forward and bring us into the year 2000 with equality to all man kind. Your biased leadership does not meet the mark.

Indian rights and protections have been interpreted and extended far beyond their original intent and constraints of the environs, technology and times during which they were signed. We are in a whole new world of technology now; facts, times and environmental concerns have drastically changed. In the affront to our sense of fairness, the frustrations of law-abiding, tax paying citizens of the United States of America are growing because of situations like this. In a time when discrimination issues are so closely watched, it is equally appalling to us how the Tribes can advertise a job position in the local newspaper stating "tribal preference". Is it really necessary to print "tribal preference"? Isn't this a given. We have witnessed more and more tribal members working non-tribal jobs off the reservation in Omak and Okanogan. Your "special attitude" by openly discriminating in the job market is being overlooked and is wrong. Your continued flaunting to disregard the laws and regulations that other citizens and governments must obey is nauseating.

This is why we are opposed to any consensual relationship between our County and the Colville Confederated Tribes. Plainly, it won't work. Two "managers" with different directions, goals, attitudes, guidelines, laws, regulations, a lack of a common purpose, etc., making up the rest as you go is tragedy. While the County will strive to do the right thing, because they have an encyclopedia of rules and regulations they live by, you work to go against the order of things. Demanding more and more, on each family member in the United States who pay taxes to our government for such things as protection from a hostile nation, sidewalks, libraries, schools, parks, streets, fire protection, police protection, and such, which tribal members enjoy. But now you are going to far in demanding "RIGHTS" by "Public Access" to private property just because the land is on the reservation. Get out your pocketbook if you want these rights. In the United States of America, we pay to own and use land.

Your proposed plan erodes tax payers rights and clearly create Tribal zoning abuses over non-tribal members and strip them of the rights that any other tax payer in Okanogan County enjoys. Such as the intentional zoning restrictions on our land imposed by the Colville Confederated Tribes, which raises concerns as to discrimination and intentional land devaluation with the moratoriums and proposed shoreline plans which only affect us on Omak Lake because we are the only non-tribal deeded land owners. As you know the rest of Omak Lake is in tribal trust. Peggy Morris has contacted Mike Palmer at the Colville Tribes Planning Department to inquire on the other Lakes (which turn out to be ponds) that you deemed natural on the Plan, and that these Lakes (ponds) are all Tribal Trust Lands, which shows we've been singled out and which clearly indicates the Tribes intent to discriminate and intentionally stripping us of our property rights and values.

Sincerely,



*Janelle M. Smith 02/13/98*  
Kevin W. Smith and Janelle M. Smith

cc: Okanogan County Commission:

804 W. McBryde  
Montesano, WA 98563  
April 7, 1998

To: Senate Hearing - April 7, 1998

Re: Sovereign Immunity Hearing

From: Geraldine Furnia  
Property owner, Washington State  
Phone - 360-249-3716

I have owned and improved our waterfront property, both with hard work and dollars, for over 25 years. Tribes have been given rights to survey and harvest our shellfish.

Questions: 1. What recourse do we have if our property is damaged by these actions?

Tribal governments cannot be sued, but they can sue us. We need to have equal rights and due process rights, which all Americans expect to have under the law.

2. Why is it not possible to waive "Sovereign Immunity" for the tribes?

This would make us all equal under the law. We must all take responsibility for our actions and be held accountable. Historically, the tribal governments have not upheld this premise in dealing with grievances from non-Indians.

These are important questions to remember during the hearing on April 7th. More animosity has been developed through these unfair decisions than harmony and fairness.

I expect that you will make decisions carefully as you consider the justification of allowing the rights to private property to be eroded.

Thank you for your consideration of my concerns.

*Geraldine Furnia*

Geraldine Furnia



2825 S.W. 110th Place  
Seattle, WA 98146  
April 7, 1998

To: Senate Hearing - April 7, 1998

Re: Sovereign Immunity Hearing

From: John and Mary Lou Hughes  
Property owners, Washington State  
Phone/Fax 206 244-7983

We have owned and improved our waterfront property, both with hard work and dollars, for over 25 years. Tribes have been given rights to survey and harvest our shellfish.

Questions: 1. What recourse do we have if our property is damaged by these actions?

Tribal governments cannot be sued, but they can sue us. We need to have equal rights and due process rights, which all Americans expect to have under the law.

2. Why is it not possible to waive "Sovereign Immunity" for the tribes?

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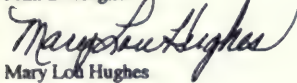
These are important questions to remember during the hearing on April 7th. More animosity has been developed through these unfair decisions than harmony and fairness.

We expect that you will make decisions carefully as you consider the justification of allowing the rights to private property to be eroded.

Thank you for your consideration of our concerns.



John D. Hughes



Mary Lou Hughes

Senator Slade Gorton  
915 2nd Ave  
Seattle, WA 98174

Charles Ifft  
24528 SE 30th Street  
Issaquah, WA 98027

Honorable Senator Gorton:

I am extremely pleased to hear of your proposal to eliminate tribal sovereign immunity from law suits. It has been too often the case where a tribe sues the state, local or federal government over an environmental issue that has questionable if any impact on the tribe. This usually ends up killing a proposed project that would benefit the American taxpayer (of which the American Indian is not a member). But when a tribe, like the Muckleshoots, build a project that has a tremendous impact on the environment and community, they claim that they don't need any permits. The same permits that they require and review for projects long distant from their reservation boundary. I'm glad that the Army Corps of Engineers is implementing the permit process for the Muckleshoots amphitheater project and I quite honestly hope it is turned down.

I was recently in Washington DC and stopped by your office, but as I expected, you were busy at the time. I did however attend a coffee with Senator Patty Murray. She holds them every week for constituents. Much to my surprise, instead of just tourists being there to shake hands and get pictures taken, there were three members of the Lummi tribe there. They were lobbying the Senator for passage of some legislation that would of course give them more money. They wished to thank her for her support and said that they felt like they had a friend in DC. I'd like to say the same about you. Myself and many of my friends are glad you've taken an interest in the Sovereign Nation problem.

I regret that I was unable to attend your hearing today on the issue of tribal immunity at the DoubleTree Suites at Southcenter. The pro-Indian press in Seattle has continually painted you in a negative light for your stand on this issue, but recent events concerning elk hunting, clam digging, the amphitheater, and as always, salmon, have brought the inequity of sovereign immunity for native Americans to the forefront. I fully support your efforts and wish you the best of luck in this regard.

Sincerely,

Charles Ifft, P.E.

## FACTS ON SOVEREIGN IMMUNITY AND TRIBAL COURTS

### Judicial Recognition of Tribal Sovereign Immunity

The federal government, states and most foreign countries have adopted the doctrine of sovereign immunity which immunizes the government from suit without its consent. See Kawananakoa v. Polyblank, 205 U.S. 349 (1907) (Holmes, J.). Likewise, the Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) noted: "Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." More recently, the Supreme Court in Oklahoma Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505 (1991), stated:

A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. . . Congress has consistently reiterated its approval of the immunity doctrine [in Acts which] reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."

498 U.S. at 510 (citations omitted). Indian tribes cannot assert tribal immunity against the United States. See United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 382 (8th Cir. 1987), cert. denied, 485 U.S. 935 (1988):

### Sovereign Immunity is Flexible. Tribes Often Waive Sovereign Immunity.

Like the federal government and the states, Tribal governments have increasingly been open to providing opportunities for challenging their governmental decisions or actions by waiving sovereign immunity. Tribes have voluntarily waived sovereign immunity by tribal statute and through contracts and agreements in order to promote good business relations and to improve accountability. Instances of tribes waiving sovereign immunity typically include water rights agreements, mineral leases, and commercial instruments.

In addition to affirmative waivers through tribal law, the trend in recent tribal court decisions is to permit tribal officials to be sued for violations of applicable federal or tribal law and to refuse to extend tribal sovereign immunity to bar such litigation. Examples of tribal waiver of sovereign immunity include the following:

The Winnebago Supreme Court ruled in Rave v. Reynolds, No 96-01 (Winn. Sup. Ct. 1996) that the provisions of the Tribal Code of the Winnebago Tribe

of Nebraska authorizing suits against tribal officials for acts contrary to tribal law or to the Indian Civil Rights Act of 1968 clearly indicated that under tribal law, as under federal common law, tribal sovereign immunity did not extend to tribal officials.

In *Thompson v. Cheyenne River Sioux Tribe Board of Policy Commissioners*, 23 Indian Law Reporter 6045 (Chy. R. Sx. Ct. App.1996), the Cheyenne River Sioux Tribal Court of Appeals, ruled that Lakota tradition and tribal law required a forum in which illegal actions by tribal officials could be heard. The decision in *Thompson* went even further than most federal and state courts have generally ruled by holding that under tribal law, tribal sovereign immunity did not extend to or bar suits against tribal agencies for injunctive and declaratory relief.

In *Moran v. Council of the Confederated Salish and Kootenai Tribes*, 22 Indian Law Rep. 6149 (S.S. & K.T. Ct. App.1995), the Court of Appeals for the Confederated Tribes held that tribal sovereign immunity did not bar suit against the members of the tribal council even though, as in federal or state court, it would have barred suit against the Tribe or the Tribal Council as an institutional defendant. The Court noted that the Council conceded that it has waived its sovereign immunity pursuant to an ordinance regarding Moran's contract and related court claims. *Id.* at 6156 n. 22.

The Cheyenne River Tribal Ordinance allows the Housing Authority to sue and to be sued in its corporate name. The Cheyenne River Sioux Tribal Court of Appeals, in an employee's wrongful discharge suit, found that the existence of a bona fide employment contract would cause the "sue and be sued" clause to take effect. (*Dupree v. Cheyenne River Housing Authority*, 16 Ind. L. Rep. 6106, 6108 (1988).)

The Navajo Sovereign Immunity Act has created four exemptions which waive Navajo Nation sovereign immunity.

#### Tribal immunity may also be waived pursuant to Federal statute.

The Indian Reorganization Act of 1934 permits tribes to create both governmental (under section 16) and corporate (under section 17) entities to carry on official and commercial functions. Acknowledging the distinction between official and commercial activities, the bifurcated IRA framework includes an optional waiver of immunity provision available to section 17 tribal corporations. This option, known as a "sue or be sued" clause, may be exercised by tribes in their discretion. It is crucial to note that a provision is only available for a section 17 corporate charter, not a section 16 governmental charter.



When federal or state governments waive sovereign immunity, they do so in very specific and narrow statutes that limit the classes of cases to which the waiver applies as well as the courts in which the suits must be filed, not in a blanket fashion (as proposed in Section 120.)

As is true with state and federal waivers, there are limitations on the types of activities for which tribes will waive sovereign immunity. Virtually all waivers of federal, state, and tribal immunity only waive sovereign immunity for suit in the courts of the sovereign whose immunity is waived, not in the courts of another sovereign. Federal, state, and tribal statutes waiving sovereign immunity are narrowly drafted and are heavily laden with special procedural safeguards including special tribunals. The courts interpreting waivers of sovereign immunity generally attempt to enforce the tradition of respect for sovereignty by strictly construing any statutory waiver of sovereign immunity. For example, the Texas Supreme Court ruled in August, 1997 that the state of Texas could be sued in contract actions but only if the plaintiff first received a waiver of sovereign immunity from the state legislature.

#### Tribal Courts Constitute Fair, Efficient, and Even Handed Forums.

Tribal courts have often been found to be more scrupulously fair to the interests of non-Indians and non-tribal members and more even-handed in their decision making processes than federal and state courts historically have been to Indians. The following provides a few examples (the following are from reported cases in the Indian Law Reporter, as provided by Robert Clinton, the Wiley B. Rutledge Professor of Law of the University of Iowa College of Law):

In *Schwab v CTEC Construction*, 21 Indian Law Rep. 6027 (Colv. Admin Ct. 1994) a non-Indian heavy equipment mechanic filed an administrative action for wrongful termination against his construction company employer which worked on various tribal contracts. The employer had laid off the worker in order to comply with his understanding of the tribal employment rights ordinance which required tribal employment preferences. Notwithstanding the strong tribal employment preference contained in the tribe's ordinances, the Colville Administrative Court ruled that the employer's termination of the employee because of his non-Indian status directly violated the stated policies of his employment.

In *Clown v. Coast to Coast*, 23 Ind. Law Rep. 6055 (Chy.R.Sx.Ct. App.1993), a non-Indian creditor prevailed in the Cheyenne River Sioux Tribal Court in a collection case against a tribal member.

In *Colville Confederated Tribes v. Meusy*, No. 96019071 (Colv. Tr. Ct., Aug. 2, 1996), 23 ILR, 6223, the trial court invalidated a tribal council resolution essentially requiring the tribal court to grant the tribal prosecutor's request for deferred prosecution. Reasoning that the resolution does not permit any court discretion in an inherently judicial arena and essentially permits the tribe to determine the outcome of a case, the trial court invalidated the tribal resolution as violating separation of powers between the judiciary and the tribal council.

In *Simplot, et al v. Ho-chuck Nation Department of Health*, Nos. CV-95-26, CV 95-27& CV 96-05 (Ho-chuck Tr. Ct. Aug. 29, 1996) 23 ILR 6235, the tribal court granted a summary judgment for non-Indian employees whose positions were abolished, while positions of Indian employees were safeguarded. The plaintiffs were not told about bumping rights and were barred from pursuing an administrative review process. The court held that this treatment denied the plaintiffs' procedural fairness in violation of the tribal constitutions due process clause and also violated the tribe's employment ordinances. The court ordered the plaintiffs to be reinstated and awarded them damages.

Non-Indian interests Can and Do successfully appeal Tribal court decisions. A few examples follow:

The Navajo Supreme Court vacated a \$85,000 damage award against General Motors Acceptance Corporation for fraudulent repossession, determining that a Navajo Nation jury award lacked a proper evidentiary basis and finding that the tribal court erred in failing to direct a verdict for the non-Indian defendant. The opinion in *General Motors Acceptance Corp. v. Bitah*, 16 Indian L. Rep 6002 (Navajo Supreme Court) takes virtually no account of the tribal membership, race, or ethnicity of the parties.

In *Tri-County Water Association Inc.v. Minre*, 22 Indian Law Rep. 6141 (1995), the Cheyenne River Sioux Tribal Court of Appeals affirmed the award of contract damages against a tribal member to a non-Indian water service utility.

Intertribal Courts of Appeal provide Additional Due Process and Unbiased Treatment in Competing Indian and non-Indian interests

In many regions of the country, the appeal process includes an appeal to an inter-tribal court of appeals. A few examples of the additional dispute forums are found in the following Intertribal Courts of Appeal: the Northwest Intertribal Court System; the Northern Plains Intertribal Court of Appeals; the

Nevada Intertribal Court of Appeals; and the Southwest Intertribal Court of Appeals.

#### States and Tribes are Joining Together for Full Faith and Comity Agreements

The following provides examples of initiatives to prevent and resolve jurisdictional disputes and improve cooperation between tribal and state courts:

The National Center for State Courts; the Conference of Chief Justices; Native American Courts Committee of the National Conference of Special Court Judges of the American Bar Association, and the National American Court Judges Association have worked to provide complaint and assistance forums for jurisdictional disputes and to improve state and tribal court cooperation.

Joint Conferences of Tribal-State Judges have been held in South Dakota, Arizona and Washington.

Chief Justices of various states have initiated cooperative agreements between the state and tribes between the courts of the respective state and tribes.

Chief Justices of New Mexico, Arizona, and Oklahoma have championed state legislation giving full faith and credit to tribal court orders.

Various states have organized state-tribal court conferences such as the annual Oklahoma Sovereignty Symposium which is co-sponsored by the Supreme Court of Oklahoma.

States have developed materials on tribal courts, such as the South Dakota Tribal Court Handbook, designed to maximize cooperation between tribal and state courts.

#### Tribal Lawyers and Judges are Law-Trained and Well Prepared Professionals

Tribes recognize that lawyers and judges must be knowledgeable and principled if the tribal judicial systems are to engender confidence in the fairness and integrity of the courts. Tribes continue to develop their courts in accordance with the highest standards. (BIA notes however that there will be no incentive for Tribes to upgrade their judicial systems if sovereign immunity continues to be threatened.)

A few examples of the growing number of law trained, well prepared participants in the tribal justice system, both as lawyers and judges follow:

The Honorable Mary T. Wynne, the Chief Judge of the Colville Tribal Court is a former Assistant United States Attorney; an attorney admitted in three states and numerous tribal jurisdictions, and a faculty member of the National Judicial College.

The Honorable Raymond Austin, the Associate Justice of the Navajo Supreme Court, has served as a visiting professor at the Stanford Law School and Arizona State University College of Law.

The Honorable Robert Clinton, Chief Justice of the Winnebago Tribe, serves as the Wiley B. Rutledge professor of Law of the University of Iowa College of Law, an Affiliated Faculty Member with the University of Iowa.

The Honorable Robert Williams, Justice for the Pascua-Yaqui Tribe, is a professor at the University of Arizona.

Frank Pommersheim, Professor of Law at the University of South Dakota Law School and author of "Braid of Feathers: American Indian Law and Contemporary Tribal Life" serves as Chief Justice on the Cheyenne River Sioux Tribal Court of Appeals and Associate Justice on the Rosebud Sioux Tribal Court of Appeals.

The Navajo Peacemaker Court has been studied as a model for officials from the United States as well as from Australia, New Zealand, Canada, and South Africa.

The New York Oneida Tribe utilizes former judges from the New York Court of Appeals.

Many attorneys and lay judges have attended training at the National Judicial College which offers special jurisdiction courses in Federal Indian law and Tribal Courts. The American Indian Law Center, located at the University of New Mexico, also provides training.

Law schools in the following states currently providing training and technical assistance to tribal courts: North and South Dakota; Wisconsin, Montana, Oklahoma, New Mexico and Arizona.

The National American Indian Court Judges Association, the Indian Judges Associations of the various states, and the Intertribal Courts of Appeal provide tribal court staff with lectures, forums, and workshops on ethics, judicial writing, evidence, court management, traditional dispute resolution, appellate review, and the substantive areas addressed by tribal courts.

Bureau of Indian Affairs  
September 4, 1997



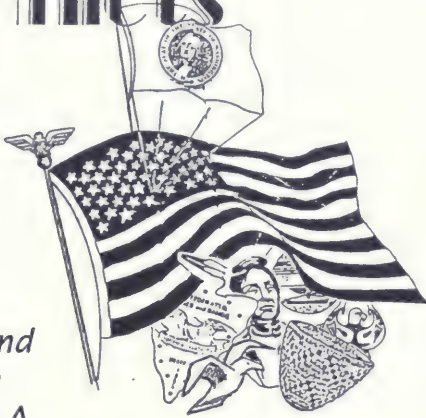
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OCCASIONAL PAPER #20

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# Solving Intergovernmental Conflicts



*Tribes and  
States in  
Conflict: A  
Tribal Solution*

Rudolph C. Rüsler

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*A Publication of the  
Center for World Indigenous Studies*

October 1992

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*Review of  
10/10/92*

## Solving Intergovernmental Conflicts

### Tribes and States in Conflict, A Tribal Proposal

By Rudolph C. Rysen

Occasional Paper #20

October 1992

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Serial 28420

# Prologue

**Solving Intergovernmental Conflicts** (originally *Tribes & States in Conflict* [Rational Island Press] 1980) is an analysis of a fundamental political dilemma facing all indigenous nations and tribes surrounded and under the political control of a state. The nearly five hundred Indian nations and tribes surrounded by the United States of America are faced with particularly complicated political circumstances because they are not only surrounded by an international state United States of America, but, they are also surrounded by individual states created in federation within the United States. The central government of the United States and the individual governments of the various states exercise separate powers and shared powers within a framework of a federal system of governments. The two-level system of governments presents Indian governments with a dual source of intergovernmental conflicts that are only in the 1990s beginning to be solved.

The ideas contained in this publication are the fruits of a year-long examination of economic, legal, administrative and political conflicts between Indian governments and neighboring state a federal governments. It was during the First Session of the Conference of Tribal Governments in 1977 (Tukwila, Washington) that Indian Government leaders entered into discussions about their desire to find new and more long-lasting solutions to intergovernmental conflicts. In response to these discussions eight Indian governments agreed to form the Inter-Tribal Study Group on Tribal/State Relations on November 16, 1979 by mutual agreement. Members of the Study Group included: President Joe DeLaCruz, Quinault Indian Nation (Chairman); Councilman Russell Jim, Yakima Indian Nation (Vice Chairman);

Chairman Jim Wynn, Spokane Indian Tribe (Member); Chairman Calvin J. Peters, Squaxin Island Tribe (Member); Councilwoman Mary Jo Butterfield, Makah Nation (Member); Chairman Russell Penn, Quileute Indian Tribe (Member); Councilwoman Shirley Palmer, Confederated Tribes of the Colville Reservation (Member).

Six Indian Governments and the William Donner Foundation of New York provided the funding for the year-long study. It was thus that Indian tribes first independently initiated an independent examination and analysis of tribal/state relations. The resulting report, first published in 1980, created unease among many other Indian Government officials who regarded the study as potentially threatening to the economic relationship between Indian tribes and the U.S. government. Many individual Indian citizens positively received the Study Group's report. They saw in the report "the first honest statement of the actual relations between tribes, the United States and states" since many public statements by the great Indian Chiefs in the 19th century.

**Solving Intergovernmental Conflicts** is a partial republication of the original Inter-Tribal Study Group on Tribal/State Relations report (*Tribes and States in Conflict, A Tribal Proposal*). It is also an update reflecting constructive intergovernmental developments since the Study Group first published its report. In the light of rapid intergovernmental changes between Indian nations, various states and the U.S. federal government, a look at the Study Group's 1980 report clearly shows how the tribal analysis and proposals then became the conceptual catalyst for these changes. But it should be noted that the Study Group's analysis was rooted in developing ideas

from as early as the 1920s when tribal leaders began the first inter-tribal organizational efforts in western Washington.

Concepts such as *sovereignty, jurisdiction, political status and intergovernmental mechanisms* became vitally important to Indian peoples in 1973 when the National Congress of American Indians adopted the *Declaration of Sovereignty*. The evolving conceptual framework for these ideas continued to develop and became more refined as Indian officials contributed to the *American Indian Policy Review Commission Report* (May 1977). Indian thinking became further refined on questions of tribal/state relations with the establishment of the National Commission on State-Tribal Relations (Chartered in 1977 by the National Conference of State Legislatures-NCSL, the National Congress of American Indians (NCAI) and the National Tribal Chairmen's Association (NTCA)). The development of tribal political thinking accelerated in the 1980s and concepts like *government-to-government relations and self-government* began to take shape.

Through government-to-government agreements, tribal governments and their neighbors began in the 1980s to develop a new intergovernment fabric aimed at reducing conflict. By the late 1980s the State of Washington and Indian governments negotiated and ratified a government-to-government agreement (Centennial Accord - See Page 19) that created a new framework for state and tribal government relations. In 1990, four tribal governments in the Pacific West negotiated the first Compact on Self-Governance with the U.S. government. The Inter-Tribal Study Group on Tribal State Relations provided the foundations for these important political changes.

The pioneering initiative of northwest tribal governments through this report created the new possibilities now topping the Indian Affairs Agenda. □

# Solving Intergovernmental Conflicts

by Rudolph C. Rysse

## Tribes and States in Conflict, A Tribal Proposal

### THE DRIVE FOR TRIBAL POLITICAL EQUALITY

Since 1964, tribal governments have worked to reclaim their authority to control and regulate their own resources, often exclusive of U.S. government control. Where the U.S. government asserted its trust obligation to manage the leasing of tribal lands within the boundaries of a reservation, for example, tribal governments have assumed dominant authority over the leasing process on many reservations. In the past, the United States controlled law enforcement on all reservations. In recent years, many tribal governments began to operate law enforcement programs of their own. The trend towards the resumption of tribal governmental powers over persons and property within reservations has been rapid and wide-ranging. Due to this assertion of self-determination and self-government tribal peoples have run headlong into powerful political obstacles, usually involving federal and state governments.

Matters long considered prerogatives of the federal governments under its claimed trust responsibility are being challenged by the initiatives of tribal governments. This emergence of Indian tribes as self-governing and self-determined political and economic forces placed a strain on the U.S. federal system.

The result has been a growing number of conflicts over legal and political authority between the tribes, the United States and the various states.

Recent efforts by tribal governments to achieve an equal footing with the States brought into focus the question of whether the legal relationship between Indian tribes and the United States is any longer valid. State and tribal governments experienced a greater intensity of conflict arising from efforts by both to more precisely define their separate authorities over water, land, timber, fish and wildlife, minerals and the environment. Controversies between state and tribal governments often relate to the quality of life of tribal peoples. Questions arise over child welfare abuses, education and health, and social services delivery on reservations. Issues of law enforcement and tribal court systems have affected both tribal and state citizens living within the boundaries of reservations. The states contend with the tribes over taxation, housing, tribal enterprise development, and zoning within the boundaries of reservations.

To further complicate these disputes, the United States government has conflicts of interest between its obligation to preserve and

protect Indian tribes in accord with treaty commitments, its claimed trusteeship; its obligation to promote the political and economic self-interest of the U.S.; and its obligation to ensure the political and economic integrity of the various states of the Union. If tribal territories were geographically located outside the boundaries of the United States, the conflict would not be so complex. Because tribes are within U.S. boundaries, the strains on the U.S. federal system are more pronounced. How the United States and Indian nations resolve this political dilemma will shape the character of the U.S. federal system and the nature of U.S. foreign relations.

Will the tribes become completely absorbed into the United States? Can the tribes co-exist as associated sovereigns? Or will the tribes become wholly independent of the United States? The political dilemma surrounding these questions highlights a fundamental controversy. For more than 125 years, the political status of the tribes in relationship to the United States has been clouded by social, legal and political doctrines (advanced by the U.S. government) which prevent a clear and unbiased understanding of tribal political, economic, social and legal interests.

Tribes which once were wholly independent members of the international community are now in the political status of *associated tribal sovereigns*. When it concluded treaty agreements with the original inhabitants of this continent, the United States recognized the sovereign authority of tribes and their political position outside of the federal system. The question of whether the tribes should be fully integrated into the U.S. federal system or whether the tribes should remain separate has never been resolved.

Since the tribes are neither *wholly separate*, nor *wholly absorbed*, their political status in the United States and the global community has remained vague and uncertain. Because the tribes ap-



pear to be both partly in and partly outside of the United States (by virtue of a politically or legally undefined trust relationship with the U.S. government), the U.S. has been able to transfer some of its powers over Indian affairs to state governments. These transfers of power occurred unilaterally and exclusive of any new agreements with tribal governments. The United States justified such actions under the guise that it can act as the trustee of Indian nations even without their consent. States and tribal governments have increasingly been drawn into conflicts because of this *de facto* and *de jure* transfer of Indian Affairs responsibilities from the national government to the states. In the face of such maneuvers by the federal government, tribes came into conflicts with both the States and the United States in their efforts to regain tribal authority over tribal lands and peoples.

Jurisdictional conflicts between tribes, the States and the federal government have become a common feature of the political landscape. State, federal and tribal courts have been unable to effectively resolve intergovernmental conflicts arising from claims to authority over tribal peoples, property and natural resources. The executive and legislative branches of the three governments have similarly been engaged in attempts to resolve jurisdictional conflicts. Unfortunately, these conflicts are often dealt with in isolation. That is, attempts to solve specific controversies in one area of dispute, usually occur outside of similar disputes in other areas of governmental authority. Rather than resolving inter-governmental conflicts, attempts within isolated government agencies often result in increased tensions and new rounds of conflict. This is because the fundamental issue of relations between the U.S., the tribes and the States has not been specifically addressed. Neither has the basic problem of the tribes being politically and structurally outside of the United States

been understood or considered. This failure to recognize the political status question as fundamental and the failure to recognize the need for formal intergovernmental mechanisms between the three governments threaten to frustrate and undermine the U.S. federal system. Moreover, the very existence of tribes as distinct sovereign entities is severely threatened.

## PART ONE

### Tribes are Outside the U.S. Federal System

Tribal governments exist as separate and distinct political organisms which derive their powers from tribal communities. They were neither created by the United States government nor the state governments. The foundations of tribal government were established long before either the formation of the United States or the creation of the states like Washington (which we shall use through for comparative purposes). Despite tribal lands being geographically surrounded by the United States and various states, tribal governments have the distinction of being politically separate from the federal system which joins the states and the national government together in a political union.

The United States federal system consists of three primary parts-- federal, state and local (county and municipal) governments. Each of these governments exercise a degree of authority over people, lands and natural resources through a maze of civil and criminal laws. The effective exercise of governmental authorities is made possible through a system of charters and constitutions which serve as the basis of the United States federation. Indian nations are missing from the preceding description of the U.S. federal system. The presumption that tribes are somehow a part of that system has continued for generations—born from wrong judicial decisions ignorance about the making of a federal system and political hyperbole.

It is true that the State of Washington is bound to the United States through a system of constitutions and enabling acts. But where do tribal governments fit into the federal system? Where do tribal governments fit into the state system of governments? The simple and uncomplicated answer to these questions is that tribal governments do not fit into the U.S. system of governments. They are outside of the U.S. federal system.

Within the boundaries of the State of Washington, there are 34 tribal governments, 39 county governments and 265 incorporated cities and towns. In addition, there are the state government and the United States government which also exercise governmental powers within the Washington State boundaries. To understand why these 34 tribal governments in the State of Washington are absent from this description of the U.S. federal system, we need to look into the history of the United States and the tribes.

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**Tribes which once were wholly independent members of the international community are now in the political status of associated tribal sovereigns**

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## The Story of Union

The issue of the external character of the tribes was a serious matter in the late 1700s and early 1800s. A number of formal attempts to include tribes as full-fledged members of the Union were attempted. One such attempt was the first treaty concluded by the Continental Congress with the Delaware Nation on September 17, 1778. Contained in the treaty was a Proposal for the creation of a Delaware tribal state "where the Delaware Nation shall be the head, and have representation in Congress". In a 1785 treaty with the Cherokee Nation, it was provided that "they shall have the right to send a deputy of their choice, whenever they think fit, to the Congress". Public sentiment among U.S. citizens continued to favor making Indian nations into states for 100 years until 1871 when the U.S. ceased making formal treaties with Indian tribes. Discussions to include tribes in the Union were not resumed because the tribes preferred to merely associate with or seek independence from ties with the new country rather than joining the U.S. federation.

## Tribes and the U.S. Constitution

The United States was designed to create a federal system which contains only two sovereign entities - the United States and the states. Any casual observer can clearly see that the U.S. Constitution was not written to create either foreign nations or Indian tribes. Nowhere in this document can it be found that the tribes are defined as a political entity within either the United States or the Washington State system of governments. Where tribes (Indian tribes) are specifically mentioned in U.S. and state documents, they are clearly separated from the internal workings of the U.S. federal system. Formal relations exist between the tribes and the United States by virtue of treaties and agreements. But there is still no

formal relationship between the State of Washington and the tribes. Three important historical facts have contributed to this absence of a political relationship between the tribes and the state:

1. *The United States Constitution strictly provides, "that states cannot enter into treaties, alliances or confederations with external political entities" (Article I, Section 10, Paragraph 10: States prohibited from the exercise of certain powers).*
2. *Treaties between the tribes and the United States strictly provide that the states shall have no power over tribes.*
3. *To become a state of the Union, the State of Washington (for example) was required to "forever disclaim" any right or title to lands within its boundaries owned by tribes and to further disclaim any authority over tribal (Indian) people or lands. Relations of jurisdiction and control were to remain in the Congress of the United States in all matters pertaining to Indian tribes.*

## The Origins of Sovereignty

To appreciate the argument that the tribes are still outside the United States federal system, one must consider the origins and meanings of the term sovereignty. Briefly defined, *sovereignty is the supreme power from which individuals and groups derive political power.* The notion comes from the days when European princes, popes and potentates claimed supreme temporal power by virtue of a mandate from God. The original religious connotations of the term *sovereignty* took a radical shift in the 1700s when the divine power of French kings was challenged by the collective will of the people. Indeed, the United States itself owes its existence to this principle of sovereignty. Since 1776, the

international order has been based on the view that sovereignty and its modern corollary, *self-government*, is inherent or inborn in each individual. The supreme power from which specific political powers are derived comes from within the people and not from a prince, pope or potentate. Such a popular sovereignty cannot be given by one group to another. Next to the tribes, the United States and other states that became independent from a dominant power is perhaps the clearest example where sovereign power originates among the people. The U.S. Constitution exists solely because the people chose to create it as a political compact and abide by it for their collective benefit.

*Associated tribal sovereigns* within the boundaries of the United States actually secured their own sovereignty long before the United States declared its own. Tribal leaders who seek to preserve and strengthen their political authority over tribal lands and peoples derive their authority from the tribal people themselves, not from any outside power.

## Treaty Relationships With the U.S.

In exchange for U.S. political and military protection, many tribal sovereigns have long agreed not to commit war against the U.S. or enter into formal treaty relations with any other countries without first gaining agreement and consent from the United States. Such *treaty relations between greater and lesser powers* is commonly practiced throughout the world.

The associated tribal sovereigns have neither become absorbed into the United States nor are wholly independent of the United States. The unique fact of inherent tribal sovereignty has been upheld time and time again in the tribal and U.S. courts, but the misconception that tribes are not sovereign has been allowed to creep into both state and national levels of government.

Due to the often competing ju-

risditional claims of tribes, the state and the federal government, an effective intergovernmental mechanism must be established to bridge the gap between Indian nations and the state. The courts and the legislative branches of the U.S. federal system have been unable to resolve controversies with external entities like tribes. The federal system is not designed to deal with external political entities. There is an obvious need to create official channels of inter-governmental mediation where none now exist. The only firm relationship which exists between the tribes and any government within the United States is the relationship established by treaties and agreements between the federal government and the governments of tribe. 5

the tribes were slowly being surrounded by an expanding country. In the process, the tribes were separate sovereigns who were becoming dependent on an increasingly more powerful United States. Tribes came to accept a dependence on the United States for their economic, political and military protection. As Marshall noted, Indian Tribes did not lose their sovereignty by accepting protection. The dependence, once agreed to, created an international association between one sovereign (the U.S.) and many other sovereigns (the tribes).

The associated tribal sovereigns

have neither become absorbed into the United States, nor have they become wholly independent. They remain in a *separate, protected status*. As with Guam and Samoa the United States cannot change the political status of the tribes unless the individual tribal governments agree to a change. *The association obliges the U.S. to work toward the elevation of tribes to a level of self governance, at which point tribal peoples can choose their own political future. This is the actual nature of an international trusteeship.*

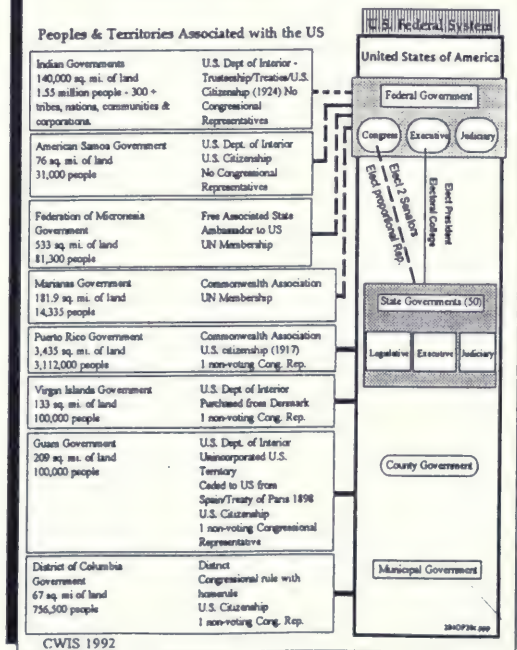
### Tribes as Associated Sovereigns

Tribes and the United States government have formed a relationship of association that is similar to the relationship which the U.S. has with American Samoa, the Marianas, and the, Federation of Micronesia. They deal with the federal government and do not share political power through the federal system as do Puerto Rico, Virgin Islands, the District of Columbia and Guam. This relationship is founded in principles of international law and not in the domestic laws of the United States. It is a relationship between a greater power and a lesser power where the greater power assumes the role of a protector for the benefit of the lesser power. (See Figure 1)

As political entities external to the U.S. political system, tribes have often been described by the legal fiction "domestic dependent sovereigns." This concept was first introduced by U.S. Chief Justice John Marshall when he rendered a decision involving a tribal/state conflict in 1831. Justice Marshall's interpretation of the relationship between the tribes and the United States became an artful way of saying that

## Inside and Outside the U.S. Federal System

Figure 1





## The Political Status Options

The options available to the tribes and the United States include *separation* or independence for a tribe; *continued association*; or *complete absorption* into the United States political and governmental system. Tribes are not alone in their desire to clarify their political status. Puerto Rico has been seriously considering the issue of whether to seek statehood or complete independence from the United States. Micronesia, on the other hand, has completed a ten-year process of negotiations with U.S. officials which resulted in a compact of free association that provides for the people of the Federation of Micronesia to exercise total internal sovereignty; to conduct its own foreign affairs and to rely on the United States for military defense. Guam (population 100,000 and an area of 209 square miles) is an island territory about the size of Island County in northern Washington State; despite its small size, Guam is considering a change from *association* to *statehood*.

If the tribes are to achieve effective solutions to the myriad of conflicts between tribal, state and federal authorities, tribal leaders must recognize that the tribes are not a part of the U.S. federal system until tribal people themselves decide otherwise. In the absence of any action by the tribes, persisting conflicts between the tribes, the state and the federal government can only get worse. For the tribes, the choices are clear:

1. *Association by treaty with the United States*
2. *Statehood by Congressional Act*
3. *Absorption into the federal system as subdivisions of the states (i.e. county, city or town)*
4. *Independent Nationhood*
5. *Complete termination, dissolution*

## Tribal Citizenship and U.S. Citizenship

The question of individual citizenship of tribal people often clouds the otherwise simple relationship between the tribes, the U.S. and the states. Because tribal people have retained the rights and privileges of tribal citizenship and they also have rights associated with being citizens of the United States, there are those who feel Indians are *super-citizens* who possess unfair personal advantages as dual-citizens of their tribe and the U.S. The controversy of dual-citizenship has caused tribes and states to clash. It has also increased conflicts between tribal and non-tribal citizens within the boundaries of tribal reservations.

If we examine how Indians in the United States came to possess both tribal and U.S. citizenship, we can readily see that tribal claims to dual-citizenship are well justified. For a discussion of tribal citizenship, we must look to the meaning of citizenship and how this idea is expressed in tribal constitutions. The term citizen refers to a person owing loyalty to and entitled by birth or naturalization to the protection of a state or sovereign political entity. By this definition, a citizen of a sovereign entity retains the rights to protection by a sovereign state unless that individual is denied such protection by an act of that sovereign entity. Tribal members, or citizens, possess similar rights and privileges to citizens of many other political entities. Citizenship in a tribe is typically dependent upon being born to a member of the tribe. However, some tribes provide for naturalization processes such as adoption or tribal legislation.

Among the tribes within the State of Washington, tribal citizenship is exclusive to one tribe. That is, a member or citizen of one tribe must relinquish prior citizenship in another tribe. By virtue of tribal constitutions, rights and protection to individual tribal citizens are specifically limited to the jurisdiction

of each tribe. Unless there exists an agreement between tribes providing for mutual or concurrent extension of rights to individuals who travel from one tribal territory to another, a citizen of one Indian tribe cannot expect rights and protection under the jurisdiction of another tribe. Citizenship in a tribe is not dependent upon being born within the boundaries of the United States or any of the States of the Union. Out of thirty-three tribal constitutions in the State of Washington there is not one which requires a tribal citizen to be a citizen of either the United States or the state. (If one were to interpret these tribal constitutions literally, such provisions as "no persons shall be enrolled as members if they are recognized members of any other tribe" might be construed to mean that persons who are citizens of the United States or individual states, as well as other tribes, are ineligible for tribal citizenship unless subsequent tribal law permits dual citizenship.) In any case, it is important to note that tribal citizenship is determined by domestic tribal law (i.e. tribal constitutions, ordinances, resolutions) and not by sovereigns external to the tribe. Each tribe within the Washington state boundaries has retained its independent authority to determine its own membership.

In many tribal constitutions, review or approval authority over matters pertaining to new citizenship have been conveyed to an agent of the United States government (Bureau of Indian Affairs, Secretary of Interior or the U.S. Congress). In some instances, review and approval authority which has been conveyed to U.S. agents concern only the entry of new tribal citizens, after a tribal government decision. In the case of the Yakima Nation, review authority has only been granted to the United States on matters pertaining to expulsion from the tribe.



Still other tribes convey no authority at all to external sovereign agents (U.S. or States). Figure 2 reveals the review or approval provisions in tribal constitutions regarding tribal citizenship.

Despite these constitutional peculiarities, each tribal government has consistently asserted and proclaimed the original and inherent authority of the tribe to set standards for tribal citizenship. This exclusive authority has never been challenged or altered as a result of relations between tribes, the United States and the various states. In fact, the United States has by virtue of its own legislation, administrative policies and domestic legal decisions perpetually accepted the tribes' inherent and exclusive authority over matters related to tribal citizenship. The granting of review or approval authority to agents of the United States does not alter the original and inherent power of each tribe to define the terms and methods for tribal citizenship.

By virtue of tribally determined citizenship criteria, individuals are granted rights and protection by the tribe. Tribal citizens (like citizens of other sovereign political entities) are committed to preserve and protect the integrity of the tribe and are duty-bound to abide by tribal laws and the tribal constitution. Such primary loyalty to the tribe is often challenged and even undermined when the rights and protections of the United States are invoked by individual tribal citizens who also have U.S. citizenship. Tribal citizens who are also U.S. citizens are often caught up in a serious dilemma when the interests of their tribe conflict with the interests of the United States. As dual-citizens, tribal citizens are often faced with divided loyalties and responsibilities; they are forced to

make choices between their obligations to the U.S. and to their tribe. This personal dilemma creates a political problem of monumental proportions both for the tribe and the United States. It challenges the imagination to determine how the sovereign integrity of the United States, the various states and the tribes can all be kept intact if the personal will on which that sovereignty is based is divided. This problem is shared among the various peoples in protected territories of the U.S. (i.e. Puerto Rico, American Samoa, Virgin Islands, etc.) due to the fact that while people living in those territories retain their original citizenship, they also have U.S. citizenship. Such dual citizenship

all the rights and protections guaranteed any U.S. citizen by the U.S. Constitution. By virtue of this Congressional act (Pub. No. 853, 76th Cong., sec 201) all tribal citizens were granted U.S. citizenship with the strict proviso that their rights and protection as tribal citizens would not be impaired. With this act, and earlier naturalization statutes passed by the U.S. Congress (see notes), the United States unilaterally offered and granted citizenship to tribal citizens (Indians). U.S. citizenship was unilaterally granted to all tribal citizens among the thirty-three Washington tribes by virtue of the 1924 Congressional act alone. By thus conferring U.S. citizenship on tribal citizens while

Figure 2  
Tribal Citizenship Review or Approval  
Authority Conveyances by Tribal Constitution

New Citizenship Only	Expulsion Only	New & Expulsion	No Conveyance
Puyallup Quileute Shoalwater Bay Skokomish Suquamish	Yakima Nation	Colville Hoh Lower Elwha-S'Klallam Lummi Nation Makah Nation Muckleshoot Nisqually Nooksack Port Gamble-S'Klallam Sauk-Suiattle Squaxin Swinomish Tulalip Upper Skagit Stillaguamish Chehalis Kalispel Spokane	Quinault Nation Snohomish Snoqualmie Steilacoom Duwamish Samish Cowlitz Jamestown S'Klallam Chinook

has hampered efforts aimed at achieving self-determination for the peoples of those island territories. Indeed, the divided loyalties which result from dual-citizenship have created substantial internal political turmoil and instability for territorial citizens. Similar internal conflicts between tribal citizens are common within the tribes located in Washington.

Since June 2, 1924, all tribal citizens (Indians) born within the territorial limits of the United States have been citizens; and they enjoy

States recognized that each tribal citizen may enjoy the benefits of dual-citizenship.

Relationships between individual tribal people, the governments of the U.S. and the States have been the subject of many fictions and misconceptions since the

at the same time recognizing and accepting tribal citizenship, the United

first formal contacts between tribes and the United States. Members of tribes were, until very recently, thought to be something less than human beings by many people in the United States. These highly prejudiced doubts as to the human character of tribal people are reflected in many terms used by U.S. politicians to describe members of a tribe (i.e. ward, incompetents and inferior beings). The paradox revealed by these concepts is that on the one hand, the United States was obliged to deal with tribes as equal sovereigns because of international law; but, on the other hand, U.S. citizen prejudices and fears have long caused them to view tribal people as less than equals.

## PART TWO

### Symptoms of a Greater Problem

The tribes and the State of Washington have been unable to relate to one another as sovereign peers within the United States. Instead of acting as responsible governments, relationships between the tribes and the state have become so strained in recent years that virtually every conflict between them is dragged into court to await a solution. More than 2,000 such cases are pending in U.S. courts. Rather than talk openly with one another and negotiate fair and equitable settlements on a government-to-government basis, the tribes, the state and the federal government continue to prolong the agony of facing up to the fact that there is indeed a very fundamental problem which must be resolved.

To clarify the concept of a fundamental problem which is at the core of all conflicts between the tribes, the state and federal governments, it might be useful to examine some of the symptomatic conflicts which have come to the forefront in recent years. There are three primary areas of conflict:

1. **LAW & ORDER:** *Tribal Law Enforcement After Oliphant*
2. **ENVIRONMENT & NATURAL RESOURCES:** *Tribal Rights to Protect Their Own*
3. **TAXATION:** *A Key to Tribal Autonomy*

In all three conflict areas, we find the root cause is a failure to

acknowledge the inherent sovereignty of the tribes as a political unit. That is, the tribes, the state and the federal government cannot agree on the appropriate powers which should be under the jurisdiction of each of these distinct sovereign entities. Rather than working together in harmony to solve the problems which plague tribal and non-tribal peoples alike, these sovereign governments all too frequently choose not to talk with one another unless someone decides to take them to court. The end result of this process is that the tribes' effectiveness in dealing with outside governments becomes totally dependent upon lawyers who have only to gain by prolonging these disputes. The problems of providing valuable and much needed services to tribal people are disrupted by these frequent sojourns into the courts. Many tribal leaders seem to have fallen hopelessly into the trap of legal rhetoric which nobody seems to understand, especially the courts which are supposed to interpret their meaning. Because of the practice of looking for legal solutions to political problems, every time there is a change in the U.S. judicial bench, some judge thinks it's a good idea to change all the rules regarding Indian Affairs! The fundamental problem of the tribes in the United States today is a political one, not a legal one. The political relationship between the tribes on the one hand and the federal system of governments on the

other remains undefined.

### A Greater Problem

We can view this greater, but very elementary problem, through a number of windows which (for lack of a better way of explaining the situation) we might call Symptoms of a Greater Problem. Whether we begin our examination by considering environmental concerns, legal-jurisdictional disputes, powers of taxation, economic development or whatever, the inescapable conclusion is that the three governments aren't really facing up to the task of solving this very elementary problem. Either they aren't listening to one another or they are waiting for some divine intervention to clear up the basic political dilemma. In any event, the fact remains unaltered. The question of whether the tribes should be fully integrated into the U.S. federal system or whether the tribes should remain separate has never been resolved. (If it were resolved then the role and powers of tribal governments would be clear and unquestionable.)

In order to build upon inherent tribal sovereignty, tribal leaders must address themselves to this simple political question and develop a workable solution. This means, tribes must have a clear understanding that as long as their sovereign political status remains undefined, there can be no lasting solutions to the intergovernmental conflicts between the tribes, the state and the federal government.

### An Old Problem

We have pointed out that the nebulous status of tribes in relation to the U.S. federal system is not a new problem. The problem has become greater with the passage of each year that it is ignored by the tribes, the state and federal governments. The problem of intergovernmental relations between the tribes, the U.S. government and the State of Washington is so old, no one knows exactly when it first began. We do

know that in the Enabling Act of 1889, the State of Washington began the first in a long series of sidestepping the issue by claiming to have no jurisdiction over Indians (a policy which has changed 180 degrees since the State of Washington decided it wanted authority over the tribes under provisions in federal law PL 83-280). Of course, the state never bothered to ask the tribes.

### The Need for a Neutral Ground

If we remember that the tribes, the state and the federal government are three sides to contend with in any jurisdictional dispute, it only makes sense for these three powers to work things out together at some neutral negotiating ground. To date, no such ground exists. Existing problems for resolving intergovernmental disputes are either so narrow in scope as to be impracticable for solving the fundamental political problem or they are merely governmental ploys to avoid dealing directly with the problem thus allowing federal and state governments to freely encroach upon the inherent sovereignty of the tribes while supposedly working on behalf of the tribes' best interest.

It has been said in preceding parts of this publication that tribes are distinct and separate governmental powers within the geographical boundaries of the United States and the State of Washington, but they are not a part of the political federation known as the United States of America. The tribes remain outside looking in through glasses provided by their American "trustee" who once pledged to protect the tribes forever, but the pledge has been broken. The trustee has not always acted in the best interests of the tribes. There remains a very basic political problem which has never been fully addressed. All three governments are aware of it but none seems willing to take the lead in doing anything about it.

### The Problem Won't Go Away

The political problem won't go away because the tribes have been granted 50 percent of the salmon harvest (which once belonged entirely to them). It won't go away because the U.S. Supreme Court has decided Indian policemen shouldn't be allowed to arrest white men. The problem won't go away because the state wants to tax revenues from businesses which operate on reservations. The problem won't go away because so many long-term timber, mineral and land leases were signed in deals made by the BIA and giant non-Indian corpo-

rate interests. The problem won't go away because the tribes say they do not want to disappear. Something must be actively done to seek a solution.

No one can deny that the tribes are proud of their heritage and that they are firmly resolved to preserve their autonomous political status at whatever cost. The greater, but very elementary problem can only be solved with great care and consideration of what is fair and equitable to all three political entities. The complexity of the symptoms which spring from this fundamental problem should serve to illustrate the challenge which lies ahead for all three governments.

## PART THREE

### Toward a Solution

By now, it should be obvious that what we are discussing is not so new. The problem which plagues the relationship (or lack thereof) between tribal, state and federal governments is an old problem. Like an ancient, diseased tree which bears no fruit, the ever-growing tangles of intergovernmental conflicts have deep roots which began with the very first agreements between the indigenous peoples of this continent and the European invaders. And like many of the so-called "agreements" or "solutions" since that time, the treaties were—and still are—a source of confusion and inequity for the tribal peoples. Because so many of the tribal/state/federal dealings in the last hundred years have been based on the treaties, they too reflect the mistakes of the early agreements. To repeat a point central to this book, we can clearly sum up all of the mistakes with one problem: a lack of clearly defined and asserted political status for the tribal nations in relation to the United States.

### The Old Road: Ambiguity and Confusion

The first agreements between the North American tribal populations and the American colonists appear to have acknowledged at least the semblance of sovereignty in the tribes. Like all treaties, these first formal contracts are internationally recognized compacts between two sovereign entities. These treaties were a symbolic acknowledgment of equal powers. But a signed treaty is only as "real" as the powers which stand to affirm the inferiority or superiority of the powers which signed the treaty. A treaty is a handshake on level ground, an affirmation of a balance of powers in a spirit of conflict resolution.

So, one might well ask, why haven't the hundreds of treaties signed between the Indians and the United States stood strong in the past two centuries? First, we can point to many weaknesses in the treaties—both within the text and the process of agreement. Many treaties contained vague or misleading language which would later be interpreted (by the U.S. Courts) against the tribes. In some instances, the translators who served



the tribes during the treaty process were blatantly misrepresenting the intentions of these treaties, leading the Indian leaders to believe that they were getting something which, in fact, they weren't getting at all. Most importantly, nearly all of the treaties were negotiated under stress and physical force. Quite often, the tribes hadn't even asked for a treaty. Just the same, they got one--whether they wanted it or not.

Lacking even a rough definition of their political status, the tribes were helpless in the face of complex and confusing treaties. Seeking to salvage what treaty rights they could, the tribes started to take their arguments into the high courts of the United States. This perhaps marks the first critical error on the part of the tribes: they looked to the United States for a definition of their powers. Not surprisingly, the United States more often than not conveniently found the tribes severely lacking in sovereign powers.

Because the tribes have continued to go to the U.S. courts for decisions on their tribal powers, they have been obliged to play by the U.S. rules--and the U.S. rules don't allow for tribal victories. The tribes have constantly found themselves in what appears to be a no-win situation. When they walk into the U.S. courts, if they hope to win their decision, they must be represented by well-trained, highly educated lawyers. But they have been hard-pressed to find sympathetic lawyers who will truly understand and seek tribal priorities. The tribes have been dependent upon lawyers who defend monetary ownership and property rights and not sovereignty. In the end, the tribe gets the money and loses the land. In the European justice system, this method of cash settlement is seen as somehow equitable. In the tribal system, however, the notion of owning and selling a piece of earth is unsettling and contradictory to tribal tradition and culture.

Once in court, then, the tribal government leaders have had to take

a back seat as the high-powered Constitutional lawyers and federal judges play a steep game of intellectual volleyball. The arguments get thinner and thinner, the points so narrow and obscure that broad conflicts end up as tedious debates. Extensions, delays, appeals and endless legal bills; this is what the U.S. courts have given the tribes. How could this be? On a simple level, tribal governments could never realistically hope to win a battle for their sovereign interests in a U.S. court. Even a much-heralded tribal "victory" has a dark promise of still more conflicts. On a broader level, however, the tribes would have a good chance for equitable, consistent agreement and what they were. The first question, of course, is whether they should even be in court. Is this a conflict for this court to decide? Does a clearer assertion of a particular tribal power answer the question in this conflict? Is this a conflict which a tribal court should decide upon? These are some of the questions which a tribe could and should ask itself before going to court within the United States.

Wandering from the tangle of court battles and double-edged "victories", the tribes have often seen that the real victories have gone to the U.S. government, which always had its own laws to protect it against tribal assertions. The next philosophy, apparently, is that if you can't beat the old laws, then you have to make new ones. So once again, the tribal leaders have beaten well-worn paths through state and national legislative halls, attempting to find fair legislation which would protect the tribes.

Unfortunately, the legislative process bears an ironic reverse relationship with the court process. This time, the tribes go to Congress or the State Legislature with some specific, narrowly-defined proposals and, when and if the law survives the process, the resulting legislation can often bear little resemblance to the original intents. One cause of this severe dilution is the

intense politicking which is an "accepted" part of the legislative dance. One paragraph--possibly even one sentence or one word--can trigger certain death for a tribal initiative. The paragraphs and sub-paragraphs are shuffled between committees and sub-committees for weeks or months. Meetings are held, hearings are convened, memos are circulated may never come. In the end, the legislation may do more harm than good and, ironically, the tribes may have to switch gears and fight against their efforts. They are left defenseless, flying a jumbo jet with a paper clip and hoping that they live through the ordeal.

Clearly, one cause for the dilemma is that the tribes have no official representative in the State or federal legislatures--no Senators, no Representatives, not even a non-voting member. Under these circumstances, the tribes must depend on a high degree of courage, persistence and moral good-will from Congressmen who could stand to lose the support of their constituency. This kind of effort requires continual support and information from responsible tribal spokesmen, keeping the members of the State and Federal legislatures updated and aware of national Indian issues and priorities. Needless to say, all of this work can go down the drain if a block of Indian-informed Congressmen should lose elections or change key committee appointments. But it has also been the case that the Indians have been unable to consistently unite on a platform of priorities, which only serves to work against the efforts of Congressmen who seek to help the tribes. It has been suggested that the tribes could gain clout by sending Indians into Congress. Perhaps this would be moderately successful on the surface, but do the tribes really want to belong to the State or U.S. legislature? Again, they must define for themselves what their political relationship with the surrounding governments ought to be before walking the same roads to nowhere.



Winning little ground in the courts or the legislatures, the tribes have frequently turned to informal agreements or arrangements with local governments. These agreements can take many forms, covering a variety of issues, including human services, law enforcement, natural resource use and development, or any number of day-to-day needs on the reservation. But the key word in all of these agreements is informal: they lack the formal advantages of established law or enforcement regulations. Has anyone firmly agreed to anything in these informal agreements? Usually not.

First we should look at some kinds of informal agreements--what they do and what they don't do for the parties involved. Typically, an informal agreement is the result of a specific conflict between a tribe and an outside party--an individual, a county agency or government. Tribes seeking to find a solution to a law enforcement problem, for example, tend to look to cross-deputation agreements as the answer, whereby they agree to share the enforcement load with outside law agencies. A tribe can also make an arrangement with a city government to pay a certain fee for the use of city facilities which the tribe needs on a regular basis but cannot build for themselves. A jail is a good example of the kind of facility for which the two parties make informal agreements. Possibly a tribe offers some resource on the reservation in exchange for another resource off the reservation. In another case, the tribe may exchange technical services or other personnel with off-reservation agencies. In any event, these agreements are deemed "informal" simply because they lack any specific intergovernmental enforcement capability should one party default on the other.

Obviously, informal agreements are made by certain people in the context of certain times. If the people and the times change, what happens to the agreement? Unfortu-

nately, many tribes have discovered that they are caught without a defense if an old agreement is put under fire by a new off-reservation city or county government. The conflicting parties cannot go to court because the agreement will have no basis in law and, as we have mentioned previously, the tribes have no place in U.S. or State courts.

How could an informal agreement ever work for the tribes? First, it cannot be "informal" because the lack of a strong legal base will eventually lead to numerous conflicts. Therefore, the agreement process must be formalized. By this, we mean that the process must not be an informal meeting between friends to "sort of" solve the problem "for the time being." Instead, a serious attempt must be made to gather the three key government entities--Federal, State and Tribal--and organize a discussion which leads to a solution that all 3 governments can live with and enforce. Once a compromise has been found, the enforcement would come from the joint actions by the three governments to establish official regulations and policies which would guide the agreement. Informal agreements have simply not carried this extra enforcement weight behind the resolutions. Because they have been vulnerable to changing personalities and misinterpretation without reprimand, informal agreements have only been minor repairs for critical conflicts.

### The New Road: A Clear Mandate for Solutions

At this point in history, the tribes, along with the state and federal government, are at a fork in the road. They can continue to follow the old road--the road which has led into the court

tangles, legislative jungles and unenforceable agreements--or they can follow the new road. The new road will take these three governments to places where they haven't been in a long time and

force them to act in ways that may, at first, seem alien to what they

once believed. Serious discussions in a spirit of intergovernmental cooperation will meet each conflict. Resolutions will be voted on and enforced by all of the governments. Responsibility, fairness and equality will influence intergovernmental actions. The old road took the tribes nowhere. The new road will take all governments to a place where they can talk as equals.

Equality is a status which the tribes have rarely felt in their previous negotiations with the other governments. Although the whole of their history testifies to their sovereignty, the tribes have not fully exercised this sovereignty in recent times. Moreover, the U.S. and state governments have been only too accommodating, consistently treating the tribes as if they were vague organizations of quasi-citizens. The federal government typically views the tribes not as tribes at all, but as individual "Native American" U.S. citizens, entitled to minority benefits and problems. As such, they are powerless in the federal eyes because it is a case of Individual vs. Nation. In the state, the tribes are viewed as quasi-governmental ethnic to the state in the day-to-day informal policy decisions. In the counties, the tribes are viewed as walled cities, not surprisingly falling under the control (at least informally) of the counties. It is an endless web, spiraling inward and closing against the tribal way of life, against tribal existence.

A new intergovernmental negotiating mechanism would be built from notions which run completely counter to these erroneous assumptions. Each of the participating government entities--tribal, state and federal--would deal with each other on a government-to-government basis. In the past, the federal government would step into a conflict between the state and the tribes only when it became necessary for the federal government to protect U.S. interests. In the new mechanism, each of the governments would be a part of the process, participating

and voting on all stages of resolution. What a new process would bring to the old problems is participation by all parties in the resolution of conflicts, possibly even before they are directly involved in those conflicts. The key ingredient is a real sense of shared responsibility for each intergovernmental problem.

But a solution itself is not the answer to a problem. People enforcing a solution is the answer to a problem. Enforcing a solution does not necessarily mean chasing offenders with weapons or stiff fines. Enforcement is really nothing more than a foundation through which an agreement is obeyed. In the case of an agreement reached through a new intergovernmental mechanism "enforcement" may mean that the governments have agreed to the administrative actions which would automatically follow any violation of the new agreement. A temporary freeze may be imposed by the leaders of such a mechanism on the activities which were created by the new agreement.

In any event, the new resolutions achieved by the intergovernmental mechanism must not be lost in the shuffle of private prejudices or informal policy decisions. Throughout the process of negotiation, resolution and implementation, it must be known and accepted that the solutions will be adhered to. Realistically, this adherence will have to be matched with administrative policy and legal regulations—both of which will reflect a responsible enforcement of intergovernmental resolutions. This multilevel enforcement would best be achieved by simultaneous tri-governmental regulation formulation. All three governments would act quickly to make the resolution a part of their guiding laws and policies.

It is easy to talk of governments as if they were movable, whole items. But, in fact, governments are nothing more-or less-than people, and people are sometimes agreeable, flexible and responsible. People can often be immovable and unrespon-

sive too. In their two-hundred year association with the people and policies of the U.S. government, the Indian tribes have come up against many such people. Often, a tribe can be sent through bureaucratic hoops simply because one powerful official is too ignorant (or too stubborn) to stop the endless game of hurdles. But federal officials have come up against equally immovable Indian representatives. Good and bad leaders are at all levels of the state government also. The key to an effective intergovernmental negotiation mechanism, then, is to insure that these good leaders are representing their governments.

### Enforcement: All that Glitters is Not Gold

We have shown some of the worst effects of the old road to conflict resolution. We have also shown some of the good effects of a new and innovative process of intergovernmental negotiation. But we must not recommend the new while pretending that the old will disappear easily. One factor that is bound to cause continuous consternation among the governments is enforcement.

When is a law not a law? When is it ignored...purposely or inadvertently. If a tribe and a local county government agree to forbid dumping garbage in a certain forest, for instance, but the garbage still seems to be appearing every now and then, what has gone wrong? An official agreement—enacted into laws and regulation—has been ignored. Granted, an issue such as this may seem minimal in the total scope of the crisis at hand, but it is small problems such as this one that will add up to major intergovernmental problems for the different governments. Relaxed enforcement on an issue such as this, could give the offenders an impression of generally relaxed—and informal—agreements at all levels. Enforcement must therefore penetrate all levels of agreements, no matter how minimal they may seem.

Enforcement is, once again, a matter of people and their actions. Once an intergovernmental mechanism has enacted new policies to guide the actions of their respective leaders, it must then depend on the people to make the daily decisions that will affect the tribal/state/federal relationship. If the people change their minds, the policy must still be enforced.

Unfortunately, the problem of people and personalities will affect the intergovernmental mechanism at all levels. A policy implemented by the mechanism will only be as strong as the respect which people have for that policy. In fact, there are two distinct and, unfortunately, different levels of government because of this dilemma. One level of government action is policy. Policy is defined as the official set of guidelines which are printed in official government publications and official government agency files. Another level of government action is practice. Practice is defined as the actual daily activities—statements, letters, memos, ideas and decisions—that come from government representatives. Often, policy does not equal practice. For the past several decades, federal and state policy with regards to tribal peoples has had very little to do with actual federal and state practices. If a state representative does not wish to follow federal policy, the problem will trickle all the way down to the county or city level.

For this reason, guidelines must be established which would carefully guide the implementation of intergovernmental policies that result from the negotiation process. These guidelines must also give clear guidance for the selection and/or training of any governmental personnel who will be working on an intergovernmental basis. A new department director in a tribe must be adequately prepared to deal with his counterparts in the state and federal government. The director must understand what the powers of the tribe are in relation to these

other governments. He must also recognize the seriousness of any agreements coming out of the new intergovernmental mechanism. In short, all levels of government must become acutely aware of the priorities of other governments—not just directors or supervisors, but assistants, clerks and secretaries also. The importance of intergovernmental cooperation must be felt everywhere.

### The Theory Behind An Intergovernmental Mechanism

We have pointed out that there are three distinct and separate forms of sovereign governments operating within the boundaries of the United States—tribal, state and federal governments. We have noted that relationships between these governments have frequently been strained by jurisdictional disputes over a wide range of governmental powers. We have expressed the thesis that the principal cause of repeated jurisdictional disputes is the persisting ambiguous political relationships of the tribes with the State of Washington and the United States government.

The U.S. courts, the U.S. Congress and the State of Washington have all frequently acknowledged the fact that tribes are politically separate from the state and federal government. As tribes attempt to wean themselves from dependence on the federal government, the degree of separation between the tribes and the state and federal governments becomes a critical factor. To tribes who are attempting to strengthen their local economies and governments, the hazards of failing to resolve the fundamental question of ambiguous relationships to other governments are something which should be considered by all tribal leaders and the state and the federal government mutually agree. Once an agreement has been forged between the three governments, then it becomes necessary to create a permanent structure to see that

the provisions of the agreement are maintained and conflicts between these sovereign governments are reduced. This formal structure is called an *intergovernmental mechanism*.

An intergovernmental mechanism involving the tribes, the state and the United States is a formalized way of bringing clarity to the appropriate jurisdictional powers and governmental authorities in the American political landscape. Sovereign powers in the modern context are based on law and formalizing of specific rights and responsibilities of governments and citizens of a government. A mechanism which is created to resolve intergovernmental conflicts, then, must have the sanction of all participating powers in formalized, legislated and ratified forms. For this reason, *the U.S. government, the tribal governments and the state government must separately agree to such a mechanism before it can serve any useful function to actually resolve jurisdictional disputes through mediation and arbitration.* Legislative actions by each of the participating sovereignties must correspond to existing legal and political frameworks so that there is no confusion about the role of the intergovernmental mechanism itself.

In order to more fully understand and appreciate the significance of such a concept as an *intergovernmental mechanism*, one must develop a firm understanding of the nuances of language in political and legal contexts. By formally ratifying legislation state and federal governments would in essence create a legal framework which is designed to resolve political disputes. Once all three governments—tribal, state and U.S.—have formally agreed to actually establish an intergovernmental mechanism to resolve jurisdictional conflicts, the scope and purpose of the mechanism itself must be clearly defined through the conveyance of authorities to the mechanism. This means that the participating governments must

address themselves to the problem of what powers should be given to the intergovernmental mechanism and how the mechanism should exercise those conveyed powers to serve the best interests of all three sovereign governments. An intergovernmental mechanism should have whatever authority is necessary to accomplish the purpose for which it was created in the first place. If the mechanism is to be a catalyst for harmonious relationships, it must be structured in such a way as to protect the sovereign powers of each of the participating governments. Any powers which are conveyed to such a mechanism must therefore be limited to the specific conflict resolution tasks which might be appropriate for intergovernmental participation.

### What Kind of Powers Should an Intergovernmental Mechanism Have?

Generally speaking, governmental organizations can exercise three kind of powers—legislative, administrative and judicial. The powers of an intergovernmental mechanism might include all of these:

#### I. Legislative Powers

Legislative powers are those concerned with formalizing laws which relate to the activities of the general population and to the operation of the functions of governments at all levels. Although an intergovernmental mechanism would actually have no law-making powers, an important function of the intergovernmental mechanism might be to research, draft and present recommendations for legislation to any one or all three governments. Such advisory authorities would minimize intergovernmental conflicts, especially when mutually agreed upon legislation was formally enacted by all three governments. This is because agreements which have become matters of law are much more enforceable than those



which are only informally agreed upon.

## 2. Administrative Powers

Administrative powers are the means by which laws are implemented or acted upon by government. They include all activities which governments undertake to interpret and enforce the laws and regulations which have been fully sanctioned by the legislative authority in the form of statutes, constitutions, policies and so on. The representatives to an intergovernmental mechanism from the tribal, state and federal governments must be authorized to develop guidelines, policies and regulations for the implementation of the goals of the intergovernmental mechanism which have been defined and ratified by the three governments. An intergovernmental mechanism is not a policing agency, but it might need to investigate the facts and have the power to subpoena witnesses in a dispute.

## 3. Judicial Powers

Judicial powers are solely concerned with interpretation of the meanings of laws and the legitimacy of actions which are taken either by governments or individuals.

An intergovernmental mechanism is not a social or recreational organization, but it is a mediation forum for serious intergovernmental conflicts. To effectively act as a mediation commission, or ombudsman, for the resolution of intergovernmental conflicts, the intergovernmental mechanism must be authorized to perform specific quasi-legal functions and exercise the necessary powers to fulfill those functions. It is not a court of law, but is merely an arbiter of disputes which might later be brought before a court of law.

By providing a form for direct negotiation, the intergovernmental mechanism can greatly reduce the costly litigation time by clarifying the disputed issues and allowing

each side to state its point of view for the record.

## The Tri-Party Necessity

Governments function solely on the basis of powers which have been vested in them. If an intergovernmental mechanism is to effectively serve the interests of all three governments, certain specific governmental powers must be transferred or conveyed to the mechanism by the sovereign entities which are represented in it.

In the case of the United States/state relationship, the sharing of governmental authority is clarified in the U.S. Constitution and state constitutions. In the case of the tribal/United States relationship, certain specific sovereign authorities have been conveyed to the U.S. government by virtue of treaties and formalized agreements based on the trust relationship of the tribes to the federal government.

However, there presently exists no legal basis for any sharing of political jurisdiction between tribes and the state. Because the tribes are a separate political entity with ties to the U.S. government, and because states are expressly forbidden to enter into agreements with foreign powers, tribal/state agreements can only be valid if approved by both the tribes and the U.S. Congress. This distinction is a very important consideration in the formulation of an effective intergovernmental mechanism to resolve conflicts between tribes, the state and the federal government. *The recognition of tribes as being outside of the U.S. federal system is a necessary prerequisite to any consideration of an effective intergovernmental mechanism.*

A second prerequisite to establishing an intergovernmental mechanism is a clear understanding of the legitimate jurisdictional authorities of each of the three governments as they now exist and operate. That is, the tribes, the state and the federal government need to re-examine their relationship to one

another so they can clearly see which jurisdictional claims are valid and which are illegitimate in light of the true political status of tribal governments. Certainly, the process of clarification will evolve further once an intergovernmental mechanism has been set into motion by formalized agreement of all three sovereign entities.

It is essential that all governments which would be affected by the actions of the intergovernmental mechanism be full participants in its formation and activities. The tribes, the state and the federal government must have an equal voice so that political negotiations within the intergovernmental mechanism can lead to lasting solutions to the myriad of jurisdictional disputes surrounding tribal/state relations. This would require the tribes, the federal government and the state to all sit down together and put their political cards on the table so that the intergovernmental mechanism can address itself to resolving political disputes and limiting costly court proceedings by developing clear and understandable legal foundations for tribal/U.S./state relations.

## How would an Intergovernmental Mechanism Work?

Once a mechanism has been created by formal legislation and mutual agreement of all three governments, the powers have been conveyed to the mechanism, and the purpose of the mechanism has been defined and accepted by all, then and only then can it begin to clear the political air surrounding tribal/state relations and eliminate the ambiguity of treaty and trust responsibilities in light of self-determination and self-government for tribal peoples.

Whenever disputes between two or more of the governments arise over matters of political jurisdiction, a complaint would be filed by an individual or government requesting that the intergovernmental



tal mechanism review the conflict and recommend alternative courses of action for resolving the conflict. In some cases, the intergovernmental mechanism would simply refer the matter to the appropriate tribal, state or U.S. Court for clarification of a point of law. In other cases, however, the intergovernmental mechanism might bring the disputing government agencies, individuals or representatives together to negotiate agreements which would become binding upon ratification by the sovereign governments involved in accordance with existing laws and policies.

The basic distinction between a *political matter* and a *legal matter* becomes a central consideration for the intergovernmental mechanism. Political disputes can only be effectively resolved by formalized agreement (i.e. laws or treaties). When sovereign governments have reached mutual agreement and sanctioned become matters of law. If there are no specific laws relating to a given conflict over governmental jurisdiction, it is difficult (and perhaps impossible) for a court of law to clarify the legal basis of relationships between governments. Tribal, state and federal governments must sit down and make a political agreement which is binding.

Courts of any of the three governments can merely serve to interpret the laws of the governments which created them: Tribal courts interpret tribal law; State courts interpret state law; Federal courts interpret federal law. If there is a legal dispute between governments regarding political powers, the matter might first be resolved in intergovernmental mechanism so that all affected governments can participate in the decisions which will affect their jurisdiction and authority.

### Equal Veto Powers

Decisions, recommendations for legislation, and administrative regulations for the operation of the inter-

governmental mechanism must be subject to scrutiny and review by the sovereign governments involved in the mechanism. To create a firm basis for negotiation, an equal veto power might be needed so that actions of the intergovernmental mechanism would always have the sanction and approval of the sovereign governments it serves. All three—tribal, state and federal—must have the ability to veto proposed actions of the intergovernmental mechanism.

### The Selection of Delegates

The number and voting status of representatives from various tribal, state and federal governments within the intergovernmental mechanism must be determined by tri-party agreement. However, the specific procedures for each separate government would vary according to their unique constitutional guidelines and governmental practices. An effective formula to assure the neutrality of the intergovernmental mechanism would be essential to its successful operation. If any one of the three sovereign entities represented had the deciding vote, it would create an imbalance which would make decisions of the intergovernmental mechanism impracticable and unenforceable.

### The Question of Enforceability

As the intergovernmental mechanism developed sound practices, administrative guidelines, regulations and methodologies for negotiation and resolution of intergovernmental disputes, the sovereign governments must develop codified legislative support to the findings of the mechanism. Once each government—tribal, state and federal—has codified jurisdictional tri-lateral agreements within the framework of their own law, violations become enforceable within the jurisdiction of the sovereign power best suited to resolve the conflict. An important function of the inter-

governmental mechanism would be to advise and recommend procedures and appropriate courts to hear specific disputes. This function would save all governments from endless and needless court battles.

### A Permanent Institution

Although the extent of activity of the intergovernmental mechanism would vary according to the conflicts brought before it, the need for such a commission would most likely endure for a very long time as a safeguard against abuses. The life of the commission would be as long as the tribes, the states and the United States retained their separate and distinct political status as sovereign governments.

### Representation and Participation

An intergovernmental mechanism must involve equal kinds of membership from all three government entities. If they are to meet at a common table to solve shared conflicts, then they must represent common elements of their constituencies. We must first look at what these bodies have in common. They all have executive (administrative) and legislative (law-making) leadership, both appointed and elected. It is from these leaders where we find the ingredients for our scenarios.

For the U.S. government, for instance, we would find legislative representation in the U.S. House of Representatives and Senate. For our purposes, the House is the more representative-specific source of leadership. Eight U.S. Congressmen represent the State of Washington. Executive leaders for the federal government are found in the Executive Branch, composed primarily of the President and his many cabinet offices (Education, Interior, Treasury, etc.).

With regards to the State government, we find a similar situation. The Governor's Office and associated departments (Fish & Game, Revenue, Transportation, etc.) pro-

vide the executive leadership, while the State legislature and senate provide representation in the law-making arena.

For the many tribes who co-exist with these governments within the State boundaries, however, we find a somewhat different situation of representation. While each of the tribes does have a government similar in structure to those at the federal and state levels, they are by no means one whole government. Indeed, one of the crucial errors in previous intergovernmental dealings has been that the state and federal agencies have consistently treated the tribal peoples as if they were one homogenous minority group, living in small communities around the state. Nothing could be further from the truth and nothing could be more damaging to effective conflict resolution. Within the legal boundaries of Washington State, for example, we find 29 U.S.-recognized tribes, (27 land-based and 2 non-land-based tribes) and yet another 5 non U.S.-recognized, non-land-based tribes. In all, there are 34 distinctive tribal governments within these boundaries. Each has its own unique population and leadership, as well as its own unique problems and priorities.

Quite obviously, then, we cannot expect all 34 tribal governments to want the same solutions for each conflict. For that reason, a method of representing those bodies in an intergovernmental mechanism must be arrived at with different formulas than the methods used for federal and state representation. Because there is no united "Congress" or "All-Tribes" government which represents all of the tribal sovereigns in the State, some options for tribal representation must be developed for an Intergovernmental Mechanism scenarios.

### **Representation by the Federal Government**

It seems both practical and fair that the legislative and executive representatives to any sort of inter-

governmental mechanism would be selected by the leadership of those two branches. Clearly, a national election could not and would not be possible, so the representatives from the executive branch could be picked by the Office of the President, while the legislative representatives could be selected by the House leaders of the majority and minority. Understandably, the people selected for participation in the mechanism must be intimately familiar with the needs and problem areas of the State and the Tribes, as well as the policies and priorities of the federal government in dealing with these other governments. They must be sensitive to both the past failures of other intergovernmental "solution" processes and current efforts to find

### **Representation by the State Government**

In a manner similar to the federal process of representation, the State participants in an intergovernmental mechanism could be selected by the Office of the Governor and the State Legislature. Again, these must be individuals with a proven capability for effective intergovernmental negotiation. This simply means that the State representatives must be sensitive to the urgency of the intergovernmental conflicts and the seriousness of a mechanism which attempts to solve these conflicts through new processes.

### **Representation by the Tribal Governments**

As discussed in the sections above, the matter of tribal representation in an Intergovernmental Mechanism will require a different process of selection. Because there is no formal organization which represents tribal governments for a purpose such as this, an organization must be "created." There are four probable scenarios for the organization of an intergovernmental mechanism with this special problem in mind:

#### *1. Treaty Area Organization*

Understandably, many tribes wish to deal on a government-to-government basis through the context of original treaties signed with the federal government. If this were the case, then the State of Washington could be divided into eight regions, each representing one of the original 8 treaty and Executive Order areas. While one overall Intergovernmental Board could preside over all State conflicts, each of the eight treaty areas would have a Treaty Council Mediation Board that would, in effect, be a "miniature" version of the larger Board. These eight Treaty Council Mediation Boards would serve as a "filter", solving conflicts at the regional level if possible, or sending conflicts on to the larger State Board. The tribal representation in the separate Treaty areas would be contributed by the individual tribes in each of those areas. Possibly four tribes in one Treaty area would send four representatives to the Treaty Council Mediation Board. These four individuals would have one vote on conflict resolution decisions, as would the combined representation which the State would send and the Federal government would send.

#### *2. Geographic Area Organization*

Another method of organizing the tribal representation on an Intergovernmental Mechanism might be by geographic areas. Realistically, the tribal governments living along the Puget Sound would share similar problems. These problems would also be very different from the problems experienced by Eastern tribes. Issues concerning fisheries and timber are common among the coastal tribes, while issues concerning mining and rivers are common among the Eastern tribes. Granted, all tribes share common problems with regards to the needs of their people (health care, education, etc.), but it is equally true that tribes share similar geographic problems. For this reason, we can

propose a scenario which is constructed much like the first scenario, except we are dividing the representation on a broader base. The state would be divided into three areas: East, Southwest and Northwest. Each geographical area would have one Area Board which would handle all conflicts in that area. The Area Boards would then refer special conflicts to the State Board.

### 3. State-Wide Organization

A third possibility for tribal representation is one which is based on the broadest base possible. Instead of dividing the tribes into treaty or geographic areas, this scenario would unite

the tribes under one umbrella. All 34 tribes would select leadership—possibly a total of three representatives—on a regular basis to speak for the tribes in an intergovernmental mechanism. Instead of several regional Mediation Boards, the tribes would find representation at one State Board. Their representatives could be picked at an annual meeting of tribal governments. One important aspect of this scenario is that the leaders must be changed on a regular basis—possibly every two years—to allow for “fresh” leadership in the intergovernmental mechanism.

### 4. Issue Area Organization

The previous scenarios have more or less been structured by physical area divisions—east and west, north and south—but there is still another method of tribal representation. Issues often bind tribes with each other in their various conflicts with the state or federal government. Conceivably, an intergovernmental mechanism could be divided by the nature of the conflicts. Natural Resources, Economic Development & Taxation, Health Services and Education are some of the broad issue areas which could be organized into Intergovernmental Mechanisms. Each issue area mechanism would seek to solely handle conflicts that fall within that

area. A broader state-wide mechanism would handle multi-issue conflicts which the single-issue groups cannot manage by themselves. Representation into these issue-specific groups would be slightly different than previous scenarios require. Rather than send any number of qualified tribal representatives to this mechanism, the tribal governments must send people who have a specific knowledge or responsibility for certain areas. In other words, tribal timber resource personnel would not be appointed for a mechanism working on educational conflicts; they would, however, be qualified for participation in the natural resources mechanism because timber is, after all, a natural resource.

### Advantages and Disadvantages

None of these scenarios are perfect, but they do represent the basic options available to tribal governments wishing to interact with the state and federal government in a new mechanism for conflict resolution. Each scenario has characteristics which seem to overlap with other scenarios, which is unavoidable in

view of the complex conflicts. In the end, the tribes may want to pursue a hybrid scenario, one that possibly combines elements of all four proposals listed above.

While the Treaty Area Organization would rely on an historical basis for organization, for instance, it would also present some problems when and if the tribes were to try to interpret that history. Where does one treaty area truly end and another begin? The history of treaty-making in Washington State is a history of conflict and misrepresentation; likewise, dividing the tribes into *treaty areas* may actually defeat the purpose of the intergovernmental mechanism. Dividing the tribes into geographical areas may also prove to be rather difficult, as the overwhelming majority of tribes are concentrated in a relatively small area of the Washington State western coastline. In any event, the representatives who speak for the tribal, state or federal governments and their people, must be responsible, informed spokespersons. More importantly, their decisions must receive the unqualified respect and support of their governments. □

## Conclusions

The coming decade will be a critical time for all tribes located within the boundaries of a state. After a century of legal and political confrontations over which government has jurisdiction in the policy areas of natural resources, economic development, cultural preservation and tribal social development, a political Mount St. Helens is ready to erupt.

Thoughtful and careful action must be taken by tribal governments to clarify their political relations with the state government and the U.S. government. This must be done to avoid being overwhelmed by political and economic forces which seek the use of tribal resources for non-tribal benefit. Clearly defined and structured intergovernmental

relations between Indian governments, state government and the U.S. government are essential to maintaining or insuring the existence of Indian tribes. As we have pointed out in earlier chapters the present relations between tribes, the United States and the state depend on many assumptions and legal theories which can be changed by the United States if its interests are violated. We have shown that the political relations between the United States and Indian tribes have long been neglected, and the result is that no formal structures of intergovernmental relations exist. The tribes are dependent on U.S. government—created mechanisms for conflict resolution. This means that the tribes really have no say in



the rules by which problems of jurisdiction are resolved. The tribes are held hostage to the rules established by the United States. The result has been that tribal interests have only been protected if and when the United States chooses to protect them.

The Inter-Tribal Study Group on Tribal-State Relations concludes that a political solution is in order. This solution is two fold:

1. Tribes must resolve to define their political identity either
  - a. within the U.S. federal system (by terminating their existence, seeking U.S. statehood, form counties within state structures, form municipalities or they must pursue a course of political action which seeks the modification of the U.S.

*Constitution—allowing Indian tribes to join the U.S. federation with representation in the federal government and sharing political power and thus remain distinct political entities);*

- b. *tribes may resolve to define a clearly structured relationship with the United States which formalizes their political association (negotiate a compact of free association, establish commonwealth territories, or formalize trusteeship association through the United Nations);*
- c. *tribes may resolve to define their political identity as independent of the United States of America.*
2. *Tribes must pursue a course of action (if they are to be politically associated with the United States, and neither independent or politically absorbed) which promotes the establishment of a Tri-governmental Mechanism between the United States, the State and the Tribes. It ought to be established through negotiations and empowered (through tribal, state and U.S. constitutional processes) to facilitate conflict resolution. If tribes are asserting their independence from the United States then many intergovernmental mechanisms already exist within the international arena. If the tribes are asserting a desire to be absorbed into the United States then those intergovernmental mechanisms which already exist under the U.S. federation will serve their need. Only those tribal governments which wish to associate with the United States and remain outside of the U.S. federation (though remain dependent on it) will need a new intergovernmental mechanism.*

## Epilogue

In the years between 1977 when tribal officials met in the First Session of the Conference of Tribal Governments, 1979 when tribal governments formed the Inter-Tribal Study Group on Tribal-State Relations, and now, a political revolution began. Indian nations throughout the United States, Canada, Central and South America have asked the question raised in 1977: *What is the political relationship between an Indian nation and the states that surround it?* By their actions, Indian nations throughout the western hemisphere have begun to answer this essential question.

In the United States of America, Indian nations began in the eighties and continue in the 1990s the development of a web of government-to-government agreements with counties, state governments and the federal government. The Centennial Accord, negotiated between Indian governments and the government of the State of Washington (1989 See

page 19) provides an intergovernmental framework on which can be built new understandings between governments that will serve both Indian and non-Indian citizens. Instead of wasteful conflict, governments can serve the interests of the people they represent through cooperative measures intent on resolving instead of expanding conflicts.

In 1987, Indian nations began negotiating with the federal government a new framework for government to government relations. In 1990, the Lummi Indian Nation, the Quinault Indian Nation, Hoopa Indian Tribe and the Jamestown S'Kallam Tribe individually negotiated the first modern treaties between the United States and Indian nations since the turn of the century. These nations each negotiated a Compact on Self-Governance that has allowed each nation to resume its responsibilities as self-governing nations.

From the Declaration of Sovereignty

in 1974 to the negotiation of Compacts of Self-Governance in 1990, Indian nations have been rapidly developing politically. The dynamics of this political development is only now beginning to take shape. Still ahead is the challenge offered by the members of the Inter-Tribal Study Group on Tribal-State Relations: Tribes must resolve to define their political identity either within the U.S. federal system or outside that system. The tribal leaders of the Pacific West have provided the political foundation for answering that question.





# CENTENNIAL ACCORD

## between the FEDERALLY RECOGNIZED INDIAN TRIBES in WASHINGTON STATE and the STATE OF WASHINGTON

### I. PREAMBLE AND GUIDING PRINCIPLES

This *ACCORD* dated August 4, 1989, is executed between the federally recognized Indian tribes of Washington signatory to this *ACCORD* and the State of Washington, through its governor, in order to better achieve mutual goals through an improved relationship between their sovereign governments. This *ACCORD* provides a framework for that government-to-government relationship and implementation procedures to assure execution of that relationship.

Each Party to this *ACCORD* respects the sovereignty of the other. The respective sovereignty of the state and each federally recognized tribe provide paramount authority for that party to exist and to govern. The parties share in their relationship particular respect for the values and culture represented by tribal governments. Further, the parties share a desire for a complete accord between the State of Washington and the federally recognized tribes in Washington reflecting a full government-to-government relationship and will work with all elements of state and tribal governments to achieve such an accord.

### II. PARTIES

There are twenty-six federally recognized Indian tribes in the state of Washington. Each sovereign tribe has an independent relationship with each other and the state. This *ACCORD* provides the framework for that relationship between the state of Washington, through its governor, and the signatory tribes.

The parties recognize that the state of Washington is governed in part by independent state officials. Therefore, although, this *ACCORD* has been initiated by the signatory tribes and the governor, it welcomes the participation of, inclusion in and execution by chief representatives of all elements of state government so that the government-to-government relationship described herein is completely and broadly implemented between the state and the tribes.

### III. PURPOSES AND OBJECTIVES

This *ACCORD* illustrates the commitment by the parties to implementation of the government-

to-government relationship, a relationship reaffirmed as state policy by gubernatorial proclamation January 3, 1989. This relationship respects the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues.

This *ACCORD* is intended to build confidence among the parties in the government-to-government relationship by outlining the process for implementing the policy. Not only is this process intended to implement the relationship, but also it is intended to institutionalize it within the organizations represented by the parties. The parties will continue to strive for complete institutionalization of the government-to-government relationship by seeking an accord among all the tribes and all elements of state government.

This *ACCORD* also commits the parties to the initial tasks that will translate the government-to-government relationship into more-efficient, improved and beneficial services to Indian and non-Indian people. This *ACCORD* encourages and provides the foundation and framework for specific agreements among the parties outlining specific tasks to address or resolve specific issues.

The parties recognize that implementation of this *ACCORD* will require a comprehensive educational effort to promote understanding of the government-to-government relationship within their own governmental organizations and with the public.

### IV. IMPLEMENTATION PROCESS AND RESPONSIBILITIES

While this *ACCORD* addresses the relationship between the parties, its ultimate purpose is to improve the services delivered to people by the parties. Immediately and periodically, the parties shall establish goals for improved services and identify the obstacles to the achievement of those goals. At an annual meeting, the parties will develop joint strategies and specific agreements to outline tasks, overcome obstacles and achieve specific goals.

The parties recognize that a key principle of their relationship is a requirement that individuals working to resolve issues of mutual concern are accountable to act in a manner consistent with this *ACCORD*.

The state of Washington is organized into a variety of large but separate departments under its governor, other independently elected officials and a variety of

boards and commissions. Each tribe, on the other hand, is a unique government organization with different management and decision-making structures.

The chief of staff of the governor of the state of Washington is accountable to the governor for implementation of this *ACCORD*. State agency directors are accountable to the governor through the chief of staff for the related activities of their agencies. Each director will initiate a procedure within his/her agency by which the government-to-government policy will be implemented. Among other things, these procedures will require persons responsible for dealing with issues of mutual concern to respect the government-to-government relationship within which the issue must be addressed. Each agency will establish a documented plan of accountability and may establish more detailed implementation procedures in subsequent agreements between tribes and the particular agency.

The parties recognize that their relationship will successfully address issues of mutual concern when communication is clear, direct and between persons responsible for addressing the concern. The parties recognize that in state government, accountability is best achieved when this responsibility rests solely within each state agency. Therefore, it is the objective of the state that each particular agency be directly accountable for implementation of the government-to-government relationship in dealing with issues of concern to the parties. Each agency will facilitate this objective by identifying individuals directly responsible for issues of mutual concern.

Each tribe also recognizes that a system of accountability within its organization is critical to successful implementation of the relationship. Therefore, tribal officials will direct their staff to communicate within the spirit of this *ACCORD* with the particular agency which, under the organization of state government, has the authority and responsibility to deal with the particular issue of concern to the tribe.

In order to accomplish these objectives, each tribe must ensure that its current tribal organization, decision-making process and relevant tribal personnel is known to each state agency with which the tribe is addressing an issue of mutual concern. Further, each tribe may establish a more detailed organizational structure, decision-making process, system of accountability,

and other procedures for implementing the government-to-government relationship in subsequent agreements with various state agencies. Finally, each tribe will establish a documented system of accountability.

As a component of the system of accountability within state and tribal governments, the parties will review and evaluate at the annual meeting the implementation of the government-to-government relationship. A management report will be issued summarizing this evaluation and will include joint strategies and specific agreements to outline tasks, overcome obstacles, and achieve specific goals.

The chief of staff also will use his/her organizational discretion to help implement the government-to-government relationship. The office of Indian Affairs will assist the chief of staff in implementing the government-to-government relationship by providing state agency directors information with which to educate employees and constituent groups as defined in the accountability plan about the requirement of the government-to-government relationship. The Office of Indian Affairs shall also perform other duties as defined by the chief of staff.

#### V. SOVEREIGNTY and DISCLAIMERS

Each of the parties respects the sovereignty of each other party. In executing this *ACCORD*, no party waives any rights, including treaty rights, immunities, including sovereign immunities, or jurisdiction. Neither does this *ACCORD* diminish any rights or protections afforded other Indian persons or entities under state or federal law. Through this *ACCORD* parties strengthen their collective ability to successfully resolve issues of mutual concern.

While the relationship described by this *ACCORD* provides increased ability to solve problems, it likely will not result in a resolution of all issues. Therefore, inherent in their relationship is the right of each of the parties to elevate an issue of importance to any decision-making authority of another party, including, where appropriate, that party's executive office.

Signatory parties have executed this *ACCORD* on the date of August 4, 1989, and agreed to be duly bound by its commitments.

*Back Issues*

*Continued from front panel*

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| <p>#9 Session V of the United Nations Working Group on Indigenous Populations, A Letter from Genève, by Rudolph C. Rysér (December 1987)</p> <p>#10 The World Bank's Indigenous Policy, by Rudolph C. Rysér (February 1988)</p> <p>#11 Government to Government Issue Paper: A Rational for U.S. &amp; American Indian Governmental Communications, Consultation &amp; Co-Existence, prepared for the National Congress of American Indians by Rudolph C. Rysér, Victoria Santana and Joe Tallakson</p> <p>#12 Fourth World Governance, by Wilson Manyfingers (February 1989)</p> <p>#13 Europe's Fourth World Nations in a "Common European Home" by Rudolph C. Rysér (June 1990)</p> | <p>#14 Self-Government and Overcoming Political Obstacles, by Jewell Praying Wolf James (September 1990)</p> <p>#15 Fourth World Nations' Realities in Canada, by Rosalee Tizya (November 1990)</p> <p>#16 Anti-Indian Movement on The Tribal Frontier, by Rudolph C. Rysér (April 1991) Revised Edition (June 1992)</p> <p>#17 Ireland, England and the Question of Northern Ireland, by Joseph E. Fallon (January 1992)</p> <p>#18 The Meaning of "Nation" and "State" in the Fourth World, by Richard Criggs (May 1992)</p> <p>#19 The State and Indian Nations Water Resource Planning, by Jovana J. Brown (September 1992)</p> |
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# Building Bridges

*Resource Guide for Tribal/County  
Intergovernmental Cooperation*

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A Final Report of the  
Tribes and Counties Intergovernmental Cooperation Project  
Northwest Renewable Resources Center  
June 1997



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*The Northwest Renewable Resources Center was founded in 1984 by leaders of industry, Indian tribes and environmental organizations to create forums for resolving disputes over use and management of natural resources. The Center is a non-profit 501(c)(3) organization dedicated to engaging citizens and leaders in creative, collaborative, problem-solving processes to achieve wise stewardship of natural resources for existing and future generations.*

## *Acknowledgements*

I would like to give my sincere thanks to the Indian and non-Indian individuals who took part in this project for their willingness to take risks; the Northwest Area and Ford Foundations for recognizing the value of this work; the current and former staff of the Northwest Renewable Resources Center for their support throughout the project and in producing this report; and Shirley Solomon for her inspirational vision.

- B.R.

## INTRODUCTION

*"Professional relationships are the heart and soul of organizational dynamics. The Center provided a venue for civic conversation and social learning to people who, though neighbors, were essentially strangers to one another. In a safe, comfortable setting, participants explored multicultural viewpoints and perspectives.... They uncovered a shared love of place and developed a better understanding of the differences between them. The experience engendered a new level of respect and empathy, a sense of common purpose and a commitment to work together."*

—Shirley Solomon, Northwest Renewable Resources Center

The Tribes and Counties Intergovernmental Cooperation Project, a six-year effort by the Northwest Renewable Resources Center (NRRRC), broke new ground in many areas. Launched in 1990, in cooperation with the Governor's Office of Indian Affairs, the Washington State Department of Community, Trade and Economic Development (CTED), and the Washington State Association of Counties (WSAC), the project fostered the normalization and institutionalization of tribal and county government cooperation in Washington State. Funding for this effort was provided by the Northwest Area Foundation and the Ford Foundation.





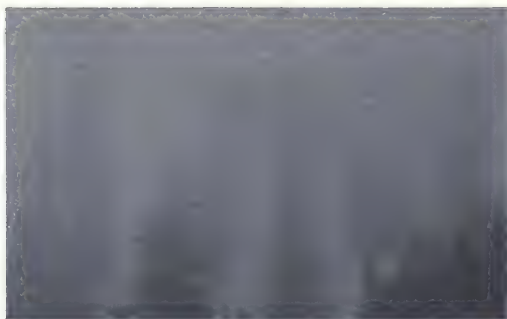


Photo by Nathan Hobbs

## Telling a New Story

For the past 200 years, federal policy toward Indian people and their land has created a complex pattern of land ownership on Indian reservations. This has isolated tribes from the regions they inhabit and forced them into dependency on federal programs. Compounding the problem are differences in cultural values and a history of racism and exploitation, coupled with tribal government frameworks that differ radically from those of their state and local neighbors. Existing alongside one another as strangers rather than neighbors, tribal/county relationships are marred by cultural discord and invariable jurisdictional conflicts. Common interests notwithstanding, coordination between governments is rare.

While the need for intergovernmental cooperation was clear when the Tribes and Counties Project began, a divisive history surrounded tribal/county relations. Too often, the stories people related to each other about Indian/non-Indian interaction were about disputes, misunderstandings, betrayals and lack of trust. Sometimes there was simply no story at all—no record of interaction between a tribe and county on a wide range of issues.

For these reasons, the Tribes and Counties Project was committed to the principle that each of its activities and events should provide a venue for telling a "new story" about tribal/county relations. If cooperation and coordination are to become normalized and institutionalized, change must occur at this most fundamental of levels—in the myths or stories people tell each other about their Indian or non-Indian neighbors:

*"When/ entering into a government-to-government relationship, there is always a risk that people would perceive that the county is giving up some of its legal authority... We had to be careful to talk about things in a way that neutralized the issue of sovereignty vs. non-sovereignty; and what it means to have this checkerboard pattern of land, in terms of the county's rights and in terms of the tribal rights, which are fairly unclear when it gets down to the details." —Laura Porter, former Mason County Commissioner*

Based on the premise that new stories would follow if opportunities for constructive Indian/non-Indian interaction were created, project strategy focused on raising and shaping public policy dialogue wherever possible around the issue of tribal participation.

## Working on Many Fronts

The Tribes and Counties Project was multifaceted, incorporating a number of complementary elements. Each was designed to further the process of normalizing, then institutionalizing, cooperation between county and tribal governments. Together, these elements are best described as a set of tools:

**Convening/Facilitation/Mediation:** Throughout the project, the Center brought tribal/county representatives together and facilitated their discussion on issues of mutual concern. Project staff then helped them develop memoranda of understanding, cooperative agreements, and other joint processes and products.

**Technical Assistance:** As consultant, advisor, and information source, the Center provided expertise on technical issues related to tribal/county cooperative efforts. These included land use planning and regulation, ordinance development, interagency and intergovernmental agreements, policy analysis, community outreach and strategic planning.

**Information Collection and Dissemination:** The Center functioned as a "clearinghouse" for information on how to resolve intergovernmental challenges through improved cooperation. Publications and resources, developed by project staff and others, were distributed to tribal/county participants.

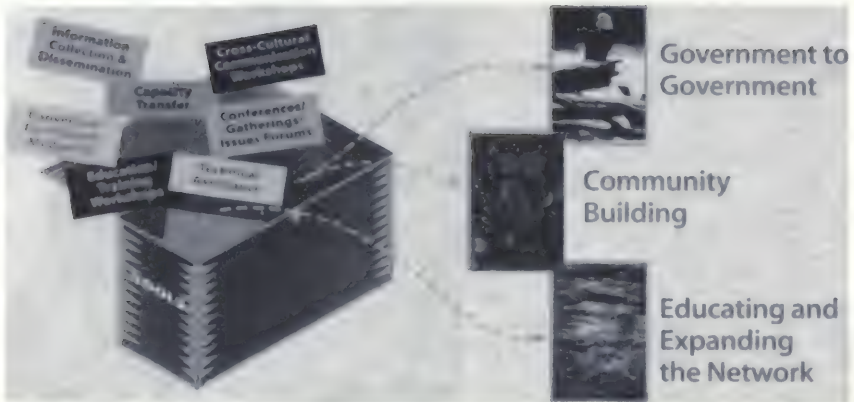
**Conferences/Gatherings/Issue Forums:** Indian and non-Indian representatives were convened to discuss what is being done and what else is possible to improve Indian/non-Indian relations. Center staff made presentations on tribal/county cooperation at conferences, conventions, and workshops sponsored by other organizations across the state and region.

**Education/Training Workshops:** Educational programs, developed and presented by the Center, prepared Indian and non-Indian officials and staff for cooperative activities.

**Cross-Cultural Communication Workshops:** Community-building programs, intended to take Indian/non-Indian relations past the "paper" stage, addressed the appreciation, understanding, and respect for culture and differences that must be in place to implement agreements effectively.

**Capacity Transfer:** The Center provided externships, outreach programs, and other opportunities for tribal members to increase their leadership capacity, and to prepare them for a role in fostering, maintaining, and implementing cooperative tribal/county activities.





### Putting These Tools to Work

The Tribes and Counties Project applied these tools in three key areas:

- 1) **Community-Building:** Although they are neighbors, tribes and counties have rarely worked on building community together. This project created opportunities to open communication, encourage understanding, and build relationships—all essential for tribal/county cooperation.
- 2) **Government-to-Government:** A host of cultural and jurisdictional issues is inherent in agreements between a tribal nation and local county government. The project offered a variety of forms and models that allowed tribes and counties to work together, government-to-government.
- 3) **Educating and Expanding the Network:** Tribal and county governments are surrounded by professional organizations, coalitions, government agencies, and non-governmental organizations. Fostering the normalization and institutionalization of tribal/county cooperation requires educating this broad network and expanding the ranks of those who will speak on behalf of cooperation.

### Achieving Results

After nearly a decade working with tribes and counties to normalize and institutionalize intergovernmental cooperation, we have learned that the work has only just begun. Cultural and jurisdictional discord between tribal and county governments has set the stage for conflict in the foreseeable future. However, where few models or examples were available ten years ago, the Tribes and Counties Project with its multifaceted approach produced significant results in five areas:

- Increased familiarity of tribal leaders and staff with county leaders and staff
- Opened lines of communication between individual tribes and counties
- Improved capacity for problem-solving within and between governments
- Gained both tribal and county commitments to seek collaborative solutions
- Developed specific models for agreements and procedures

## Notes on How to Use this Report

In writing and designing this report, a variety of graphic and visual elements are used to illustrate key models and processes developed during the Tribes and Counties Project. Throughout the report, information is presented on several levels reflecting tribal, county, and community involvement in the project. Because the Tribes and Counties Project incorporated many efforts and endeavors over a six-year period and referenced a diverse foundation of earlier NRRC projects, a number of graphics are presented to simplify the complexity.

We have made every effort to present the outcomes and lessons learned in a format that is easy to follow, moving from general to specific. For this reason, some processes emphasize only the important highlights. The results, stories, and lessons learned over the last decade are unparted in four segments:

**Chapter 1:** An annotated history of the last 200 years of Indian and non-Indian relations with respect to land and resources. A knowledge of this history is essential in understanding the conflicts of today.

**Chapter 2:** The story of the Swinomish Indian Community and Skagit County Joint Comprehensive Land Use Plan. This landmark effort, completed during the Indian Land Tenure Project, created the foundation of the Tribes and Counties project approach.

**Chapters 3-5:** Details of the project focus on three key areas: Community-Building, Government-to-Government, and Educating and Expanding the Network.

**Chapter 6:** A discussion of the project outcomes, details of the final Tribes and Counties Conference, and a look toward the future.

Readers desiring more detail on specific elements of the Tribes and Counties Project are encouraged to delve deeper into the text accompanying each section and into supplementary sources referenced in the bibliography. Several publications mentioned in the text are available for perusal or can be accessed through the NRRC (See Appendix 1, "Order Form").



About the Photos: A Sense of Place







## Chapter 1

## FOUNDATIONS OF THE PROJECT

*Where the Journey Began*

*"The past is our heritage, the present is our responsibility, the future is our challenge."— [anonymous]*

To properly understand the approach, activities, and accomplishments of the Tribes and Counties Project it is important to review the context and environment in which it took place.

At the macro level, there are several hundred years of interaction between the tribes and the federal government to consider, including key events, policies, and legislation with lasting impacts today. This includes recognizing the history of Indian/non-Indian relations around specific issues of governance, land use, and natural resource management—a history which continues to affect relations on a wide range of issues. Focusing closer, Washington state over the past few decades has seen both heated confrontation and ground-breaking cooperation between Indians and non-Indians.

The Tribes and Counties Project recognized that an awareness of history is essential in building cross-cultural understanding and is a necessary prelude to intergovernmental cooperation. The following pages present a chronology and summary of this history, including the net effect today of events at the federal level and in Washington state. This history is not intended to be comprehensive, but rather to provide a context for the project work.

## FEDERAL INDIAN POLICY

The history of federal/tribal relations is one of fluctuating governmental policies towards Indians, their land, and resources. These policies have produced disastrous effects on Indian tribes and Indian peoples. For the past 200 years, federal policy has wavered between the goals of *removal* (separating Indians from the rest of society) and *assimilation* (absorbing Indians into the mainstream). These vacillations have forced the tribes to react to vastly different attitudes, expectations, and situations—often before they could fully recover from the damages of previous programs.

Photo by Natalie Tobler

## Early Relations

Two European legal doctrines, *discovery* and *conquest*, formed the basis of dealings between the native inhabitants and the newcomers, giving rise to the complex modern body of law governing Indian land. This body of law attempts to define the legal relationship of Indians to their land and resources within the American legal system.

**Doctrine of Discovery:** Discovery was, in essence, a principle of exclusion or preemption that bestowed on the "discovering" nation the exclusive right to make treaties with native inhabitants for the purpose of establishing trade relations and settlements.

Discovery allowed a nation to regulate relations with the native population in any manner it wished, free of interference. It also bestowed on the "discoverer" the exclusive right to acquire land from the natives. The doctrine was intended to regulate relations between European nations and did not address the rights of the native people.

**Doctrine of Conquest:** The separate legal doctrine of conquest established that a conquest by force of arms merely displaced the old sovereign and gave dominion to the conqueror. The existing laws of the country remained in force until altered, and the inhabitants retained their individual property rights unimpaired. The only exception to these rules, and the only means of gaining title by conquest, was to prevail in a "just" war. Without this justification, the conqueror could only obtain title to the lands of the conquered by purchase or by voluntary cession.

In keeping with these guiding doctrines, and following America's independence from England, Congress forbade settlement on Indian lands beyond state boundaries. The Northwest Ordinance of 1787 affirmed Indian property rights as a national policy, declaring in part:

*"The utmost good faith shall always be observed towards the Indians: their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed."*

The United States Constitution, ratified in 1789, consolidated the power of Congress over Indian affairs. All existing treaties continued in force affirming respect for Indian rights, while future treaties were to be approved by the Senate. The Constitution also declared treaties, including Indian treaties, to be the "supreme law of the land," placing them outside state



Photo courtesy of Choctaw Confederated Tribes archive.



or local legislation. Today, it is when Indian treaty rights and local-level objectives or activities collide that much of the conflict between tribes and counties arises.

Administrative responsibility for Indian relations in the early republic was placed in the Department of War; in 1849, the Bureau of Indian Affairs (BIA) took over the responsibility within the Department of the Interior.

## Land Cessions and Westward Removal

Deeply committed to the rights of liberty and property, the young republic embarked on its national course, adhering to the august principle that Native Americans had unquestioned rights to their lands. Unfortunately, the gap between principle and practice (or central policy and local reality) widened, accompanied by frontier brutality. Land cessions and westward removal soon became the national policy, accomplished by treaties and land purchases. Indian rights to land continued to be respected formally, but legal extinguishment of most of those rights became the nation's goal.

One of the earliest federal Indian policies limited relations between Indians and non-Indians by regulating and restricting trade. Article I, Section 8 of the U.S. Constitution states, "the Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with Indian tribes." Among the early laws enacted were non-intercourse acts prohibiting land deals with the Indians except with the specific approval of Congress. Despite these trade restrictions, exploitation of Indians through trade was one of the major causes of conflict between Indians and non-Indians on the western frontier. The constitutional principle of Indians interacting with non-Indians at the federal level, rather than the state or local one, is a central reason why tribes and counties have had relatively little contact and few working relationships.



Photo courtesy of National Geographic Archives

## Policy of Removal

By the early 1800s, non-Indian settlers moved west rapidly, spurred by their quest for land and the philosophy of Manifest Destiny. The westward expansion led to important changes for native populations—most notably the policy of removal. Trade restrictions could no longer maintain peace between

Indians and non-Indians. In 1830, the Indian Removal Act forcefully relocated all Indian communities east of the Mississippi to the west.

The "Five Civilized Tribes" were marched from their homes in the Southeast along the "Trail of Tears" to Oklahoma. Tribes from the Northeast and Great Lakes were also subjected to this policy. A series of boundaries for a permanent "Indian Country" was drawn, beyond which American settlement would not take place. Before long, however, each of these lines was breached by new waves of settlers in the western expansion.



## Reservations and Allotment: Attempts at Assimilation

The federal government justified the removal policy as a way to protect the Indians from repeated encroachment by white settlers. There was, however, a fundamental flaw in the policy: there was no way that Indians could be removed fast enough or far enough.

By the mid-1800s, repeated conflicts between tribes and settlers over land and resources led the federal government to a new form of removal, pushing through a series of treaties that established reservations. This policy, aggressively pursued, reserved certain areas in perpetuity as homelands for the tribes. In exchange, the tribes agreed to cede the rest of their territory to the newcomers. In many cases, the tribes in the treaties reserved other rights, such as medical and educational support and access to traditional hunting and fishing resources.

## The Allotment Period

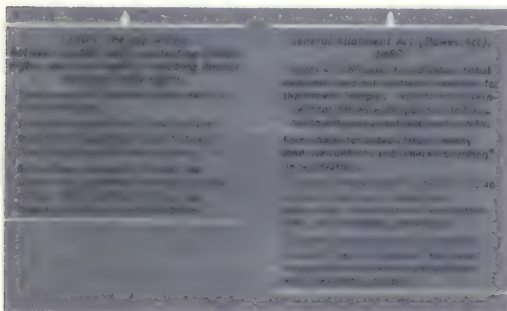
Initially, reservations were seen as a means to isolate the Indians, protect them from the settlers, and provide them a homeland. The Indians, however, could not continue their traditional lifestyles while confined to reservations: the land base, in most cases, was not sufficient to support their subsistence economies.

Congress closed the treaty-making era in 1871, but reservations continued to be created by executive order. Attempts to "civilize" and assimilate the Indians continued with the General Allotment Act (Dawes Act) of 1887. The Act sought to teach Indians "American" ways by converting them from a communal land use system to private, individual land ownership. The theory was that this would then make farmers out of "savages."<sup>1</sup>

The Allotment Act was designed to transfer reservation lands from tribal to individual ownership. Individual members of tribes were allotted from 40 to 160 acres to establish family farms. Land not allotted or otherwise reserved for the tribe was considered "surplus," sold to the government, and then opened for homesteading. Allotted lands were to be held in trust for a period of time (at least 25 years) thought to be sufficient for Indians to assume management of their own affairs. This trust period was extended several times and is now indefinite.

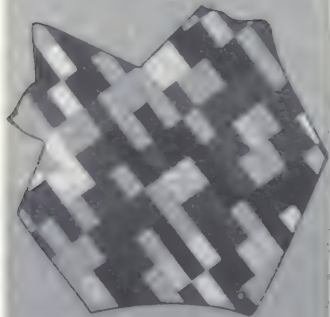
The Allotment Act was not a success. In fact, according to the Bureau of Indian Affairs, "It is an understatement to say the allotment was not successful. In truth, it was a disaster for the nation's tribes. In the nearly 50 years of the allotment period, Indian land holdings were reduced from more than 136 million acres in 1887 to less than 50 million acres in 1934, when the policy was abandoned completely."<sup>2</sup>

Tribal communities were severely shaken by the results of allotment. Many allotments were of an economically insufficient size—they simply could not be used. Over time, after many Indian allottees were granted fee title to their lands, they sold their fee patent allotments (usually to non-Indians) to provide cash for poor families or to pay debts. Many individuals lost properties to county governments when they failed to understand that taxes must be paid on the land. As the reservations were divided up, a "checkerboard" pattern of land ownership developed when non-Indians acquired allotments and other lands.



### "Checkerboard" Ownership of Reservation Land

The checkerboard pattern of land ownership on reservations was a result of the federal government's policy of allotment. Under this policy, land was divided into small parcels, some of which were allotted to individual Indians and others to the federal government. This pattern of ownership was often referred to as "checkerboard" because of the alternating squares of land ownership.



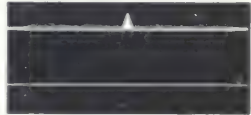
Legend:  
 Federal Land  
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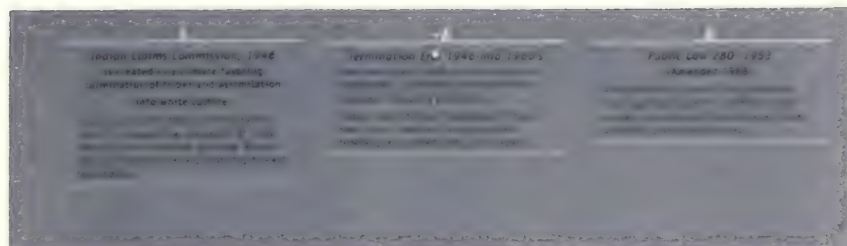
### Revival of Tribal Organizations

In 1924, Congress passed a statute conferring citizenship, but without guaranteeing the right to vote, to all Indians born within the United States. While this can be seen as another attempt to "Americanize" and assimilate the Indians, it contained the seeds of the coming "reorganization" era, when federal policy focused on preparing Indian groups to take part in the political process.

The Indian Reorganization Act (IRA) of 1934 ended the allotment period, launching a brief revival of tribal organizations. Its measures included restoring Indian land bases and promoting economic development on the reservations. Some land was purchased and returned to tribal control during this time, but the Indian land base remained essentially unaltered and most of the economic development funding never arrived.



Tribes were not legally bound to reorganize under the IRA, but hundreds did so, with help from the federal government in drafting new constitutions, codes and government structures. Some tribes retained a traditional form of governance



## Settlement of Indian Claims

In 1946, Congress created the Indian Claims Commission to hear and decide tribal claims against the United States and report its findings. Most claims involved the improper taking of tribal land. The Claims Commission was established for these reasons: 1) a strong public sentiment that wrongs against the tribes should be made right and a policy of terminating tribes; and 2) the assimilation of Indians into society was gaining momentum; people who favored assimilation felt that resolving land claims was a first step. The net effect of the Claims Commission was to cement the alienation of many acres of tribal land at prices far below their value.

## Termination Era

From the mid-1940s to mid-1960s, tribal communities faced the most direct challenge to their survival in the twentieth century. Dillon Myer, director of detention camps for Japanese Americans during World War II, became Commissioner of Indian Affairs. Known as the Termination Era of federal Indian policy, the government sought to end (or "terminate") the special relationship between the federal government and the tribes (known as "federal recognition") and to dissolve tribal communities.

These efforts culminated in House Concurrent Resolution 108, passed unanimously by both houses of Congress in 1953. HR 108 stated in part that it was the policy of the federal government, "to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are acceptable to other citizens." As a result, over 100 tribes, bands, and rancherias were terminated and 2.5 million acres of land removed from protected status. Approximately 12,000 Indians lost tribal

affiliations that included political relationships with the United States. Today, some of these "terminated" tribes have been "restored"; enjoying their federally recognized status once again.

Public Law 280, also passed in 1953, empowered states to assert civil jurisdiction over reservations—with or without tribal consent. Both pieces of legislation have created difficulties and jurisdictional struggles between tribes and local governments.

Concurrently, the BIA encouraged tribal members to leave their remaining reservations under BIA's "relocation" program. Designed to reduce reservation unemployment, the program was intended to provide grants to Indians who relocated to urban areas to find work. Once relocated, however, the Bureau's support tended to disappear, creating a population of urban Indians who added dislocation and culture clash to their unemployment problems.

### Self-Determination and Self-Governance

By the mid-1960s, Indian groups began taking a more active role in their own socioeconomic programs, affecting implementation of federal policy. Indian self-determination emerged as a policy during the Nixon administration and continues today. This policy favors maintaining the federal protective and trust relationship but, at the same time, provides increased tribal participation and control over tribal affairs. It states that "the time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."

American Indian self-governance and power is derived from traditions pre-dating the U.S. Constitution. "Indian governmental powers, with some exceptions, are not delegated powers granted by express acts of Congress, but are inherent powers of a limited sovereignty that have never been extinguished."

The Supreme Court consistently has found that tribal governments possess sovereignty over their members and their territory. These powers are limited only where federal statute, treaty, or other restraints have specifically divested

them. The authority of Indian tribes to legislate or adopt substantive civil and criminal laws comes from their status as sovereign political entities. As part of this power, it has been upheld that tribes have the authority to regulate land use through zoning. However, although there is no argument that tribes have jurisdiction over tribally-owned land, the controversy continues over whether tribal governments

have the authority to exercise control of land use on non-Indian land within the reservation boundaries.

A series of court decisions in the early 1980s affirmed some tribal rights to establish and enforce zoning codes applicable to all reservation lands. In the landmark case *Montana v. United States*, 450 US 544 (1981), the Supreme Court found that the Crow Tribe could not regulate hunting and fishing of non-members on fee lands, due to a presumption that the tribe did not have comprehensive



Photo courtesy of the National Museum of the American Indian

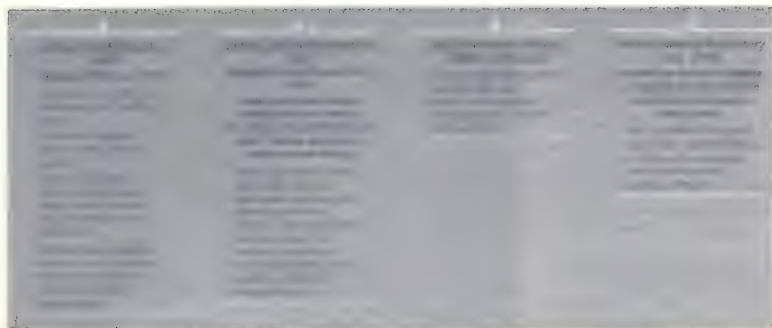
authority to regulate non-Indian activity on non-Indian owned land. However, the court identified significant exceptions to this rule:

*"A tribe may also retain inherent power to exercise civil authority over the conduct on non-Indians on fee-lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."*

Despite this ruling and others that clarify the extent of tribal authority in certain cases, there are two factors which complicate the issue: 1) non-Indians subject to tribal jurisdiction have no rights to participate in tribal government; and 2) tribal sovereignty is not subject to the normal constitutional restrictions and safeguards to which all other types of government in the United States are subject.







In 1968, the Indian Civil Rights Act gave tribes additional rights and responsibilities by imposing on them most requirements of the Bill of Rights. It also provided funds to develop tribal judicial systems; amended Public Law 280 to require tribal consent before states can have civil jurisdiction over reservations; and established a procedure for retrocession, or the return of civil jurisdiction on reservations to tribal governments.

The policy of self-determination became law with passage of the Indian Self-Determination and Education Assistance Act of 1975. Tribes have made considerable use of this law to assume, by contract, the administration of important reservation programs. The federal government, however, still makes basic decisions about the contracts as part of its overall trust responsibility. This situation touches at the heart of the ongoing paradox in federal-tribal relations—that of federal control negating tribal self-determination.

### The Self-Governance Project

Begun in the 1980s, the Self-Governance Project attempts to address this paradox. Nine tribes participated in the first demonstration phase or "tier" of the Self-Governance Project and another 20 were added for the "second tier." Self-Governance authorizes participating tribes to plan, conduct, and administer their own programs, services and functions rather than the BIA, which historically has performed (and often, mismanaged) these functions for the tribes. If the project succeeds, most or all of the federally-recognized tribes could apply self-governance strategies at some point in the future.

While the initial goal of federal spending on Indian programs was to assist Indians in shaking off their dependency and become

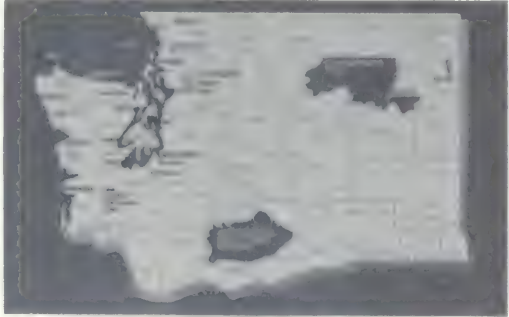
self-supporting, Indian communities and individuals have continued to need outside help to bring them up to the economic and social level of other American citizens.

The need for federal programs points out an obstacle to tribal sovereignty and autonomy. Most Indian tribes and reservations are not economically self-sufficient. Few attempts to replace the Indians' aboriginal self-sufficient economies have succeeded. One piece of federal legislation that is having an effect in this area is the 1988 Indian Gaming Regulatory Act. Many tribes now use gaming as a way to bring badly-needed capital into their economy.

## WASHINGTON STATE/TRIBAL RELATIONS

Isaac Stevens, the first governor of Washington Territory, was instructed by Congress in 1854 to make treaties with the local Indian tribes and to move them onto reservations, freeing up land for non-Indian settlers. Non-Indian settlement expanded rapidly after the treaties were completed and Washington became a state in 1889.

For most of its history, Washington state and the tribes have had an adversarial relationship. Most notable among the conflicts were the "Fish Wars." Heating up in the 1960s, these confrontations percolated for decades leading to the Boldt Decision, which escalated all the way to the U.S. Supreme Court.



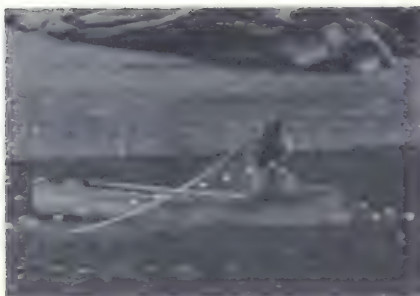
*Indian reservations in Washington state*



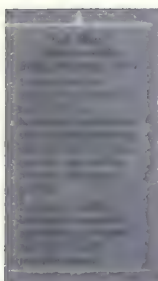
*Photo by Natalie Tobin*

The process that ended the Fish Wars, generated several landmark cooperative agreements, beginning with fisheries and progressing to other natural resource issues. During the 1990s, the Centennial Accord, Brendale Decision, and the Growth Management Act have all had a major impact on tribal/state/local relations in Washington. This history is discussed below in relation to its effect on the environment in which the Tribes and Counties Project was conceived and conducted.





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### "Fish Wars"/Boldt Decision

Each of the Stevens Treaties included the following phrase:

*"The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory."*

But in just a few short decades, salmon runs began to decline. Rapid expansion in non-Indian fishing coupled with extensive logging, destruction of watersheds, road-building, pollution, irrigation projects, property development, and continued building of dams on most major rivers left little or no passage for salmon to their spawning areas. The state also passed legislation that limited Indian fishing by closing rivers and streams in Puget Sound, but allowed non-Indian fishing boat and trap operators to continue taking salmon in salt water.

During the 1960s and 1970s, disputes over the regulation of Indian fishing resulted in demonstrations, fish-ins, and confrontations between Indian and non-Indian fishing interests, commonly known as the "Fish Wars." The tribes felt that the state was violating their treaty rights by not allowing them access to the fish and not protecting the fish runs. The federal government and seven Puget Sound tribes (later joined by other Washington state tribes) filed suit in federal court.

The Boldt Decision, reached on February 12, 1974 by federal judge George Boldt, ruled that:

- ◆ Treaty tribes had been systematically denied the right to fish off their reservations.
- ◆ The tribes were entitled to the opportunity to catch half the harvestable salmon and steelhead returning to traditional off-reservation fishing grounds.
- ◆ Ceremonial and subsistence catches were not to count as part of the off-reservation share.
- ◆ By meeting specific conditions, the tribes could regulate fishing by their members.

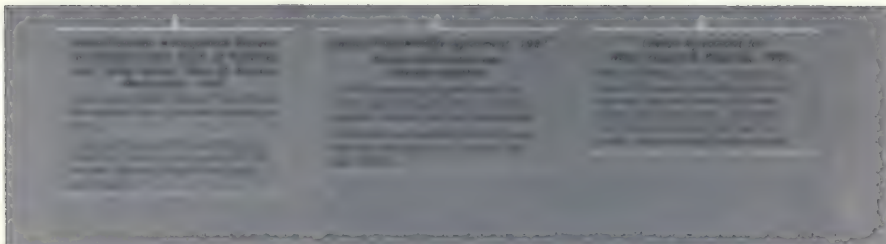
The Boldt Decision did not end the "Fish Wars." Confrontations between Indians and non-Indians at fishing areas became more heated. Controversial as it was, the Boldt Decision was upheld unanimously by the U.S. Ninth Circuit Court of Appeals in San Francisco, and by the Supreme Court in a landmark series of cases.

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On July 2, 1979, the Supreme Court upheld almost all of the Boldt Decision: The court ruled that the "fishing in common" phrase in the Stevens Treaties meant that non-treaty fishermen might also fish at the Indians' usual and accustomed places but the tribes have a right guaranteed by treaty to 50 percent of the harvestable fish.

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Between 1979 and 1984, the state and tribes went back to court, many times as they struggled with opposing visions of how to implement these treaty fishing rights.



### Cooperative Agreements Facilitated by NRRC

Cooperative negotiated agreements emerged in the mid-1980s, as Washington state and the tribes began to set aside their historically combative relationship. NRRC played a key role by facilitating many of the processes that led to those agreements, beginning with joint salmon management.

For decades, contentious fights over salmon fisheries had eroded effective management of this prized resource. In 1984, the Washington State Department of Fisheries (WDF), now part of the Department of Fish and Wildlife, and the treaty Indian tribes of western Washington launched a new approach to fisheries management. After their long and bitter battles, working together was not easy. WDF and the tribes requested assistance from the Center resulting in the *Joint Fisheries Management Project*.

To longtime observers of the salmon fisheries, progress made by the 21-month Joint Management Project was all but unbelievable. In 1983, the state and tribes had undertaken 66 court actions on season management matters. In 1984, they did not go to court once and in negotiations settled every key season management issue. Soon thereafter, they successfully negotiated a *Puget Sound Management Plan* to guide their joint working relationship.

In the wake of this landmark effort, leaders from the timber industry, environmental groups, Indian tribes and state agencies in Washington state successfully negotiated a flexible, cooperative approach to forest practices management. Called the *Timber/Fish/Wildlife Agreement* (TFW), this unprecedented effort resolved long-standing and difficult issues regarding the interaction of timber, fish and wildlife, avoiding

a major confrontation before the Washington Forest Practices Board, the state's timber regulatory agency. This agreement was approved and funded during the 1987 session of the Washington State Legislature without a dissenting vote.

In 1990, the State of Washington hired NRRC to facilitate a process for cooperative water resources planning. The Center's effort brought together representatives of state government, Indian tribes, local governments, agriculture, the environmental/recreational community, business community, and sports/commercial fishing groups. Despite a long history of conflict over complex issues, participants developed the *Chelan Agreement*, which detailed a cooperative decision-making process for Washington's water resources.



Photo courtesy of  
Washington State  
Department of Fish  
and Wildlife



# Centennial Accord: First of Its Kind in the Nation



Governor Booth Gardner and  
Jameson S'Kallaw Tribal  
Chair Ron Allen sign  
the Centennial Accord

Northwest Renaissance Festival, 1989

Clear directives on state/tribal interactions in Washington state did not exist until recent years. Individual state agencies adopted their own tribal relations policies, creating an ad hoc approach to state/tribal relations. In August 1989 (Washington state's centennial year) then-Governor Booth Gardner and the federally recognized tribes of Washington created a new opportunity for state/tribal cooperation and coordination in a document known as the "Centennial Accord."

This accord was heralded by Indian and non-Indian leaders alike as introducing a new era of partnership. Other states have looked to the Centennial Accord for its model language.<sup>3</sup>

The accord acknowledges the tribes as equal rather than subordinate governments, and decrees that the state and the tribes will develop a "government-to-government" relationship with emphasis on natural resource management, social service delivery, and revenue sharing.

The agreement acknowledges that there is no known path to follow in developing state/tribal relations. While there are well established protocols to guide state interactions with foreign governments and other state and local governments, there are no guidelines for dealing with tribal governments.





## Brendale Decision: "Cooperation Forcing" on Land Use

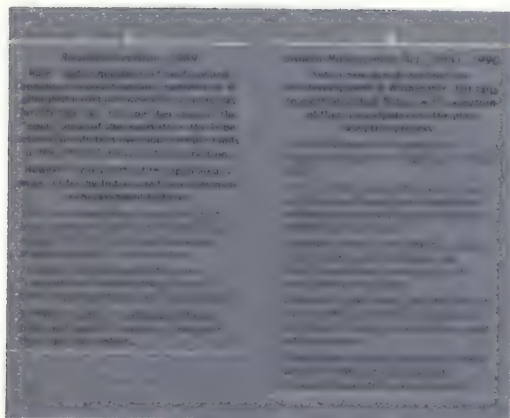
In 1989, the U.S. Supreme Court was asked to decide whether the Yakama Indian Nation had authority to zone non-Indian fee land on the 1.4 million-acre Yakama Reservation in eastern Washington. In a complicated split

decision, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* 109 S. Ct. 2994 (1989), the Court allocated jurisdiction on the basis of ownership.<sup>7</sup>

The Court ruled that, with regard to land use planning and regulation of non-member owned fee lands, Yakima County has jurisdiction over non-member lands in the "open" areas of the reservation; and the Tribe retains jurisdiction over non-member lands in the "closed" areas of the reservation. At the time of this decision, the closed area of the Yakama reservation encompassed 740,000 acres and has been closed to the general public since 1972. A total of 3% of this land is held in fee by Indians and non-Indians. However, the open area of the reservation is not restricted and nearly 50% is owned in fee by Indians and non-Indians in a checkerboard fashion.

Many tribal advocates consider the Brendale Decision an assault on tribal sovereignty. By holding that every parcel of land which passes from trust status carries away the tribe's sovereign regulatory power, it appears to curtail the territorial extent of tribal authority. But by requiring that local governments take tribal concerns into account, the Court's opinion is, for all

practical purposes, "cooperation forcing"—due to the checkerboard land-ownership pattern. Rational, comprehensive land use planning cannot occur in a checkerboard fashion. Such checkerboard patterns are the rule on the majority of reservations. In this legal environment intergovernmental cooperation, as advocated by the Tribes and Counties Project, was very timely.



## Growth Management Act

The Growth Management Act (GMA) set a new agenda for land use and development in Washington state. Adopted in the 1990 session of the Washington State Legislature, the GMA catapulted planning to the forefront.

Prior to 1990, land use planning occurred under enabling statutes that authorized, but did not require, local land use planning. State guidance was minimal and regional coordination largely absent. Mandating a "bottom-up" approach and setting a brisk compliance schedule, the GMA requires all Washington counties to designate and protect resource and critical lands.

The GMA's regionally-consistent comprehensive land use plans include, among other elements—regional facility siting, open space corridors, water availability, and transportation. Citizen involvement, coordination with adjacent jurisdictions, and mediation of disputes are all essential requirements of the process.

Nowhere, however, in the original GMA legislation were tribal governments or Indian reservations mentioned. This omission is significant: Indian tribes are governments which exercise jurisdictional authority over land use, and Indian reservations comprise more than eight percent of the state's land base. The tribes also hold

substantial off-reservation treaty protected natural resource rights on lands located throughout the state.

Much of the first six months of Phase II of the Tribes and Counties Project was spent working to address this omission. In concert with the Northwest Tribal Planners Forum and the Northwest Indian Fisheries Commission, NRRC urged the state's Growth Strategies Commission to include language that acknowledges tribal governments, addresses the need for tribal/county coordination, and directs counties on how to proceed.

The Commission's recommendations, designed to augment GMA, included a significant tribal section, as did executive-sponsored legislation developed to implement the recommendations. Unfortunately, the effort was largely unsuccessful. Legislation that passed contained only one reference to tribes and that is only with respect to their

participation in the plan adoption process.

Photo by Natalie Cohen



#### Impact of the Growth Management Act on the Tribes and Counties

Project was significant. On the one hand, the GMA removed a critical aspect of the Skagit/Swinomish model discussed in Chapter 2: the voluntary coming together of tribe and county, based on individually-perceived incentives in a collaborative search for ways to cooperate and coordinate. On the other hand, the mandate to plan, coupled with failure to acknowledge tribal governments and their reservations, made the Center's ongoing efforts to promote cooperation especially timely—creating the need for a third party to initiate outreach, foster linkages, and broker opportunities between counties and tribes.

GMA implementation is under way. However, its goals of balancing economic development and environmental protection through regionalism and interlocal cooperation cannot be fully realized if the tribes are not represented at the table.

Successful comprehensive land use planning requires full participation of all jurisdictions, but full tribal participation is not occurring. That which is occurring is on an ad hoc basis and not within a government-to-government framework. Through its lack of policy direction, GMA has all but given the counties permission to ignore tribal governments in significant long-range decisions regarding natural resources. By doing so, GMA creates a situation with a high potential for conflict.

At the same time, it offers an unusual opportunity: for all its shortcomings, GMA is regional in scope, comprehensive in nature, and requires interlocal coordination and consistency. It implicitly "forces" cooperation at the local level and can, in time, become an effective foundation for tribal/county coordination.



## Endnotes

- <sup>1</sup> Lyden, Fremont J. and Legters, Lyman H. Editors. *Native Americans and Public Policy*, 1992 University of Pittsburgh Press p. 18
- <sup>2</sup> By 1887, more than 200 Indian schools had been established under federal supervision. At these schools, Indian youth were immersed in white American values. Forced to cut their hair and dress "American," they were taught industrial crafts and punished for using their native languages. The principal of the Carlisle Indian School said his aim was to "kill the Indian and save the man."
- <sup>3</sup> Northwest Renewable Resources Center, *Indian Land Tenure and Economic Development Project: Phase I Report*, 1987
- <sup>4</sup> American Indian Lawyer Training Program, *Indian Tribes As Sovereign Governments: A Sourcebook On Federal Tribal History, Law and Policy*, 1988 p. 35.
- <sup>5</sup> *Montana v. United States*, 450 U.S. 544 (1981) at 565-566
- <sup>6</sup> Within Washington state, however, an acknowledged limitation in scope is that the Centennial Accord only applies to state executive agencies.
- <sup>7</sup> In 1994 the Tribe reinstituted the traditional spelling of its name.

## Chapter 2

## Swinomish/Skagit Intergovernmental Cooperation, 1987-1999

## An Award-Winning Model for Cooperation

*"This program represents a long term commitment to regional cooperation between a federally recognized Indian tribe and a State of Washington county government. The process is the first of its kind in the United States and illustrates a promising alternative in land use conflict resolution. This unique program recognizes the Tribe's jurisdictional authority while looking beyond the boundaries of the reservation and working jointly with Skagit County administering zoning programs."*—Project Summary, APA/PAW Honor Award for Special Intergovernmental Coordination<sup>1</sup>

The NRRC's Indian Land Tenure and Economic Development Program (ILT), funded by the Ford Foundation and the Northwest Area Foundation, set a new precedent for tribal/county cooperation.

First of its kind in the nation, the ILT resulted in the **Swinomish/Skagit Joint Comprehensive Plan**, a solid model for cooperation recognized in multiple awards.

*"Whether or not the plan was adopted, this was a model that stood on its own."*

—Shirley Solomon, Facilitator, NRRC

The plan, in fact, has been adopted by the Swinomish Indian Community and included in Skagit County's comprehensive planning process under the Growth Management Act.

Designed to assist tribes in improving the planning, management, and use of reservation resources, the lessons learned and models developed working with the Swinomish Indian Community and Skagit County formed the basis of the Tribes and Counties Intergovernmental Cooperation Project.

Photos by Natalie Fobes

## Role of the Center: Breaking New Ground

NRRC played a major role throughout this landmark project, identifying key Indian and non-Indian players and helping them determine whether they could work together to accomplish mutual goals. Project staff served as intermediary, assisting individuals, groups and governmental bodies who have much in common but have failed to build positive relationships due to a history of misunderstanding. As project convener, the Center provided a safe, low risk climate in which to explore, build familiarity, clarify positions, and address issues of mutual concern:

*"They were the moderator, facilitator, like a big brother-big sister at times. [The facilitator] really kept everything together, when things appeared to be falling apart. She brought a kind of neutrality to it, being able to make suggestions as to how we might overcome obstacles, in a non-threatening, conciliatory, understanding, compassionate way. I think everybody felt that she was trying to protect their interest as well."*

—Gary Christensen, Skagit County Planner

The Center's approach assumed that to solve a problem successfully, all parties connected to the problem must be part of the solution. NRRC worked with participants to build positive relations despite a history of conflict. In the case of the Swinomish Tribe and Skagit County, after initial discussions the tribe looked for ways to work cooperatively with the County to resolve jurisdictional issues on the reservation. From then on, the Center played many roles to support cooperative problem-solving and keep the parties working together.

Legal scholars, among them Craighton Geopple in his *Washington Law Review* article, "Solutions for Uneasy Neighbors, Regulating the Reservation Environment After *Brendale*," (April 1990) view the Swinomish/Skagit process, described below, as one example of how to effectively resolve the apparently unworkable jurisdictional morass created by the *Brendale* Decision (see page 16).



## Swinomish/Skagit Cooperative Process

The 7,449-acre Swinomish Reservation is located on the southern end of Fidalgo Island in Puget Sound, enjoying an extensive coastline prized for residential and recreational development. The Swinomish Tribal Community, comprising 650 members from four tribes, is exercising its self-governance in two ways: by assuming broader jurisdictional responsibilities over its reservation territory; and by developing a diverse, sustainable economy. Tribal enterprises include fish processing, a casino, restaurant and cultural activities. The tribe views the ability to regulate land use activities on the reservation as one of its inherent governmental functions, integral to attaining tribal long-term goals.

Over the past century, the Swinomish Indian Reservation has changed from a communal land base to a complex "checkerboard" of land holdings and legal status. About 48% of the reservation land is Indian-owned, and non-Indian residents outnumber the Swinomish by almost three-to-one. Non-Indians own 51% of the land. This "checkerboard" pattern creates jurisdictional problems for land use planning and regulation. The tribe claims jurisdiction over all reservation lands, regardless of ownership, while the county claims jurisdiction over the non-Indian owned land.





## Laying the Groundwork for Cooperation

The Swinomish Tribe and Skagit County each administer zoning programs which include permitting and enforcement functions on the non-Indian owned land. This situation has caused problems when sometimes conflicting regulations are applied concurrently. Rather than dispute the jurisdictional question, the tribe and county agreed that the best way to resolve the conflict was to launch a joint planning program. Furthermore, the county's political climate favored cooperation, a marked change from several years before when the area was a hotbed of anti-Indian sentiment.

Despite good intentions, the parties recognized that cultural dissonance surrounding Indian/non-Indian relations could make true collaboration difficult, if not impossible, to achieve. The approach called for an intermediary to open lines of communication, provide necessary information, and facilitate problem solving.

Representatives from the Swinomish Tribal Community and Skagit County, convened by the Center, came together to discuss issues of mutual concern. Each acknowledged that through history, Indian and non-Indian interests have been intricately interwoven. They further acknowledged that neither government could take

successful action unilaterally without incurring substantial litigation costs. Both saw advantage in developing a formal government-to-government relationship, since both the tribe and county regulate land use activities on the reservation.

In its accepted position as a nonaligned intermediary, the Center's staff moved freely among various interests, convened the key players, began the problem-solving dialogue, and kept things moving. This approach proved especially well-suited to the task of breaking through a century of racial prejudice and distrust to address issues surrounding relationship building between Indian and non-Indian governments. It was also a highly effective way to reduce political risks inherent in a process designed to initiate change.

**Innovation carries with it risks and uncertainties.** The two parties were understandably hesitant, and needed considerable encouragement to participate. With slim operating budgets and innumerable competing demands for those resources, they were not willing to pay for this endeavor suspecting that the talks might be unproductive. Given the length of time it took to reach agreement, paying for help to talk to the "other side" would have been difficult to justify politically.

### The Critical Element: A Multifaceted "Third Party" Role

The availability of a non-partisan professional—at no cost to the participants—to function as project organizer, facilitator, mediator, researcher, analyst and catalyst, is the critical element in the approach:

*"The Center's role was in its primary function: to make sure that the process continued as a process and that the rules were followed...The process required somebody to attend carefully to all of the particular details that arise when you get people together and when you create an environment where dialogue occurs."*

—Nick Zafaratos, Planning Director for the Swinomish Tribal Community



Recreation Renewal Project in Center photo

The schematic presentation on the following pages illustrates the landmark journey toward cooperation undertaken by Skagit County and the Swinomish Tribe over a three-year period, assisted by NRRC. The complex process, simplified to its highlights in the diagram, culminated in a true government-to-government relationship: the successful model for cooperation was manifested in a Joint Comprehensive Plan as an approach for resolving land use issues on the reservation.

# INDIAN LAND TENURE PROJECT: JULY 1986-October 1989

*See also: Resource Project Model*

**Challenge:** Improve the planning, management, and use of reservation resources.

**Response:** All parties must be part of the solution.

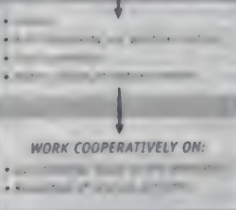
**Issue:** Cooperation not sufficient in addressing interjurisdictional conflicts.

**Overview:** Preparing for Cooperation: 1986

Swanwich Indian  
Community

NRRC  
Intermediary  
Project Convener

Skagit County



## WORK COOPERATIVELY ON:

- Review of land tenure issues
- Review of land tenure issues
- Review of land tenure issues



# INDIAN LAND TENURE PROJECT

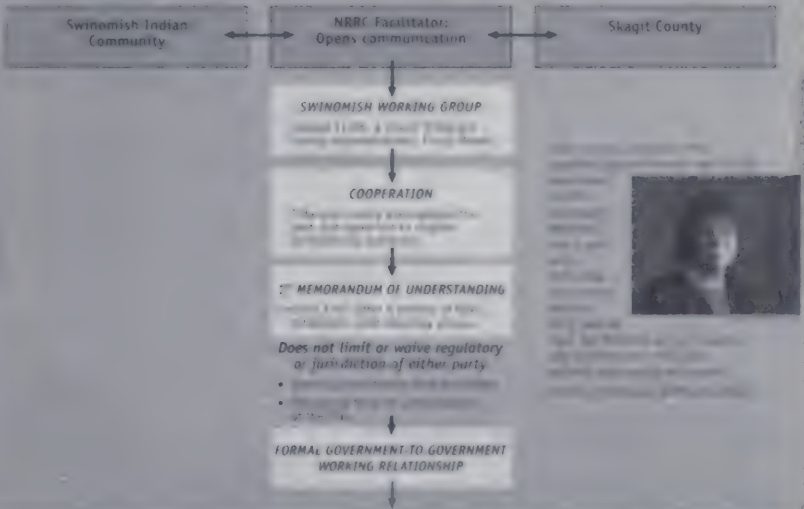
Swinomish-Skagit Joint Comprehensive Plan

## A New Model for Cooperation

**Challenge:** *Conflicting regulations stand in the way of agreement in land use decisions. Tribe claims jurisdiction over reservation land, regardless of ownership type. County claims jurisdiction over non-Indian owned land.*

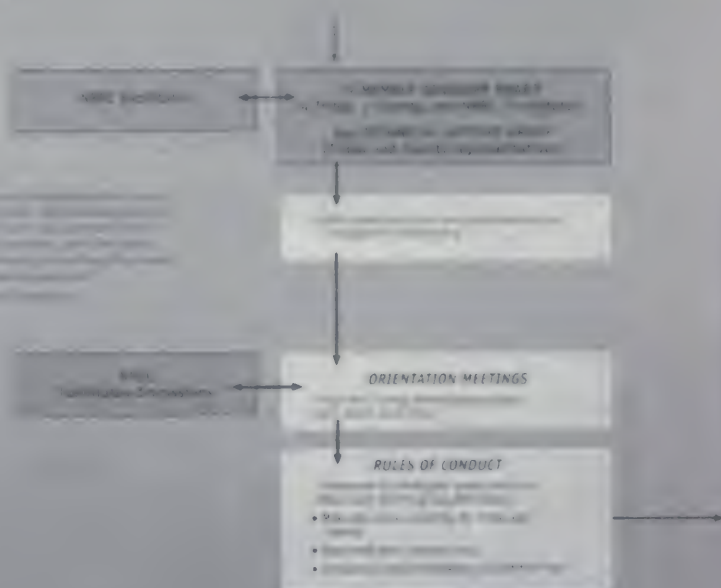
**Issues:** *Zoning  
Permitting  
Enforcement*

*Timeline: 1. Identification of Concerns 2. Dialogue*



## INDIAN LAND TENURE PROJECT

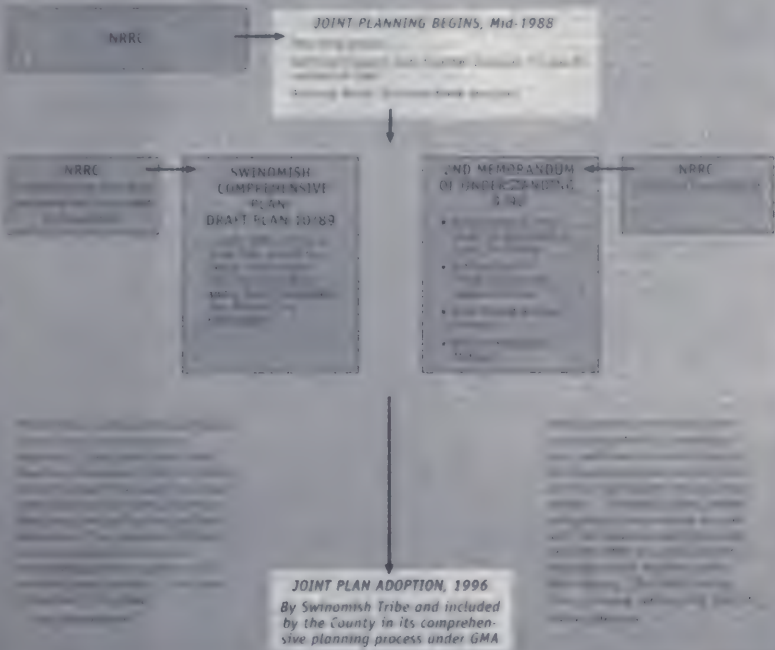
Figure 2





## INDIAN LAND FUTURE PROJECT

(Continued)



## Swinomish Working Group

By November 1986, the Swinomish Working Group was established to explore ways to create a joint land use planning and management relationship. Existing conditions, problems, and opportunities for the reservation were discussed. Policy makers involved in this issue at the time ranged from a Skagit County Commissioner and the Mayor of La Conner, to the Chairman of the Swinomish Tribal Community and planners from both jurisdictions.

The Center facilitated Working Group discussions so that both sides might clarify how they could structure and gain from a joint planning program.<sup>2</sup> Different models and strategies were presented for discussion, clarifying the scope of the issues and how they would be addressed. The first steps were taken toward developing a Memorandum of Understanding (MOU). Both the tribe and county agreed that it would be advantageous in meeting their goals to develop a working government-to-government relationship.

## Cooperative Planning: Understanding the Tribal and County Perspectives

From the beginning, the tribe and county agreed that cooperative planning was the best route to take:

*"There was a general agreement, from our respective professional backgrounds, that there ought to be a better way than the isolated and conflictive course the two governments had been running." -Nick Zafaratos, Planning Director for the Swinomish Tribe*

Reaching agreement on the scope and approach of the joint planning effort, however, took several months. According to participants, the reasons were largely political. These included maintaining the delicate balance of sovereignty on both sides while respecting the needs and viewpoints of all constituencies; and reconciling the history and ongoing process with new issues other than land-use. Similar perceptions resurfaced many times during the Tribes and Counties Project:

*"When you look at tribal planning, there's the added complexity of not only dealing with the tribal community and the political tribal community itself, but melding with the political climate of the outside. If you're talking city, county, or state, you're talking about a political climate. Having a complete understanding of how all of this interacts will determine, in part, how our processes work. It is my hope that we start gaining more and more technical expertise, not to make it more complex but to make it more simplified, to build in the flex and growth that we need as tribal planners." -Larry Campbell, Planner for the Swinomish Tribe and President, Northwest Tribal Planners Forum*

Both Skagit County and the Swinomish tribe have never wavered in their respective positions of jurisdiction on the reservation. Both needed to approach cooperative problem solving carefully, so as not to "weaken their stance" in the eyes of their constituents. As Gary Christensen explains:

*"... We have more non-Indian residents on the reservation who own half of the land. In our efforts to try and respect the tribe's interests... that means that sometimes much of the burden is actually going to be imposed on the non-tribal residents. They tend to, as property owners, think about their land and their land only. We see this even off the reservation. A landowner wants full property rights and doesn't always think of what's in the community's best interests."*



Tribal representatives also needed to show that they were not "giving in" to the County. This was for several reasons: first, as a sovereign nation, the tribe is working toward self-governance. Further, the tribe hopes to leave its dependence on federal government and county services behind. Working with the county could be perceived as giving up this sovereignty and developing further dependence:

*"The Tribe will always have a concern that entering into a joint dialogue will be seen as a weakening of our jurisdictional stand, which is a very firm one; and that means we assert absolute jurisdiction over all lands on the reservation, regardless of ownership, and the State has no business on the reservation, period... The Tribe is willing to recognize that the County has an interest in the reservation. But it doesn't acknowledge their jurisdiction... If you want a definitive determination on the extent of county interest, you probably need to argue the factual issues in court. But the point of our project is that the community can deal with the problem and avoid litigation."*—Nick Zaferatos

The county felt its actions were "risky"—in part because of the anti-Indian sentiment left in the wake of the 1974 Boldt decision, which split fishing rights 50/50 between Indians and non-Indians. Many non-Indians held that the Boldt decision gave "special" rights to Indians.<sup>1</sup> The risks, the county believed, were rooted in conflicting perceptions of cooperation. Non-Indian landowners on the reservation look to the county as the sole power to regulate activities on their land. The majority of these residents do not recognize the tribe's authority. By working cooperatively with the tribes, county representatives feared repercussions at the ballot box.

*"The biggest issue has been that we needed to have fair representation on the reservation for non-tribal members. They needed to be able to have a jury of their peers... The problem on the reservation is that as a non-tribal member, if you don't like the decisions the tribal council is making, you have no remedy, you can't vote them out of office."*—Gary Christensen

Despite these risks, both sides were clear: a cooperative approach was the best way to address these issues, largely because the alternative was litigation. "Recognizing that the interests of both were closely intertwined and that neither government could act unilaterally without incurring substantial litigation costs, they agreed on the advantages of a formal intergovernmental agreement"<sup>2</sup>





## Preparing to Work Together

Before the formal work of creating a plan began, the Center organized a series of educational "orientation meetings" for the Advisory Board. These sessions provided background and a general overview on a range of issues pertinent to the tasks at hand, as well as an opportunity for tribal/county representatives to learn more about each other. Presentations included:

- ◆ Federal Indian Law and Policy
- ◆ Functions of Tribal and County Governments
- ◆ History of the Swinomish Indian Community
- ◆ History of Skagit County, Culture Values and World View
- ◆ Consensus Decision-Making
- ◆ Cooperative Problem-Solving

Each session included time for discussion and interchange. Ground rules were created as a result of the final orientation session, for the Advisory Board and the Technical group to follow during the joint planning process (See Appendix 3). These "Rules of Conduct," as they were referred to, established a framework for the dialogue. They addressed issues of making the work a priority, both for the tribe and the county; talking with the media by approved press releases only; and agreed to use consensus decision-making in crafting the plan.<sup>9</sup>

Although the "Rules of the Conduct" did not address it directly, including the public in decision-making was an important element in the process. The Board decided to create a draft document from the two existing Comprehensive Plans (i.e., the county's plan and the tribe's plan) then go to the public for review and comment. Considering the public climate, this appeared to be the most efficient route.

### Joint Planning Process Is Essential for Success

A crucial aspect of the MOU was the joint planning process it established. Not only was it a commitment to develop a Joint Comprehensive Land Use Plan for the reservation, but the tribe and county proceeded on the basis of "sound planning principles," setting aside land ownership and the issue of jurisdiction:

*"The tribe and the county both administer zoning programs which include permitting and enforcement functions on the non-Indian owned land. This situation has caused problems because of the concurrent application of sometimes conflicting regulations. Rather than dispute the jurisdictional issue, the tribe and the county agreed that the best way to resolve the conflict was to embark on a joint planning program."*

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*"What was good about this process was that we went through some educational programs early on...Professors from the universities came to talk about legal issues and historical importance to the tribes and the region. It's important to build good, strong reasons as to why this [cooperation] is being attempted. Rather than get into the heart of the bottle early on, we tried to ease into it and educate people. This was insightful on the Center's part, and I think that was part of the success, perhaps, in being able to have some agreement—to understand each other better going into the process. I think this would be a strong component of any successful planning program, should something like it be tried elsewhere. You begin to learn about and understand who it is you are going to be working with, prior to just trying to work on something."*—Garry Christensen

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## Joint Planning Begins

Once the ground rules had been established, joint planning work began. For the next year, the outline of the joint plan was established; information content gathered, organized and agreed to; and differences reconciled between the existing Swinomish and Skagit County Comprehensive plans. The Technical Working Group put together proposals for specific sections of the plan, and the Advisory Board discussed them.

The Board began with the section, "Existing Conditions," since both sides could easily agree about existing conditions on the reservation. How they came to agreement on this section created a model for resolving matters in subsequent sections.

### Process of Creating a Joint Comprehensive Plan

- 1) The Technical Working Group, with the Center's help, developed a draft for each section of the Plan.
- 2) The Advisory Board reviewed the drafts.
- 3) The Center facilitated discussion. According to several Board members, only a few technical areas of disagreement arose requiring compromise. When comparing maps from the two existing plans, Board members were surprised at how similar they were, in terms of land use designation. Disagreements occurred over minor land-use and density designations, but the group worked through these and resolved them.
- 4) In addition to customary comprehensive plan sections, such as "Existing Conditions" and "Goals and Policies," the Swinomish Comprehensive Plan contains a unique section concerning the reservation entitled, "Portrait of a Homeland." The Board decided this section should have an "Indian feel to it," through an overview of federal Indian policies; a history of the people from the Skagit region, including the Swinomish; and a look at the current Swinomish Indian Tribal Community today. This "Indian feel" is also facilitated by side-bars placed throughout the plan that give the tribal perspective.
- 5) The completed Draft Swinomish Comprehensive Plan contains six main sections plus a table of contents and appendices. The Introduction states, "the Plan functions as a tool for the residents of the Swinomish Indian Reservation to collectively promote the general public health, safety, morals and welfare of the community."<sup>18</sup>



## Sovereignty Issues

Maintaining the sovereignty of both parties was always present as a political issue, the Center found, but it never served to derail the process for long.

*"On the sovereignty question, I think that certainly in Indian country the perspective is that a tribe is on a higher order than a county in the governmental hierarchy, and that tribes run a real danger in behaving as equals with the counties because it may in some measure abridge the depth and breadth of tribal sovereignty. That comes up again and again. The language of the MOU speaks to that by saying there is nothing in this that abridges the sovereignty of either or speaks to the jurisdictional questions of either. The MOU is a solid piece of work. There is nothing in it after all these years that I would add or change. In the MOU, the question of jurisdiction is set aside."*  
—Shirley Solomon

Documents completed by Center staff suggest that there were external issues that slowed the process, although participants played these down and the group continued to move forward.



Photo by Nature Notes

### Testing the New Tribal/ County Relationship

Two controversial events have tested the tribal/county commitment to this new relationship. The first relates to a permit for a tribally-sponsored aquaculture development, which County commissioners denied; the other to a forest practices action, which permitted logging in an on/off-reservation area sensitive to the tribe.

These events threatened to rupture the still-fragile working relationship between the county and the tribe, and caused delays to the project. Buffering the process and retaining momentum was a constant challenge, but the principals clearly recognize the opportunities created by the process and remain committed to it.

### The Brendale Decision

As a single factor, the Brendale decision, handed down in the summer of 1989, had the greatest potential to derail the process. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* [(109 S. Ct. 2994 (1989))] focused on whether the Yakima Indian Nation or the County of Yakima held authority to zone fee lands owned by non-members of the tribe within the reservation boundaries.<sup>11</sup> Two non-Indian fee-land owners, in different areas of the reservation, had brought the case.

The court ruled that the county had jurisdiction in the area where half the land was owned in fee by non-tribal members and where public access had not been restricted. The court upheld tribal zoning authority over the area that was primarily trust land and closed to the general public.<sup>12</sup>

Nick Zaferatos, Planner for the Swinomish Tribe, states the problem succinctly:

*"The County would apply its jurisdiction to fee lands, which is about half of the reservation; and the Tribe would apply its jurisdiction to all reservation lands. So we had a classic Brendale inconsistency."*

After substantial discussion on the Brendale decision, representatives involved in creating the comprehensive plan for Skagit County and the Swinomish Tribe came to the same conclusion as Williams did in her article, "Brendale and its Relationship to Zoning on Indian Reservation Lands," published in *Planning and Zoning News*: the case did nothing to resolve the jurisdictional conflict, and they had already chosen cooperation over litigation.

*"By requiring case by case determinations, Brendale did little to solve the complex problems raised by checkerboard jurisdiction. Instead it provided local governments and tribes with two alternatives—litigate or cooperate."<sup>13</sup>*



Photo by Nature Notes

## Memorandum of Understanding (II): Implementing Procedures

In addition to the Comprehensive Plan, the Advisory Board created and approved a second Memorandum of Understanding, "Administrative Procedures for Implementing a Coordinated Land Use Policy" (See Appendix 4). To everyone involved, these procedures are as important as the Comprehensive Plan itself.

- 1) Institutionalize consultation between the tribe and the county.
- 2) Establish procedures for administering the Joint Comprehensive Plan, including a Joint Permit Review Process.
- 3) Provide planning staff with a dispute resolution mechanism to address any future conflicts over implementation of the Comprehensive Plan.

The second MUC also laid out the answer to an all-important question: "Who is responsible for what?" Specifics of county and tribal government responsibility are defined, based on what each government had been providing up to this point, and the capabilities of each.

*"The county will be responsible for processing permit and other land use applications on no-trust lands other than Indian owned fee simple lands. The Tribe will be responsible for processing permit and other land use applications on trust lands and Indian owned fee lands."*

## Completion of Draft Plan and EIS

In October 1989 the Swinomish Planning Advisory Board completed the draft plan and forwarded it, with recommendations for adoption, to the tribal and county planning commissions. Jointly with the tribe, the county also issued a Draft Environmental Impact Statement (EIS) on the plan for public comment.

## Impact of the Growth Management Act on Plan Adoption

The county's ability to respond to public comments and adopt the Joint Plan was stalled in 1990 by passage of the Washington State Growth Management Act (GMA). Signed into law as ESHB 2929 by then Governor Booth Gardner, the GMA mandates some degree of planning for all cities and counties. Counties with fast growth rates must follow a series of stated planning goals and procedures.

Skagit County is considered one of these fast growing counties. The magnitude of implementing the GMA, from the County's perspective, stalled adoption of the Swinomish Comprehensive Plan until a county-wide comprehensive plan is adopted. Once the plan is adopted, the county expects to finalize the environmental review and resume adoption of the Swinomish Comprehensive Plan. They will consider it as a Joint Plan within the Comprehensive Plan. To be adopted as such, the Swinomish Comprehensive Plan must conform to policies written in the County-Wide Plan—a goal which is already close to being met. It appears that only minor modifications will be needed to bring the Joint Plan into full conformance. Nick Zaferatos sums up the cooperative effort this way:

*"Ever since the work started in 1987, mentally the Tribe has, and I think the County also has accepted that we are in a mode of working together, shoulder-to-shoulder. While the plan itself has not been adopted yet, the fact that we started it, and that we came out of it demonstrates that we are working true to the commitments that were made in that plan."*

*"And that's how it all works. You build the basic institutional framework, the basic understanding, and that allows the administration of those problem issues to be addressed within a framework of coordination. It gives us very clear guidance about what our collective public policies are. It prompts us to work together and to cooperate. And if there is a willingness there, and political support by the elected officials, then you have every reason to expect to succeed."*

In 1996, the Swinomish Tribal Community adopted the Joint Comprehensive Land-Use Plan as the land-use plan for the reservation. Skagit County has incorporated the plan into its ongoing comprehensive planning process under GMA and expects to adopt it in 1997.



### Lessons Learned

Lessons learned during the ILT Project (1987-1989) formed the basis of the Center's approach in the Tribes and Counties Project. In addition, educational sessions developed for the ILT's Swinomish/Skagit process formed the foundations of the later "Short Course on Tribal/County Intergovernmental Cooperation" and Fellowship Circle Model; while the two Memoranda of Understanding developed by the Swinomish Tribe and Skagit County have been used by several other tribes and counties as a model for their own efforts toward cooperation. (See Chapter 4, Government-to-Government Examples.)

Important lessons were learned in two areas. The first involves reasons for why the ILT was so successful. These include the project's multifaceted approach; the Center's role as facilitator; the ability to present alternative courses of action when needed; and providing the services at no cost to the participants.

The second has to do with where the greatest challenges lie for the future, as tribes and counties prepare to work together: Long-standing barriers to communication must continually be broken down (although they may never disappear entirely); participation cannot be forced or artificially accelerated; the new tribal/county relationships forged are tenuous and fragile, requiring effort and commitment to sustain; more time must be spent on education, orientation, and skills development; and that unforeseen and uncontrollable events require almost constant buffering.

### Endnotes

- <sup>1</sup> This award was presented to the NRBC for its Indian Land Tenure Program by the Washington Chapter, American Planning Association and Planning Association of Washington Joint Awards Program, 1989-1990.
- <sup>2</sup> Northwest Renewable Resources Center, (NRBC), *Indian Land Tenure and Economic Development: Phase I, Northwest Renewable Resources Center Report*, 1987, p. 53.
- <sup>3</sup> Fishing has been an important Skagit Valley industry and recreation for non-Indian residents since the early days of settlement. Compounding a century of racial tensions that had existed between the two communities, the Boldt decision produced so-called "hotbeds" of anti-Indian sentiment in areas around Puget Sound.
- <sup>4</sup> Williams, Kristine M. Coordinating Jurisdiction on Indian Reservations, *Planning and Zoning News*, October 1992, pp. 5-10.
- <sup>5</sup> Memorandum of Understanding for Establishing a Coordinated Tribal/County Regional Planning Program Between The Swinomish Indian Tribal Community and Skagit County, March 17, 1987.
- <sup>6</sup> *Ibid.*
- <sup>7</sup> *Ibid.*
- <sup>8</sup> Swinomish Land Use Advisory Board (SLUAB), Draft Swinomish Comprehensive Plan, September 19, 1990, p. 4.
- <sup>9</sup> The rule concerning communication with the media appears to be the rule most important to the participants at the time: "9. We agree that all communications with the news media will be by periodic, approved press releases only." Due to the risks both parties were taking (and how these might appear to their constituencies), they feared distortion or inflammation of issues by the press. This decision was made despite the facilitator's encouragement to keep the media—and thus the public—informed.
- <sup>10</sup> Swinomish Land Use Advisory Board (SLUAB), Draft Swinomish Comprehensive Plan, September 19, 1990, p. 7.
- <sup>11</sup> Williams, Kristine M. *Brendale and its Relationship to Zoning on Indian Reservation Lands*, *Planning and Zoning News*, October 1992, pp. 10-12.
- <sup>12</sup> *Idem*, Coordinating Jurisdiction on Indian Reservations, *Planning and Zoning News*, October 1992, pp. 5-10.
- <sup>13</sup> *Idem*, *Brendale and its Relationship to Zoning*, *Planning and Zoning News*, October 1992, pp. 10-12.
- <sup>14</sup> Memorandum of Understanding Between the Swinomish Indian Tribal Community and Skagit County, Administrative Procedures for Implementing a Coordinated Land Use Policy, September 19, 1990.

## Chapter 3

*"If we want to find ways to work together, we  
have to change more than just our policies. We have  
to change our attitudes."*

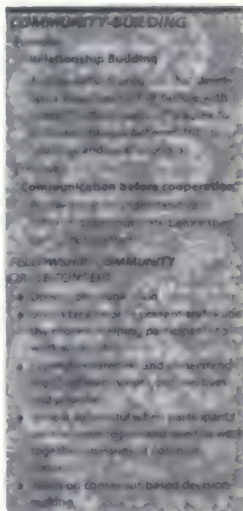
—Anne Pavel, Skokomish Tribal Council

For the majority of tribes and counties, traveling the journey toward cooperation depends on community building—first, by opening one-on-one communication between individuals and then among groups of community and government leaders. By working together to develop a shared understanding about the range of perspectives and values in the community, tribal and county governments can establish a foundation for working together.

This is why community building, fostered by the Center through the Fellowship/Community Circle Model, is such a critical element in the Tribes and Counties Project. Fellowship/Community Circles are designed as cross-cultural, community-building programs that reach beyond the project's core participants, creating a broad network of people who will speak on behalf of tribal/county cooperation and other cooperative efforts within a community.

Between 1992 and 1996, the model has been applied three times in Washington state. Circle participants have voluntarily reconvened on many occasions to affirm their ongoing commitment to cooperation.

The Circle Program maximized the benefits of the Tribes and Counties Project. It gave community members the ability and gained their commitment to develop and sustain individual and institutional linkages between tribes, counties and other local entities. Program participants set aside personal and organizational barriers to communication as they became comfortable with other Circle members. Each participant gained an expanded awareness of different values, perspectives, and priorities through varied program activities.



## PILOT FELLOWSHIP CIRCLE (SERIES I)

Conducted as a pilot, the first Fellowship Circle series took place in four sessions between June and October 1992. Its 16 participants were selected by the Center for their diverse backgrounds and experience, wide range of values and viewpoints, and for their willingness to work with Center staff in shaping the Fellowship Circle program.

The Fellowship Circle concept emerged from the Indian Land Tenure Project when staff realized that without a foundation for cooperation in place, finding ways to normalize and institutionalize tribal/county cooperation—the goals of the Tribes and Counties Project—could not be achieved. That foundation is the growth of knowledge, understanding, trust, and relationships within and between communities. The pilot series of the Fellowship Circle (although not targeted to a specific geographic region) was effective in building parts of that foundation, and made these intergovernmental aims more likely to succeed.

In a setting that encouraged open communication, participants explored values, perspectives, and priorities. Cultural differences were framed through open discussion, audio/visual presentations, speakers, performers, and between-session activities. Participants then discussed these differences and learned to communicate more effectively across cultural lines.

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### *Pilot Fellowship Circle (Series I)* **Participants and Connections to the Tribes and Counties Project**

#### **Northwest Renewable Resources Center**

Shirley Solomon, Facilitator  
Michael Kern, Project Assistant

#### **State/Tribal**

Michelle Aguilar, Executive Director, Governor's Office of Indian Affairs and Co-sponsor, Tribes and Counties Project  
Gabriel Landry, Washington State Department of Social and Health Services and Puyallup Tribe, Indian Policy and Support Services  
James L. Peters, Tribal Relations Coordinator, Washington Dept. of Natural Resources and Squaxin Island Tribe

#### **Tribal**

Larry Campbell, Program Manager, Swinomish Indian Tribal Community and Project Extern, Tribes and Counties  
Luther F. Mills, Jr., Tribal Council Member, Suquamish Tribe  
Anne Pavel, Chair, Skokomish Tribe and Project Extern, Tribes and Counties; Participant in Hood Canal Community Council  
Jay L. Watson, Planning Director, Port Gamble S'Kallam Tribe and NWTPF representative to the PAW Board; helped develop the *Tribal Short Course*.

#### **County**

David Goldsmith, Director, Community Services, Jefferson County  
Participant in Quinault/Jefferson County MOU process; formerly with DCD (now DCTED), a Tribes and Counties co-sponsor.  
Laura Porter, Mason County Commissioner (now with DCTED) and participant in the Skokomish/Mason County process.  
Paul Parker, Associate, Environment, Land Use and Resources, Washington State Association of Counties (co-sponsor, Tribes and Counties)

#### **Regional**

Mary McCumber, Executive Director, Puget Sound Regional Council  
Ramona Soto-Rank, Greater Portland Council of Churches  
Teresita Batayola, Manager, External Relations, Seattle Water Department

#### **Other Organizations**

Bill Robinson, Trout Unlimited - Washington  
Nadine Zackrisson, Senior Associate, Huckell and Weinmann

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# PILOT FELLOWSHIP CIRCLE—4 Sessions, June-October 1992

Developed in an Series 1

Broad Based, not Geographically Targeted

Figure 1

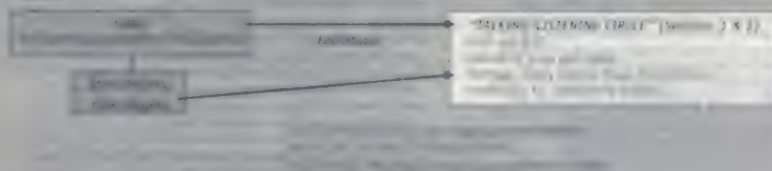


Figure 2

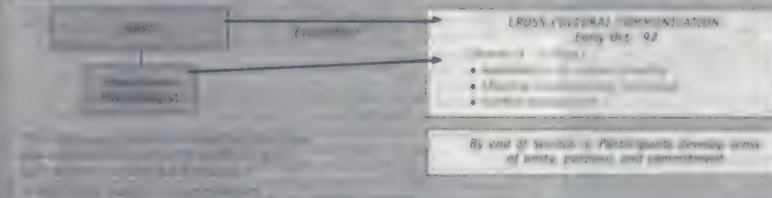
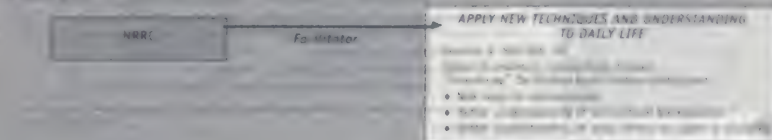


Figure 3







Northwest Regional Resource Center photo

### The Listening/Talking Circle: A Foundation for Relationship-Building.

In the first two sessions, participants used a Talking Circle to "break the ice" and get to know each another. The Talking Circle is a powerful communication technique, providing a structure that conveys *the right to speak and the responsibility to listen*. As such, it was ideal for the Fellowship Circle. It brought the various voices forward so participants could share their feelings about where they live and their perspectives on the future.

They spoke about their heritage and family history and about their hopes for the future. They saw slides that illustrated the cultural diversity of Washington state and discussed the thoughts and feelings the slides evoked. They listened to storytellers who told tales from cultures as diverse as Russia, Haiti, and Northwest Coast Salish. They broke into small groups to write stories of their own, and listened to a folk singer who sang songs from many cultures.

### Listening/Talking Circle

- 1) A Listening/Talking Circle begins with a brief quiet time, allowing participants to reflect on the task at hand and their contribution.
- 2) The Circle then opens to address the selected topic.
- 3) Traditional circles use a **talking stick** or some other significant object as a means of empowering the speaker, signaling to all who has the floor. For the Fellowship Circle, participants are asked to select an object with appropriate symbolism.
- 4) Each person has an opportunity for self expression, and may speak from the head or the heart. Only when the speaker indicates that he or she is finished—by passing the object—will the next person begin, continuing until all have spoken.
- 5) Open discussion then begins.

### Consensus Based Decision-Making is Key

The underlying philosophy of the Listening/Talking Circle is consensus based decision-making, a very old way of bringing groups to common purpose and agreement. Its assumptions, methods, and results are different from parliamentary process or Robert's Rules of Order.

Consensus holds that each party brings a part of the "truth," and that better decisions are reached by putting together all pieces of the truth before proceeding. It is a process which shows respect for participants as worthy individuals and acknowledges their opinions, expertise and constraints. **A consensus-based approach reinforces the idea that there are many possible solutions to a given problem**—thereby encouraging creativity and new ways of looking at things. Most importantly, it delivers decisions and opinions that the entire group supports.

## Cross-Cultural Communication

The group examined cross-cultural communication more directly at the end of Session 2 and in Session 3. An educational psychologist introduced the Circle to his model of cross-cultural communication and used it to evaluate an earlier session. Participants examined effective communication techniques, conflict management styles, and cross-cultural communications. The Circle held small group discussions of relevant articles on topics ranging from society's need for an enemy to the Columbus quincentenary. The small groups reported back to the Circle and open discussion followed. By the end of Session 3, the Circle had developed a sense of unity, purpose and commitment.

## Applying New Insights

*"The time has come to respect our differences and learn to work together."*—Larry Campbell, Swinomish and Program Manager, Swinomish Tribal Community

During the final session, Circle members applied what they had learned and strengthened the bonds they had formed.

In small groups, participants talked about cultural differences in the conception of time. They thought about the role of storytelling in developing and maintaining culture. Each member of the Circle told the others how he or she planned to incorporate the Fellowship Circle experience into their lives.

*"If we want to move forward on regional economic development and environmental protection, we have to learn to work together."*—Paul Parker, Washington State Association of Counties

Participants unanimously expressed their desire to maintain the connections they had formed. Before their farewell dinner, the Circle held a "give-away," facilitated by one of the Indian participants. Each member of the Circle had brought something of personal significance that he or she wanted another member of the Circle to have. Drawing names out of a hat, they took turns presenting and explaining their gifts.

## Lessons Learned

- 1) Participants and project staff considered the pilot Fellowship Circle a success. The Circle clearly had:
  - Broad application for relationship-building.
  - Potential as an important tool for improving cross-cultural communication.
- 2) This was, nevertheless, a difficult piece of work which stretched participants and staff both personally and professionally.
  - Participants sometimes retreated into defensive and superficial behavior in uncomfortable situations.
  - At times, extreme "politeness" masked true feelings when the group faced significant disagreement. Conflict avoidance can be more destructive to communication and relationship-building than direct conflict. By retreating into "civil" behavior, participants disengaged from the process, removing their energy and commitment. If this impasse had not been broken, the Circle and its growing relationships would not have progressed. At times, conflicts were not suppressed and it was palpably "us" versus "them."
- 3) Despite these moments, almost everyone in the group stayed involved. The Circle worked through its difficulties and moved on:
  - Overcoming these impasses brought discord to the surface, rather than letting it simmer.
  - By sharing their perspectives and values at the beginning, participants trusted each other enough to take a chance: they could explain what had offended or made them uncomfortable. Participants then acknowledged each other's perspectives, apologized if they had spoken or acted unwisely, and explained how their words and actions could have been misunderstood.
- 4) Structuring this Fellowship Circle as a pilot was beneficial to everyone:
  - Participants served as a "steering committee," helping to fashion an effective and responsive cross-cultural communication process.
  - The group could experience and critique the program simultaneously, functioning as evaluators even as they were being affected and changed by it.
  - Participants offered valuable insights into the strengths and weaknesses of the pilot Circle, contributing greatly to the success of future circles.

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***This experience provided a compelling lesson:***

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A relationship-building program is essential before a diverse community attempts to work together: without knowing each other's backgrounds and perspectives—and without building trust and relationships—the first obstacle, conflict, or misunderstanding can be fatal to the effort.

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- 5) Participant evaluation forms, completed between sessions and after the final session, offered timely feedback on activities including those most successful in building relationships and breaking down barriers, and those which missed the mark.
- 6) As expected in a pilot, some activities did not work as well as planned. The Talking Circle was uncomfortable for some Native participants:
  - An Indian elder from outside the group led the session. He passed around a rain stick and taught the participants to use Native words. Some tribal members felt that this format too closely resembled the talking circles used in their cultural and traditional ceremonies, and was inappropriate in this context.
  - This situation created an opportunity to confront differences and cultural misunderstandings directly.
  - From this experience, the Center learned the benefits of retaining key features of the Talking Circle method, but with a need to structure them in a more universal format. Key elements for participants included:
    - Sit in a circle
    - Take turns speaking instead of competing for "airtime"
    - Pass around an object that signifies who has "the floor"
    - Agree to speak from the heart as well as the head
    - Listen with an open mind, acknowledging that each person's input increases the wisdom of the group.

A more universal Talking/Listening Circle has been used in the project's community-building activities ever since. Jim Peters, Tribal Relations Coordinator for the state Department of Natural Resources and a member of the Squaxin Island Tribe, summarized the value of the pilot Fellowship Circle with these words:

*"We can't stop at symbolic actions. We need to develop a real commitment to working together to solve problems. Through the Fellowship Circle, we've been able to tackle some tough issues, deal with them, and move on."*



## SKAGIT FELLOWSHIP CIRCLE

In analyzing the Pilot Fellowship Circle, NRRC staff determined that the Circle had been hampered by occurring "in the abstract." Participants came from across the region. They did not sense that their relationships with other Circle members would have immediate use, nor would they necessarily work together after the Circle concluded. The experience, for the most part, affected them indirectly. They knew whom to call for advice, and found mentors and friends in other cultures and communities. They had gained a better understanding of each other's cultures and could navigate the differences with greater skill.

Desirable as these outcomes were, staff believed that the program would be more relevant if participants were from one region and shared issues of common concern. Thus, what they learned and the relationships developed in the Circle could be put to direct and continuing use.

### Another Perspective on Working Together

*"Can you bring tribal people and county people together, for the sake of building a better relationship between them and nothing more? Is that the way to go? First of all, you turn them into friends (or at least acquaintances), and then figure out what it is they're going to do together. That is one side of the argument.*

*Mine is that there's no point and it doesn't work to just bring them together to be friends with each other; that they need to have a project to work on together so that there is a real reason, it's in each of their interests. This is a mediator speaking, but it's in the interest of both sides to come together and then they will build a relationship that will be useful in other contexts."*—Lucy Moore, Western Network, Santa Fe, New Mexico

### Acting on Lessons Learned

The Center decided to narrow the focus and target a particular geographic region for the second series: Skagit County, Washington. Representatives from the Swinomish Tribe and the Skagit Systems Cooperative (the fisheries arm of the Swinomish, Upper Skagit and Sauk-Suiattle tribes) requested the Circle be conducted in Skagit County to build relationships and promote broader-based understanding for Indian views and priorities.

*"Life in the Valley is changing, and to our detriment. It will be a tremendous asset to the whole Valley to work together."*

—Shubert Hunter, Sr., Vice-Chair, Upper Skagit Tribe





Northwest Renewable Resources Center photo

## Participants Share Common Goals

The Skagit Fellowship Circle brought together 20 elected officials and key policy staff from the county, several communities, and the Swinomish, Upper Skagit and Sauk-Suiattle tribes. It was conducted over four all-day sessions, from April to September 1993.<sup>2</sup>

Like the first Fellowship series, the Skagit Fellowship Circle created a foundation for cooperation—this time in a specific geographical setting. By strengthening trust and understanding between the Swinomish Tribe and Skagit County, the Circle breathed new life into the Swinomish/Skagit Joint Comprehensive Plan by moving the plan adoption process along.<sup>3</sup> The process used to develop the joint plan became the model for the Tribes and Counties Project.

The Center structured the Skagit Fellowship Circle as a cross-cultural community building effort. It created a broad network of informed people and a foundation for future cooperation between the Indian and non-Indian communities of Skagit County:

*"When I walk into a meeting and I see Robert's Rules of Order, I know that I won't be saying anything—not a single word. But what we've done here will last forever."*—Jim Wilbur, Swinomish Tribe

## Skagit Fellowship Circle Participants and Connections to the Tribes and Counties Project

### Northwest Renewable Resources Center

Shirley Solomon, Facilitator

Michael Kern, Project Assistant

### Tribal

Andy Fernando, Planning Director, Upper Skagit Tribe. Shared a story, "Old Skagit Ways," at the 1993 Gathering.

Shubert Hunter, Sr., Vice-Chair, Upper Skagit Tribe

Robert Joe, Sr., Chair, Swinomish Indian Tribal Community: a long-time supporter of Tribes and Counties and member, SLUAB

J. Lawrence Joseph, Councilman, Sauk-Suiattle Tribe

Larry Wasserman, Environmental Services Director, Skagit System Cooperative; formerly with Yakama Nation; played a major role in Tribes and Counties and other NRRC projects as negotiator, speaker, and resource person.

Jim Wilbur, Swinomish Tribe and member, SLUAB

Nick Zaferatos, Business Manager, Swinomish Tribal Community SLUAB; a major player in the Swinomish-Skagit Joint Comprehensive Plan process; President, NWTPF<sup>4</sup> and participant in the 1992 PAW Fall Conference focusing on tribal/county cooperation (second day held on the Swinomish Reservation)

### County

Robert R. Hart, Commissioner, District 1, Skagit County. Spoke at the 1993 Gathering

David Hough, Director, Skagit County Planning Dept.

James Kirkpatrick, General Manager, PUD #1 of Skagit County

Rich Medved, Director, Skagit County Public Works Dept.

Brian Rolfson, Skagit County Port Commissioner

Stephanie Wood, Administrative Coordinator, Skagit County

### City

Carol Johnson, City Planner, City of Sedro Woolley

Phil Messina, City Administrator, City of Burlington

Jim Neher, City Supervisor, City of Sedro Woolley

Dan O'Donnell, Mayor, City of La Conner

### Regional

Kelley Moldstad, Executive Director, Skagit Council of Governments

# THE NRC'S FOLLOW-UP TO THE TMI-2 ACCIDENT

By William E. Shafer

President and Director, Nuclear Energy Institute

*Journal of the Nuclear Energy Society, Volume 18, Number 4, Summer 1988*

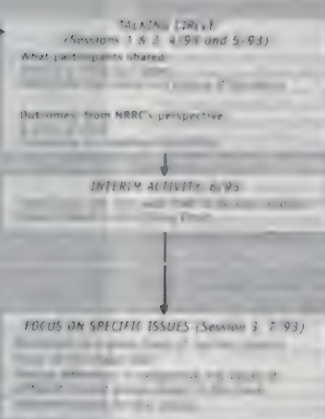
Abstract

The Nuclear Regulatory Commission's (NRC) response to the TMI-2 accident is described. The NRC's initial response was to conduct a thorough investigation of the accident. This was followed by a series of public hearings and a final report. The NRC's response was comprehensive and thorough, and it was designed to ensure that the accident would not be repeated.

Introduction

The TMI-2 accident was a major event in the history of the nuclear industry. It was a serious accident, and it was a wake-up call for the industry. The NRC's response to the accident was comprehensive and thorough, and it was designed to ensure that the accident would not be repeated.

The NRC's response to the TMI-2 accident was comprehensive and thorough, and it was designed to ensure that the accident would not be repeated. The NRC's response was comprehensive and thorough, and it was designed to ensure that the accident would not be repeated.



THE NRC'S RESPONSE TO THE TMI-2 ACCIDENT

## SKAGIT FELLOWSHIP CIRCLE

## Phase 3

• Participants develop a shared vision of the future of the Skagit County Watershed  
• Participants develop a shared vision of the future of the Skagit County Watershed  
• Participants develop a shared vision of the future of the Skagit County Watershed

## FOCUS ON COOPERATION (Section 4, § 93)

• Participants develop a shared vision of the future of the Skagit County Watershed  
• Participants develop a shared vision of the future of the Skagit County Watershed  
• Participants develop a shared vision of the future of the Skagit County Watershed

## RESOLUTIONS PASSED (§ 94)

• Participants develop a shared vision of the future of the Skagit County Watershed  
• Participants develop a shared vision of the future of the Skagit County Watershed  
• Participants develop a shared vision of the future of the Skagit County Watershed

## Phase 4

NRRC

## FOLLOW UP

• Participants develop a shared vision of the future of the Skagit County Watershed  
• Participants develop a shared vision of the future of the Skagit County Watershed  
• Participants develop a shared vision of the future of the Skagit County Watershed

## Phase 5

NRRC

Facilitator

## PARTICIPANTS RECONVENE, 1994

• Participants develop a shared vision of the future of the Skagit County Watershed  
• Participants develop a shared vision of the future of the Skagit County Watershed  
• Participants develop a shared vision of the future of the Skagit County Watershed

## Phase 6

## RESULTS ACHIEVED (OVER TIME)

- Participants develop a shared vision of the future of the Skagit County Watershed
- Participants develop a shared vision of the future of the Skagit County Watershed
- Participants develop a shared vision of the future of the Skagit County Watershed
- Participants develop a shared vision of the future of the Skagit County Watershed
- Participants develop a shared vision of the future of the Skagit County Watershed

It was timely that the Skagit Fellowship Circle convened in 1993. Relations between the Swinomish Tribe and Skagit County had stalled once again, and the Center was interested in working with those involved in the Joint Comprehensive Land Use Plan to get things moving. The experience of working together on the Joint Plan, although positive, had not changed the organizational dynamics between the tribe and county, nor the professional relationships of people involved.

*"When I came into office, what shocked me was both the local tribes and local governments were spending so much time fighting among themselves on areas where they had general agreement—everyone wants to preserve the resource."—Bob Hart, Skagit County Commissioner*

The Skagit Fellowship Circle created a safe, comfortable setting in which to reconvene. Through formal and informal activities, participants explored viewpoints, perspectives, and differences. They became more familiar and comfortable with one another, discovering a shared love of place and better understanding of the differences between them. The Circle engendered a new level of respect and empathy, a sense of common purpose, and a commitment to work together.

*"I had never dealt with a tribal entity before. I was concerned about making faux pas—saying the wrong thing. I discovered that we can work together and I can be comfortable sitting down and discussing these things. As people change, we don't want all we've done to go for naught."—Carol Johnson, City Planner, City of Sedro Woolley*



Photo by Susan H. Hoge

## A Sense of Place

The first session began with a Talking Circle, in which participants introduced themselves and their connection to the region. Discussing a subject so close to their hearts quickly brought the group to a deep and meaningful level of interaction.

In the afternoon, they were joined by a local archaeologist who took them back in time, before European settlement, to "The Place That Was." He described the journey of a Native family from Whidbey Island, up the Skagit River to Lake Wenatchee. Next, a historian described the cultural and ecological changes that accompanied the arrival of Euroamericans, in "And the Settlers Came." Before concluding with a dinner together, participants viewed slides of contemporary and historical Skagit County scenes, and discussed the stories, memories, ideas and images these slides evoked.

*"Our people have been here for ten thousand years. We look at the animals as our guardian spirits. The eagles, wolves, and killer whales are like our angels."*

—Jim Wilbur, Swinomish Tribe

*"It's been 125 years since my great grandparents first came to the Valley. We're still stewards of the land. It's a family tradition. We don't own or control the land, we're here with nature."*

—Bob Hart, Skagit County Commissioner

Bob Hart,  
Skagit County  
Commissioner



Photo by Susan H. Hoge



## Discovering Issues of Common Concern

One month later, in Session 2, the Circle passed around an artifact brought by one of the participants, sharing the thoughts and feelings it provoked. They screened a video about tribal land and fishing rights and discussed the insights it conveyed. Before adjourning, they brainstormed issues of common concern to be discussed in Session 3.

## Reconvening to Explore Further

Session 3 opened with the reading of a poem, which one participant had "found" in notes distributed by project staff. This poem contained the voices of all Circle members. Participants then shared an activity between sessions with one other participant, discovering that many had strengthened relationships begun in earlier Circle sessions.

A major issue of concern to all participants was the Skagit River:

*"The Skagit becomes part of you. The river flowing and eddying is like the blood coursing in my veins."* —Andy Fernando, Planning Director, Upper Skagit Tribe

Participants laid a rope on the floor to represent the River. Standing at "their place" on the river, they described their greatest concern from where they were standing. The list was long and drew the group together:

- ◆ Water quality
- ◆ Flooding
- ◆ Effects of logging
- ◆ Population growth
- ◆ Development impacts
- ◆ Farming needs
- ◆ Restoration
- ◆ Educational activities
- ◆ Intangible values of the river
- ◆ Fish runs
- ◆ Sewage
- ◆ Public access

The afternoon was devoted to role playing. Participants discussed different perspectives and values by assuming a variety of roles, and described the feelings of each about growth management:

- ◆ Developer
- ◆ Environmentalist
- ◆ Business person
- ◆ Tribal member
- ◆ Farmer
- ◆ Government representatives
- ◆ Newcomer
- ◆ Property rights advocate

As in Session 2, they closed the Circle by brainstorming topics for the next session, followed by a dinner together.

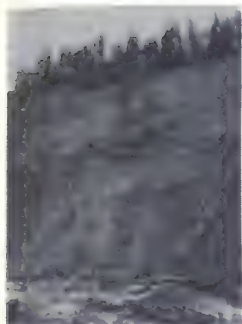


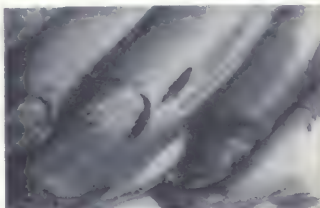
Photo by Natalie Fagan

## Final Session Produces Landmark Results

In their final session, participants reviewed the Circle's accomplishments and how to move their cooperative efforts forward. They spoke of the profound impact the Circle exerted on them, both as individuals and as representatives of their government or community. They were emphatic on two points:

- 1) The Circle should continue.
- 2) It should be expanded along two tracks: intergovernmental and community-building.

Photo by Natalie Fagan



Discussions arising from the Fellowship Circle revealed a deep caring for the land and a concern that much of value—including a sense of community and love of place—was being lost to rapid growth and an influx of new residents. Tribal people were concerned about protecting sacred sites, including access to ancestral fishing, hunting and gathering areas in the face of increasing development pressure:

*"We aren't able to partake of the things we like to do—clam digging, shellfishing, planting oysters—because of the pollution going into the water."* —Robert Joe, Sr., Chair, Swinomish Tribal Community



### Action Plan for County Tribal Cooperation

- They pledged to educate colleagues using the Circle's joint letter.
- Participants developed a list of short-term goals as a way to continue the momentum established by the Circle. These goals included:
  - At least two resolutions from the county and municipalities acknowledging the authority of the tribes and the interrelationship of interests
  - Progress on the Swinomish Comprehensive Plan
  - Cooperation on North Pacific fisheries issues
  - Exploring the possibility of a cultural history/community-character component to the Skagit County Comprehensive Plan
  - Putting on a cultural/social event.

Within two weeks of the final session, the Town of La Conner, City of Sedro Woolley, and Skagit County had all passed resolutions acknowledging the three tribes as legitimate governments, committed to nurturing the bonds that exist between them (see Appendix 5). The resolutions received favorable press coverage and editorial comment.

After completing the Skagit Fellowship Circle, project staff spent a significant amount of time "spreading the word" about the outcomes and developing methods to leverage its success. The open letter, resolutions, newspaper article and editorial have been widely distributed.

### A New Tool for Cooperation: "Voices of the Valley"

"Voices of the Valley," a 17-minute video produced by the Center, documents experiences and lessons learned through the Skagit Fellowship Circle. Telling the Circle story from the participants' viewpoint, it has been used locally, regionally, and nationally to promote the process and showcase the outcomes.

The video highlights a practical model for finding ways around barriers to communication, and methods which tribes and counties can use in learning to work together.

### Reconvening the Circle: Key Outcomes

Circle participants reconvened in March 1994, after a six-month interval. They expressed interest in continuing to meet on a regular basis. All agreed that the Circle was an excellent venue for maintaining communications, rekindling the commitment to work together and extending the ethic of cooperation and participation. Another meeting was scheduled for the fall.

Circle participants came together again in October 1994, and reaffirmed their commitment to the Circle. They reported that intergovernmental cooperation was beginning to occur at all levels: from the first-ever tribal participation on the Regional Health Committee and the County-Wide Economic Development Plan to forest practices joint review and tribal casino development. These events, participants felt, resulted from relationships developed during the Fellowship Circle.

Following these efforts to review events, gauge progress, and plan future activities, Circle participants agreed that their relationships (both personal and professional) were very different from what they once were. The ice has been broken and a degree of familiarity established. It is now much easier to initiate interactions, discuss what needs to be done, and share information formally and informally.

Several activities requiring intergovernmental coordination have been instituted and show real promise. The Swinomish Plan is now part of the Skagit County Comprehensive Plan and awaits action by the Planning Commission. In the words of Robert Joe, Sr., longtime Chair of the Swinomish Tribal Community:

*"We've got a long way to go and it won't always be easy. But at least we've made a start together."*

Robert Joe, Sr.,  
Chair of the Swinomish  
Tribal Community  
Photo by: Natalie Yellon



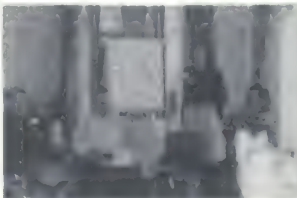
### Lessons Learned

From the Center's perspective, the Skagit Fellowship Circle was a stunning success. It produced outcomes far exceeding staff expectations.

- 1) The experience proved many times over that a Fellowship Circle will have more power and impact if it has a regional focus. Repeatedly, Circle members referred to the Skagit River and other geographical features of Skagit County with a deep sense of reverence and respect. Through their efforts in the Circle, several participants have assisted one another professionally, testifying in support of each other's projects and initiatives. This outside activity is exactly what the Circle is meant to foster clearly; it has cemented the bonds between those who engaged in it.
- 2) Skagit County continues to maintain a close working relationship with the Skagit Systems Cooperative for regional fisheries management, and with the tribe on developing the county-wide comprehensive plan—in particular with the environmental elements, critical areas, and fish and wildlife habitat.
- 3) As in Series 1, participants became more knowledgeable about their neighbors' cultural background and political situation; and more versatile at navigating differences in general. They learned new ways to communicate, discovering that more is accomplished when people are encouraged (in an appropriate environment) to speak from the heart.
- 4) In the rush to "get things done" and resolve specific issues, people neglect to spend the time needed to develop understanding and meaningful relationships. With strong working and personal connections, more is accomplished in the long run.

### HOOD CANAL COMMUNITY CIRCLE

In late Summer 1995, a longtime Jefferson County commissioner invited the NRRC to conduct a Fellowship Circle in the Hood Canal region. Staff discussed the idea with individuals from different constituencies. Across the board, people were receptive to a venue for cooperation.



Northwest Forestry Institute, 1995-1996

Battles over endangered species protection, old growth timber, and natural resource management had, in recent years, damaged the social fabric of the Hood Canal Watershed. One respected community activist spoke figuratively of "all the blood on the ground," and fears that lines would harden in the future.



The Hood Canal watershed encompasses Mason, Jefferson and Kitsap Counties and the Shokomish and Port Gamble S'Kallam Indian Reservations.



To further "test the waters," the Center, in partnership with the Planning Association of Washington and 12 other entities, sponsored an all-day workshop, "The Health of Hood Canal and the Role of Local Land Use Planning." Eighty-seven people with varied interests attended the event:

- ◆ Elected officials
- ◆ Flood control district officials
- ◆ Staff from towns, cities, counties, and tribes
- ◆ Environmentalists
- ◆ Farmers
- ◆ Timber company representatives
- ◆ Large and small landowners
- ◆ Developers
- ◆ Officials from state agencies
- ◆ Planning commissioners
- ◆ Oyster growers
- ◆ Citizens

In facilitated dialogue at workshop's end, people spoke of needing a new way to do business together and expressed concern for their "place." Exhausted with the present process (but skeptical of ever working together) they welcomed the Community Circle as a way to build and mend these relationships.



Revised Manuscript to be reviewed

With support from two organizations with strong ties to the Watershed—the Hood Canal Coordinating Council (discussed in Chapter 5) and the not-for-profit Long Live the Kings, dedicated to wild salmon recovery—the Center convened the Hood Canal Community Circle in November 1995.

The primary goal of the Circle was to build "common ground on common ground" among those who live and work in the Hood Canal Watershed. In this venue, a small group of community leaders could experiment with new ways of addressing complex and potentially divisive public policy issues.

In its invitations to participants, the Center was clear that the program did not have a prescriptive agenda; nor did it seek a substantive outcome, such as an agreement. Rather, it would provide new tools and create a climate for future cooperative action—the nature of which would be determined by the group.

Twenty-three residents participated, representing different perspectives from throughout the Watershed. All were considered people of influence in their communities. Their comments appearing in the following pages (unless otherwise noted) were taken from the video, "Building Community Within a Watershed," produced by the NRRC and documenting the impressions of Community Circle members.

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## Opening Comments to the Hood Canal Community Circle

by Shirley Solomon, NRRIC Facilitator

*"We work on the premise that community-building is heart-to-heart, between people on a one-to-one basis. We have very little opportunity for such interactions. There are few venues in which people who don't necessarily think alike can come together. As all of us who track public issues know, the level of discourse in the public arena is such that very little can be accomplished other than in a polarized manner. The opportunity here is to come together, get to know people in different ways, get to find commonalities around place, and then work through some particular issues. It's to tool you up basically, so you can set forth and interact more effectively on your own. The venue today is really getting to know people, getting to know them in a different way, bringing other dimensions to the discussion, and taking things a little slower. We are always rushing immediately into issue development, defining the measure of what it is we need to battle over, or discuss.*

*The notion is you are all living together, you're all here in the watershed, and you all have different orientations and perspectives—hence the circle. The format we will use in the morning is a valuable one. Everyone comes at things slightly differently, and unless all the voices are pulled forward the full picture does not emerge.*

*We will start the circle and ask you, if at all possible, to stay with us throughout the circle experience because it can be quite personal and quite intense. We're asking you to tell us who you are, what it is that you care about, and we'll symbolize that by passing around a jar of Hood Canal water. The point is to move the discussion into a somewhat different place, so that you don't just talk about where you work or live, but what you care about, what matters to you. And it matters in relationship to place, the place is what binds you... The premise there is that you really don't know me until you know my story. And place is what you have in common."*

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## Hood Canal Community Circle Participants

### Northwest Renewable Resources Center

Shirley Solomon, Facilitator  
John Klem, Creative Community Solutions, Facilitator  
Betsy Reynolds, Project Assistant  
Donna Simmons, Hood Canal Coordinating Council, Education Coordinator

### Tribal

Michael Jones, Tribal Councilmember, Port Gamble S'Kallam Tribe, Kingston, WA  
Gary Peterson, Tribal Councilmember, Skokomish Tribe, Shelton, WA  
Bart Robbins, The Hama Hama County, Lillwauap, WA

### County

Phil Best, Commissioner, Kitsap County, Port Orchard, WA  
Richard Wojt, Commissioner, Jefferson County, WA

### Other Organizations

Al Adams, Hood Canal Salmon Enhancement Group, Union, WA  
Helen Daly, Upper Hood Canal Watershed Committee, Silverdale, WA  
Rick Endicott, Long Live the Kings, Union, WA  
Bill Matchett, Hood Canal Environmental Council, Bremerton, WA

### Businesses

Jon Day, Seabeck Shellfish Farm, Seabeck, WA  
Larry Hill, Director, Seabeck Conference Center, Seabeck, WA

### Other Community Leaders

Karen Best, Port Orchard, WA  
Ed Boutwell, Hoodsport, WA  
Irene Davis, Belfair, WA  
Ted George, Poulsbo, WA  
Judy Likkell, Union, WA  
Pat McCullough, Belfair, WA  
Jean Moore, Union, WA  
Celia Parrott, Belfair, WA  
Mark Sleeper, Shelton, WA  
Robert Sund, Hoodsport, WA  
Charles Winne, Hoodsport, WA

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# HOOD CANAL COMMUNITY CIRCLE: 3 ALL-DAY SESSIONS

NOTE: HOOD CANAL COMMUNITY CIRCLE

Targeted to a specific region and issues, includes community at large

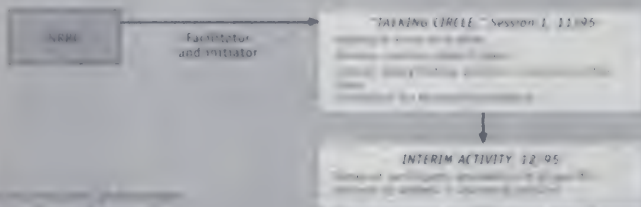
**Topic:** Building community, defining a Watershed, Vision for the Hood Canal Watershed, Circle

**Issues:** Environmental issues, water quality, Planning, Wildlife, resource management, Water quality

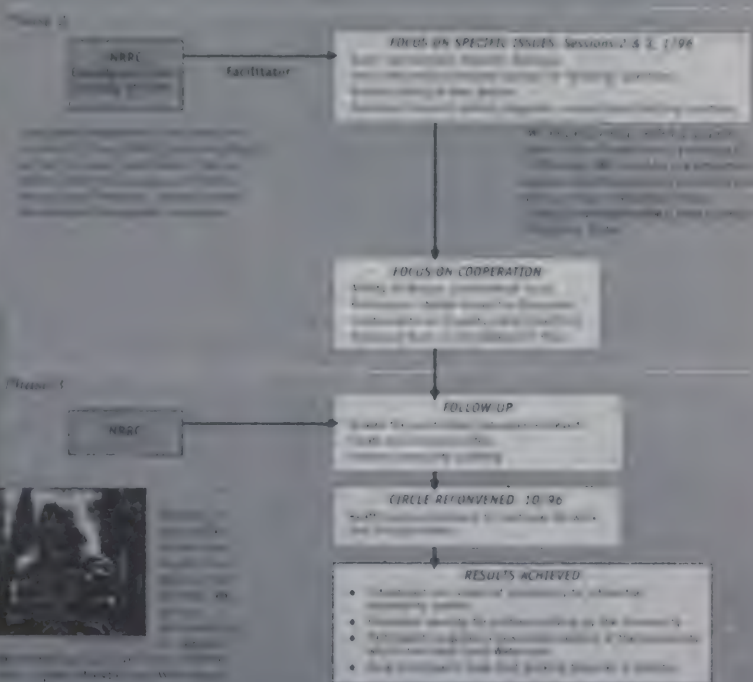
## Growth and development

- Goals:**
- Build community groups, groups that live and work in the Hood Canal Watershed
  - Create a vision for future development, future
  - Build a network of groups that can work out of behalf of community cooperation
  - Coordinate community efforts
  - Prepare new ideas

FIGURE 1



## HOOD CANAL COMMUNITY CIRCLE.







### Session 1: The Talking Circle and a Sense of Place

Applying lessons they learned in the Pilot and Skagit Fellowship Circles, project staff began by developing a shared sense of place among the participants. Boundaries of the Hood Canal Watershed established the concept of community. The Center knew that the program would be more relevant if Circle members came from one region, and if they needed to work together on issues of common concern. Within this format, participants were more likely to make direct and continuing use of the relationships they had developed in the Circle.

Following the model of previous Circles, participants got to know one another first, as a foundation for relationship-building.

***In the Talking Circle, they got acquainted with each other as individuals and as neighbors within the watershed—not to discuss issues.***

As in the Skagit Fellowship Circle, participants spoke about their heritage, family history, and hopes for the future. In the afternoon they viewed slides illustrating places around the Watershed, and discussed thoughts and feelings the slides evoked.

### Session 2: Promoting Dialogue Over Debate

The second session, an intensive two-day workshop, was held in early January 1996. Specific concerns about the Watershed had been identified through a participant survey. From these data, the Center created exercises and activities that introduced new methods of public dialogue and cooperative problem-solving. The main theme of these exercises was to teach tools that promote dialogue over debate.

*"There used to be spiritual sites on the North Fork of the Skokomish River where our people could go to renew themselves spiritually. We used to have sockeye and spring salmon there, but no longer. You can't have a healthy community, healthy families, or healthy children if you've lost your economic base and lost the soul of your community."* Gary Peterson, Tribal Council member, Skokomish Tribe

*"As I grow older, I gain a greater understanding of the water quality and environmental issues, and have*

*developed a passion to preserve the Canal. We can't keep people away, but we can show them what they can do to preserve it."*

Pat McCallough,  
Belfair Resident



Jefferson County Commissioner Richard Wight holds a jar of Hood Canal water as he describes his connection to the watershed.



PHOTO BY MARC KENNEL

### Reaching Consensus on Divisive Issues

- 1) Working in small groups, each participant had the opportunity to express how he or she felt about key issues. Staff began by asking the question, "How do you feel about growth in Hood Canal?" In a Talking Circle format, each participant had several minutes to respond. The facilitator recorded abbreviated versions of their answers:

"I value the small towns and communities."

"I would like to see growth 'contained' and see lots of open space."

"Growth has to be accommodated; things change; it's inevitable."

"Development must occur in a way that maintains the spiritual presence of the Canal."

"Growth has not been beneficial to me."

"As we change our use of resources, growth can be accommodated."

"I want people to share and enjoy the canal's abundance, but growth needs to be controlled to do this."



Hood Canal Shoreline

- 2) Participants grouped similar responses into categories. Responses about controlling growth were placed together, as were those relating to spiritual or cultural values, and so on.

- 3) Participants then were asked to create "bridging questions" that addressed two or more categories. For example, "How do we have growth and maintain open spaces?" and "How do we allow growth and keep rural areas?" After developing their bridging questions, participants chose one of the questions to brainstorm.

- 4) This exercise taught a variety of tools:

- Participants could express how they felt about an emotional issue, and listen to the feelings of others.
- They learned how to work together and find areas they shared in common.
- They had an opportunity to work together to find answers to an "answerable" question.

### Tangible Outcomes: Real Steps Toward Cooperation

"For and against" debates had polarized the Hood Canal community over a variety of issues. Using these exercises, the Community Circle could discuss issues ranging from tribal shellfish rights and fears of property owners to sedimentation in the Canal and failing septic systems. These discussions took place in an atmosphere of curiosity and respect, rather than anger.

*"Some of the problems were so polarized it looked as though there'd be no possible solution. But the bridging questions helped resolve these issues, even when [it was] the wildlife biologists versus the timber companies."*—Jon Day, Seabeck Shellfish Farm

Participants were enthusiastic about the process and praised the overall experience. They spoke of their eyes being opened, making new personal connections, and discovering unexpected good will in others.



Non-Peaking, Non-movable  
Reservoir, Cedar Point

## A Tool for Others: "Building Community Within a Watershed"

In documenting the Hood Canal Fellowship Circle, NRRC produced a video entitled, "Building Community Within a Watershed." This tool communicates the Circle experience from the participants' viewpoint, and will help promote further community involvement. It will also widen the reach of the project, and expand the momentum of the Circle beyond its original participants.

### Lessons Learned

- 1) From the Center's standpoint, the Hood Canal Community Circle successfully adapted the original Fellowship model. **Most importantly, from its roots in Indian/non-Indian cross-cultural communication, it broadened the focus to include the community-at-large.**
- 2) The lack of specific cross-cultural exercises at Hood Canal is what sets this model apart from previous Fellowship Circles. Interestingly enough, many non-Indian participants interviewed for the follow-up video said that the opportunity to work with Tribal members was the most memorable portion of their experience.
- 3) The Center introduced a new vision of community to a set of influential community leaders, and expanded their capacity for problem-solving. Our hope is that the experience created a network of people inspired to speak out in favor of community cooperation; and who will take collaborative action to sustain Hood Canal's natural and human resources.

## Project Outcomes

Evidence is emerging to support this hope. Project staff have received reports of Circle members applying "dialogue over debate" in public meetings and seeking involvement where they once felt powerless. Jay Watson, who attended the Pilot Fellowship Circle, reflects on the outcomes in conversation with Tribal Councilmember Michael Jones, a participant in the Hood Canal Community Circle:

*"Good is coming out of the Fellowship Circle. A lot of things that were brought up there may not necessarily lead to immediate coordinated efforts by all of the county commissioners...but it brings people together on specific issues and they go away and do something. I think that's a real benefit...."*—Jay Watson, Planner for the Port Gamble S'Klallam Tribe

The Circle was designed to give participants a chance to learn about each other in a relaxed setting, learn new ways of problem-solving, and new ways of framing issues. Members expressed a range of feelings about the experience, all of them positive and heartfelt. Early on, many had expressed concern about this being yet another meeting where nothing was accomplished. In the end, all participants expressed a new understanding of the community within the Hood Canal Watershed:

*"...What this is all about is that we're all neighbors and we're trying to get along. We're trying, more or less, to go back to the way things used to be years ago, when you didn't have to lock your door, or we weren't afraid to say, 'Well, that's a [completely wrong] way of looking at this.' We can say, 'This is a problem and I think we need to talk about it.' I think that people are slowly gaining trust in their neighbors."*—Michael Jones, Sr., Port Gamble S'Klallam Tribal Council Member



Photo by Mercedes Young

**Endnotes**

<sup>1</sup> The first two missions were called Fellowship Circles; the third was termed a *Community Circle* to better reflect the intent of the Circle model.

<sup>2</sup> A documentary video, "Voices of the Valley," produced by the NRRL, is the source of all comments from Skagit Fellowship Circle participants in this section, unless otherwise noted.

<sup>3</sup> Several members of the Swinomish Land Use Advisory Board (SLUAB) who developed the Plan, including the Skagit County Planning Director, had been replaced. The Skagit Fellowship Circle helped these new people understand what had taken place between the Swinomish Tribe and Skagit County, and helped both sides build or rebuild personal relationships.







Photo by Maurice Fisher

The current policy of Indian self-determination began 25 years ago. Before that, federal policy vacillated between two conflicting policies: removal of Indians, followed by attempts to assimilate them into the dominant society. Reservations, established for the exclusive use of Indians, were dismembered through the General Allotment Act of 1887, which broke up the tribal land base and introduced non-Indian landowners onto reservations.

As a result, most reservations today are a "checkerboard" mix of Indian and non-Indian owned land, creating a host of jurisdictional problems. Non-Indian reservation landowners, as well as state and local governments, constantly challenge the tribe's ability to control land and resources on the reservation.

The nature of the tribal/federal relationship has limited the interaction between tribal governments and their state and local counterparts. As a result, most Indian communities are politically, economically, and socially isolated within their own region.

Despite common interests and overlapping concerns, there are no guidelines and little intergovernmental coordination between tribes and local governments.

### "Sources and Functions of Tribal Governments"

Excerpt from the Planning Association of Washington  
on intergovernmental relationships

The Indian community is different from the non-Indian community in that it is a sovereign nation. It has its own government, its own laws, and its own customs. It is a unique and distinct entity. The Indian community is a sovereign nation, and it is entitled to the same respect and recognition as any other nation. The Indian community is a sovereign nation, and it is entitled to the same respect and recognition as any other nation. The Indian community is a sovereign nation, and it is entitled to the same respect and recognition as any other nation.

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## The Tribes and Counties Project

In their journey toward cooperation, tribes and counties must find the bridge that leads from one-on-one communication to intergovernmental cooperation. The Tribes and Counties Project provided models that opened the way for tribal and county governments to establish communications and develop tools for cooperation to fit their needs: a memorandum of understanding, interlocal agreement, joint comprehensive plan, open letter to the community, resolution, or other form of commitment to work together on issues of mutual concern.

Each of the four government-to-government examples presented here is different in its approach, sequence of events, and in the nuances of relationships between the players. But many similar threads run through these stories (and in others where the Center has been involved). In each case, tangible and intangible results were achieved by the tribes and counties involved. Despite factors that at times served to derail the ability to cooperate, each story can be characterized as a model for cooperation. The ongoing challenge of sustaining cooperative efforts is very real for the tribes and counties featured here, and for others across the United States.

### Sustaining Cooperation:

#### The Ongoing Challenge of Institutionalization

Perhaps the greatest challenge for successful government-to-government cooperation on an ongoing basis is coping with turnover. Reflecting on their experiences, participants interviewed mentioned that when people leave, it can be very difficult to sustain a cooperative effort—hence the importance of institutionalizing the government-to-government relationship.

### Working Government-to-Government: Challenges and Common Threads

- "Checkboard" land ownership patterns on the reservation, combined with a history of not communicating over issues of common concern
- Complex legal decisions and state policies to navigate through, but no clear guidelines on how to resolve jurisdictional conflict or establish relationships
- A mutual interest in communication and working together, but very real issues of public perception and loss of sovereignty if governments choose this path
- Use of a third party to initiate discussion, facilitate a process, or provide models to work from. This approach led to:
  - breakthroughs in communicating
  - Establishing relations
  - Creation of formal agreements
  - Increased ability of staff and leadership from each government to work together
- Turnover in tribal and county elected officials: Turnover slows the working relationship due to re-education of new but willing leaders, and can halt it altogether, if coupled with lack of interest or unwillingness to cooperate.
- A number of leaders and staff from each tribe and county continue to look for ways to institutionalize the working relationship and continue communicating despite turnover.

### Providing the Chance for Long-Term Intergovernmental Cooperation

#### The Navajo Perspective

The Navajo Nation has a long history of cooperation with the federal government. The Navajo Nation has been a part of the federal government since 1864. The Navajo Nation has been a part of the federal government since 1864. The Navajo Nation has been a part of the federal government since 1864.

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The NRRC provided information and assistance to several tribes and counties in their efforts to achieve cooperative relationships:

- Shokomish Tribe/Mason County
- Quinault Indian Nation/Jefferson County/Grays Harbor County
- Colville Confederated Tribes/Ferry County/Okanogan County/5 Cities
- Lummi Indian Nation/Whatcom County
- Squamish Tribe/Kitsap County
- Hood Canal Coordinating Council: Shokomish Tribe, Port Gamble S'Klallam Tribe, Mason County, Kitsap County, Jefferson County

This report focuses on four of these efforts. In each, the Center's role changed and adapted to the individual needs of the governments involved.

- 
- **Shokomish Tribe/Mason County:** The Center served in a mediation/facilitation role throughout the process.
  - **Quinault Nation/Jefferson and Grays Harbor Counties:** The Center was invited to participate in the first meeting and followed up with information and advice throughout the process.
  - **Colville Confederated Tribes/Ferry and Okanogan Counties/5 Cities:** The Center provided examples and information. Several individuals involved in the process attended a conference and workshops on intergovernmental cooperation, offered by the Center during this time. The Center facilitated educational community meetings at the end of the process.
  - **Hood Canal Coordinating Council:** The Center provided facilitation in the Council's reorganization and followed up with advice, information, and technical assistance for several years after.
-





Jefferson County Farmlands

While the Center's role can be described as one of mediator, facilitator, or information provider, the overall goal of NRRC's government-to-government efforts within the Tribes and Counties Project was to provide a "ripple effect" in the arena of tribal/county relations. The majority of these efforts involved disseminating the information, processes, and lessons learned in Skagit County to other tribes and counties in the region. The Memorandum of Understanding (MOU), Joint Comprehensive Land-Use Plan, and Interlocal Agreement developed by the Swinomish Tribal Community and Skagit County with the assistance of the Center, still stand as excellent models for institutionalizing tribal/county cooperation (see Chapter 2).

*"From the point of view of tribal governments, the Tribes and Counties project is implementing government-to-government relationships at the local level. Tribes have long sought and insisted on government-to-government relations with the federal government, and this is well-established federal policy. Thus, cooperation with other units of government is not new to tribes, but the possibility of cooperation at the local government level is relatively new and well-received....It should be pointed out that this project is not the first effort to engender positive relations between tribal governments and state and local governments, but it appears to be the first to bring practical results in this region."*

*—Robert Coulter, Executive Director of the Indian Law Resource Center, Helena, Montana in a report to the Northwest Area Foundation, "Evaluation of the Scope and Impact of the Tribes and Counties: Intergovernmental Cooperation Project."*

By no means are these examples presented in their entirety; rather, they are shown in a form that can serve as models for others seeking to develop working relationships, memoranda of understanding, or other such agreements. Finally, we wish to acknowledge the hard work and risk-taking by numerous individuals involved. Without them, these cooperative efforts could not have developed.



## SKOKOMISH TRIBE/MASON COUNTY

The Skokomish Indian Tribe comprises 682 enrolled members, making up 260 households. Seventy-eight percent of the Tribal population lives on the 4,987-acre reservation or off-reservation in Mason County.

For the Skokomish, the Allotment Act of 1887 dismantled the communal land base of their reservation—their homeland—producing a checkerboard pattern of Indian/non-Indian owned land. Today, the Skokomish Reservation is 40% non-Indian owned fee lands, and 60% tribal. This creates jurisdictional conflicts and ambiguity between the Tribal government and local/state entities.

### Skokomish Tribal Government

The governing body of the Skokomish Tribe, the Tribal Council, comprises seven members elected from the general Tribal membership. Council members, who serve staggered four-year

terms, oversee all Tribal activities while a Tribal Manager, hired by the Council, handles day-to-day operations. Elections are held annually to fill expiring positions. Tribal members have the power of initiative and the power to recall Tribal Council members.

### Government-to-Government Cooperation: Finding Common Ground

Cooperative efforts began in 1991, when the Center facilitated meetings between Mason County and the Skokomish Tribe as they explored opportunities to work together.

*"I believe that the Center's facilitation in the Hood Canal Coordinating Council work led us to build enough trust to do this project, specific just to the Skokomish Tribe and Mason County."—Laura Porter, Former Mason County Commissioner*

In a series of individual meetings with tribal and county representatives, both governments expressed interest in establishing a cooperative relationship. Together, they identified these common issues:

- ♦ Water quality
- ♦ Flooding
- ♦ Community sewer system
- ♦ Land use

Moving from a desire to work together to developing a Memorandum of Understanding and community-based planning process is shown schematically in the following diagram.

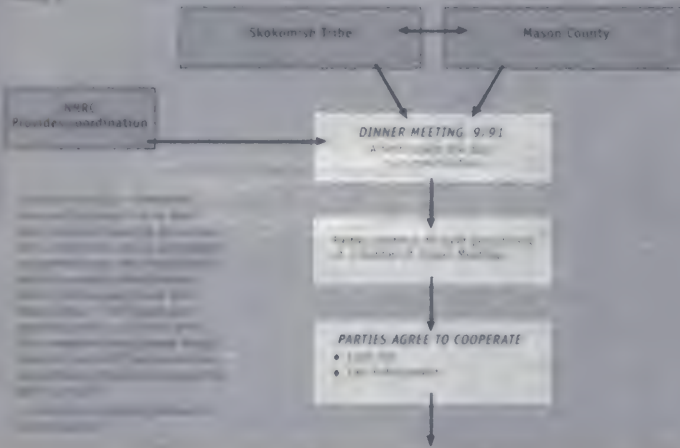


# Skokomish Tribe: Mason County, 1991-1992

**Challenge:** "Checkerboard" pattern of land ownership on the reservation causes land use conflicts.  
**Needs:** Programs of land use coordination  
 Solid waste management  
 Law enforcement and emergency services  
 Water quality  
 Flooding on Skokomish River  
 Community sewer system

## Prior Relationship:

### Process:



## Skokomish Tribe/Mason County, 1991-1992

### Phase 2



**MEMORANDUM OF UNDERSTANDING, 1/92**  
Written framework for Government-to-Government relationship

"We don't really refer to the MOU now, but it did change things. The start for each government cooperate with each other now. They consider what's good for the County, including the reservation. That wasn't happening before."  
—Anne Pavel, Skokomish General Council



**TRIBAL/COUNTY COOPERATIVE EFFORTS**

- ◆ Fireworks sales and fire prevention
- ◆ Road and culvert maintenance to facilitate fish passage
- ◆ Law enforcement

"We still have a number of issues to work on. Land-use issues are still unresolved. But we have a good working relationship."  
—Bill Pomeroy, Mason County Commissioner



## A Landmark Effort

The Skokomish Tribe and Mason County initiated their joint effort with a three-hour dinner meeting, memorable for several reasons: This was the first time in history that the Skokomish Tribal Council and Mason County Board of Commissioners had ever gathered formally for a joint meeting. Both the tribal and county representatives recall a friendly evening, with open and honest talk.



Bill Hunter  
Mason County  
Commissioner

photo by Natalie Toben

*"I had met with the Tribe as a commissioner, but this was the first time that we met as a Board."*  
—Bill Hunter, Mason County Commissioner

Out of this meeting came commitments from both parties to continue communicating. This was significant, as there had been no dialogue at the policy level between the Tribes and County up to this point, although one of the county commissioners and a tribal council member had known each other since childhood.

This first meeting led to a series of dinner meetings, some hosted by the Tribe and others by the County, where they began to discuss the issues. This led to an agreement to develop a Memorandum of Understanding (MOU), that would include the framework for a government-to-government relationship.

*"The tribe needed to know that the communication was government-to-government, and that the communication was tribal council to county commissioners, both as legislative and policy-making bodies for their governments, and not some other kind of communication.... The county needed to know that it was understood that we were not presupposing any kind of giving up of authority that we had traditionally asserted in the areas that are listed in the MOU."*

*"Because we were willing to meet did not mean that we were willing to compromise. It took us quite a while to decide. I think [the facilitator] talked to individual players behind the scenes for months before we felt safe agreeing to communicate [as a Board]."*  
—Laura Porter, Former Mason County Commissioner

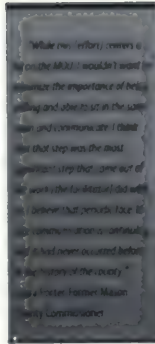


Northwest Renewable Resource Center photo

Laura Porter (left), Mason County Commissioner and Anne Pavel, Skokomish Tribal Councilmember talk during the Pilot Fellowship Circle

## Role of the Center in the MOU Process

- 1) The Center provided ongoing technical assistance to the Skokomish Planning Committee, helping them prepare for interaction with Mason County. Constituted by the Skokomish Tribal Council, this committee addresses on-reservation land use planning, regulation, and intergovernmental coordination with the county, and makes policy recommendations to the Council.
- 2) To accomplish its task, the Committee proposed a planning process for the reservation similar to the County's. The Center, at the Committee's request, reviewed key Skokomish planning documents to extract and categorize the goals and objectives currently in place.<sup>1</sup> Any conflicting goals or objectives were noted, as were any gaps.
- 3) Through the Tribes and Counties capacity building/internship component, the Center sponsored tribal policy-level participation for Anne Pavel in ongoing meetings with Mason County, in other Growth Management Act implementation efforts, and in the Hood Canal Coordinating Council.
- 4) Center staff developed the language for and coordinated the signing of a Memorandum of Understanding between Mason County and the Skokomish Tribe in early January 1992. This language was based on the model developed by the Swinomish Tribe and Skagit County. The MOU states their respective intentions to develop a government-to-government working relationship (see Appendix 6).



## Lessons Learned

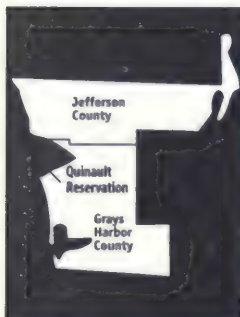
- 1) As in the Swinomish/Skagit case, opening communication between the Tribe and the County was just as important (if not more so) than the creation of a written agreement.
- 2) Challenges in cooperation continue between the Tribe and County, but both believe that the process of creating an MOU built a foundation.
- 3) According to tribal and county representatives, having the leadership of both parties work together opened the way for tribal and county staffs to work together (even without a directive to do so). As in the Swinomish/Skagit case, tribal and county staff know now that they can communicate over common issues. This was not the case prior to the MOU.

*"The MOU formalized the relationship we had already developed."*  
 —Bill Hunter, Mason County Commissioner



The Quinault Indian Nation, located in Jefferson and Grays Harbor Counties, has 2,727 tribal members. Fifty-one percent of them live on the 208,150-acre Quinault Indian Reservation. Land ownership on the reservation is 70% Indian owned and 30% non-Indian owned fee lands. Tribal government authority for the Quinault Nation rests with an 11-member elected council serving 3-year terms.

The Center developed a relationship with the Quinault Indian Nation through the Indian Land Tenure Project, and with representatives of Jefferson County through the Hood Canal Coordinating Council and other project work. During the ILT, technical assistance was provided to the Tribe in its quest to purchase a portion of the alienated land on the reservation. In addition, the Quinault Tribal Chair at this time was Joe DeLaCruz, a member of the NRRC's board of directors.



## QUINULT NATION/JEFFERSON/GRAYS HARBOR COUNTIES

### Identifying Issues of Common Concern

In early 1991, NRRC participated in a luncheon meeting between the Quinault Nation and Grays Harbor/Jefferson Counties. The Tribe and the two counties then conducted a series of technical discussions and developed a proposed MOU.

*"For years, Jefferson County had taken the position that the Tribe had jurisdiction over all activities within the boundaries of the Quinault Reservation, including land use decisions and building permits for in-holders (non-Indian landowners). The Brendale decision called all that into question. The court said at least two things: One is that there's a closed area and an open area on the reservation; even if you have an open area, the County must consider the Tribe's cultural, economic, and social interests in its decision-making. If you share jurisdictions, you have to do that, at least. Clearly [the County] doesn't have full jurisdiction; at a minimum we share it, and it could be that [the Tribe] has the whole thing."*

—David Goldsmith, Jefferson County Planner

Before the MOU process began, Jefferson County had taken the position that the Quinault Indian Nation had jurisdiction on-reservation, regardless of ownership. When the Supreme Court handed down the Brendale decision, the Tribe contacted Jefferson County with an interest in exploring whether this decision would change how in-holders were addressed.

The MOU dealt with this issue. A permit process was established whereby the Tribe would process all building permits for property on-reservation, regardless of ownership.

"We sat down with the Tribe and said, 'Let's take a look at our planning parameters, take a look at all the things we do and find the places where we duplicate.' The Tribe has their own constitution.

They have their own shoreline management program, their own building codes. We decided to see where our respective codes were the same and where they're different. And at the points of difference, let's see how we can resolve them. At the points that are the same, it doesn't matter if the Tribe issues the permit or if we do it, if they're the same code, they're the same code."

-David Goldsmith, Jefferson County Planner

Issues have been more complex between the Quinault Tribe and Grays Harbor County. The Quinault reservation has more in-holders in Grays Harbor than it does in Jefferson County.

"I think over the years...the regulatory authority over non-tribal, fee-simple lands has always been a question. Our situation is a little different than Jefferson [County], in that there are about 900 lots or parcels created that people pay taxes to us on. Quite a bit more than Jefferson County."

-Robert Paylor, Grays Harbor County Commissioner



David Goldsmith

Photo by Natalie Fellers

## Memorandum of Understanding

The push for intergovernmental coordination on these land use issues prompted development of a draft Memorandum of Understanding between the Quinault Nation and Jefferson/Grays Harbor County. The county representatives requested the Skagit/Swinomish Memorandum of Understanding as a model. The Tribe and the Counties went on to develop their own MOU (see Appendix 7).

"The MOU we developed gave both of us—the Tribe and the County—a strong insight into how we operate, what our particular interests are, and what pressures bear against us. The Tribe has just as much pressure in different ways as the County has... We each spent a considerable amount of time working on relationships, working on understanding what our various political pressures were, where the out-of-bounds markers were."

-David Goldsmith, Jefferson County Planner

"Jefferson ended up signing the MOU, the Quinaults did. Grays Harbor County signed an MOU, but it was different than the one that came out of the negotiating process."

-Robert Paylor, Grays Harbor County Commissioner

Robert Paylor points out that the situation was different in Grays Harbor County for several reasons: 1) One of the Grays Harbor County commissioners chose to withdraw from decision-making on the MOU, citing a conflict of interest. This left two members of the Grays Harbor board to agree to sign it. 2) Three different commissioners occupied the third seat on the commission during the MOU's development, making it more difficult to reach agreement; and 3) The sheer number of non-tribal land owners on reservation created a variety of unresolved land use issues.

In the proposed MOU, both counties and the Tribe agreed that any development on the reservation would have the same public health and safety-water and sewer access-as state law requires off-reservation.

For Grays Harbor County, several issues related to permits, zoning, and setbacks were not addressed in the MOU. These continue to be negotiated.



Robert Paylor

Photo by Larry J. Worsham



## Quinault Nation/Jefferson and Grays Harbor Counties, 1991-92 Memorandum of Understanding

**Issues:** Land use jurisdiction  
Permit processes

The Brendale decision brought into question how land use decisions would be made on the Quinault reservation.

### Process

#### Phase 1



"In one of the first meetings we just had a casual lunch and talked about the process, to try to resolve some of these land use issues. We went off on our own from there. The Center was not necessarily involved like it has been in others, but it was a jumping off point for coming to some type of conclusion."

-Robert Taylor,  
Grays Harbor County Commissioner

#### SERIES OF TECHNICAL SESSIONS

- Discussion of common issues
- Development of proposed MOU

"The MOU process gave the County (1) an appreciation for what's going on within the tribal boundaries and (2) an understanding of how to deal in a tribal environment, which is different than the county structure."

-David Goldsmith, Jefferson County Planner

# Quinault Nation/Jefferson and Grays Harbor Counties, 1991-92 Memorandum of Understanding

Phase 2

## **PROPOSED MOU**

Similar to the Skagit/Swinomish Model

### **Jefferson Co. Portion of MOU**

- ◆ Approved 12/91
- ◆ Defines shoreline land use
- ◆ Density issues
- ◆ Outlines responsibilities of county and tribal gov'ts
- ◆ Addresses in-holder issues indirectly by recognizing their position

### **Grays Harbor Co. Portion of MOU**

- ◆ Not Yet Approved  
due to different set of issues:
- ◆ More in-holders
- ◆ More land within tribe's jurisdictional boundaries
- ◆ Different land use circumstances

*"The MOU is now the best step it is  
an excellent Agreement that is  
the outstanding mechanism"*

*Mayor M. Stedje,  
Quinault Indian Nation*

## Public Involvement in the MOU Process

In the case of Jefferson County, due to timing (and because the Board of Commissioners were leaving office) the Board took action on the MOU as a resolution—making it binding as Board policy—but not as an ordinance. Therefore, there was no public hearing involved.

According to the County, in-holders were included in the MOU process to the extent that their primary issue, that they be given a “fair shake” to use their property, was addressed. Through the MOU, the Tribe recognized the in-holders’ presence and that they have certain rights to the property granted them. In-holders were not formally included in the process, however.

From the Grays Harbor perspective, “In our case, [the MOU] was modified in a public meeting with a big crowd....It was like watching sausage being made. It isn’t very pretty. It was an uncomfortable situation for all parties when we got to that point, because we had to do all of it in a public meeting,” Robert Paylor explains.

*“When it went to the public, the people opposed it and the Commissioners were not able to keep it [intact].”*

—Guy McMinds, Quinault Indian Nation

## MOU Enhances the Comprehensive Planning Effort

Under the Growth Management Act, Jefferson County was required to develop a comprehensive plan. With the MOU in place, the County was committed to including the Quinault Nation in the process. They found that the County and Tribe already had consistency on certain issues, such as the definition of rural land use densities. Other issues, especially involving permits, will take more time to resolve.

Grays Harbor County was not mandated under GMA and did not opt to plan under the Act. It had already created a comprehensive planning process in the 1960s.



Guy McMinds

Photo by Larry J. Workman

## Lessons Learned

- 1) Turnover, both in county commissioners and tribal positions, has affected working relationships.
- 2) The MOU evolved from the idea of a “community plan” that both the Tribe and County could support. From Jefferson County’s perspective, the MOU was a more appropriate tool because it involved a limited geographic area, allowing the parties to deal with very specific issues quickly.
- 3) The Center provided a model to work from, so the parties did not have to start from scratch.
- 4) Summing up the question, “What advice would you give to other tribes?” Guy McMinds of the Quinault Indian Nation comments:

*“I think you have to have personal relationships with County Commissioners and County Planners. I think you have to have personal relationships with the [non-Indian] land-owners, too. This builds a foundation for later negotiations.”*



## COLVILLE CONFEDERATED TRIBES/ FERRY/OKANOGAN COUNTIES

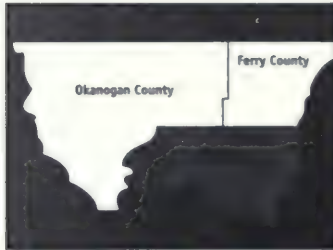
The Colville Confederated Tribes, one of the largest in Washington State, includes 8,231 tribal members from 11 Bands. The 1,400,000-acre Colville Indian Reservation is located in Okanogan and Ferry Counties.

Most of the reservation land—about 80%—is Indian-owned; tribal members comprise 56% of the total reservation population of 7,962. A substantial number of non-Indians live on the Colville Indian Reservation, making up about 40% of the population. Approximately 20% of the reservation land is non-Indian owned.

In late 1994, Ferry County, Okanogan County, the Colville Confederated Tribes, and five

cities (Coulee Dam, Nespelem, Okanogan, Omak, and Elmer) came together to work out an Interim Process and Protocol and a Conflict Resolution Process, as a precursor to comprehensive planning in the area. NRRG staff provided information and advice to then Ferry County planner Terry Knapton, on developing an MOU type of agreement.

This process established a tribal/county Intergovernmental Cooperative Agreement, patterned after the Swinomish Tribal Community/Skagit County and the Quinalt Tribe/Jefferson County MOU and other models (see Appendix 8). Developing an "MOU" was discussed; however, the term "Cooperative Agreement" was used to better reflect the intent of the work.





## Process for Developing an Intergovernmental Cooperative Agreement

### 1) A facilitator guided the process.

"[Kurt Danison] basically kept us on track. I think the professional planners and the attorneys drove it, [but] what he did was keep us on task. He made sure we met and stayed on, he made sure no one made personal attacks. He kept the spirit of cooperation and a positive mode. The professionals on all sides spinned the thing through the system."

—Terry Knapton, former Ferry County Planner



Terry Knapton

### 2) Participants included elected

officials of each entity, including business council members, mayors, and county commissioners. Other participants included planners and legal representatives of both sides.

### 3) Members agreed to work through the issues, emphasizing positive reasons and minimizing jurisdiction and negative conflicts that had been obstacles to cooperation in the past. Among the topics discussed were areas in which the Tribe and County already had cooperative agreements, including:

- Law enforcement
- Mental health and other social programs
- Educational programs
- Road management
- Community services

### 4) Moving to the subject of land use was a natural progression. This was an area of common ground, in which participants shared mutual needs and concerns.

### 5) As preparation for developing the Interim Process and Protocol, all agreed on wanting to "protect and preserve our life styles, our environment, our natural settings, our agricultural lands, and our timber lands from over development."

### 6) All parties signed the Intergovernmental Cooperative Agreement on Land Use.

## Building on a Protocol

Using the Skagit/Swinomish and Quinault/Jefferson government-to-government processes as models (in addition to other tribal/county initiatives), the parties developed an Interim Process and Protocol to help the Tribe and County do business with each other on a daily basis. The process included determining the flow of permits on reservation land, based on whether trust or fee lands were involved. Conflicts were resolved through a dispute resolution process, which included a joint action team of planners and a representative of each government, if the dispute could not be managed by planners alone.

"We called it an Interim Process and Protocol. We knew it was going to take us a while to get where we wanted to go... where we have, in ideal terms, one document that governed everything. Obviously that may take years. So, in the meantime, what do we do on the ground when a subdivision application comes up, whether it be on fee land or trust land? How do we deal with it? On a day to day basis, how do we do business with each other? What we came up with was an interim process and protocol that dealt with day-to-day planning work.... And in that, we actually had a flow of the permit through a process. If it was on tribal trust land, it went to [one] agency (not called the lead agency, but another term to get away from that whole issue). If it came through fee land, the other agency processed it."

—Terry Knapton, former Ferry County Planner

Before Terry Knapton was employed by Ferry County he had been a planner for the Colville Tribe. When the discussions began, he pulled out a draft agreement they had worked on several years before. That document became the catalyst for a series of meetings. Tribal council representatives, county commissioners, and several mayors from the cities were present at the meetings, facilitated either by a person from the County Economic Development Council, Terry Knapton, or Kurt Danison. The end result was an agreement that all parties could accept.

Photo by Sarah  
Sawyer/Alamy



Kurt Danison

*"The tribes are quite clear (it's clear to me anyway) that they are a sovereign nation, and they don't have to deal with counties and cities. We're not equal when it comes to government to government relations, so everything in this has been couched jurisdictionally. We are just talking process here, we don't even talk about lead agencies. It's the 'processing agency,' we are real careful about that."*  
—Kurt Danison, Highlands Associates

A dispute resolution process was built right into the agreement. If a dispute arose, the first stop was the coordinating committee, which included one elected official and one staff person or planner from each participating entity. The Tribe had elected officials and a planner; each county had a commissioner and a county planner; and Kurt represented the cities.

*"At any time if there was a conflict on the part of the County or the Tribe, we would stop and go through a dispute resolution process. It started at the lowest level between the planners. If that didn't work, then it went to what we called the joint action team, which included the planners and a representative of each government. It could be a county commissioner and a mayor, or a county commissioner and a tribal council member. If that didn't work we possibly would use mediation, a mutually agreed upon mediator. If that didn't work, then we always had litigation."*  
—Terry Knapton

*"The end result was that we decided to work this out among ourselves rather than let someone else in a court room far, far away make a decision for us, and we really didn't deal with the jurisdiction issue, we weren't going to win that. There was no way we would get over that hump. Nobody was ceding jurisdiction on anything and that was actually one of the biggest humps we faced. The tribes weren't ceding their jurisdiction to something other than the Federal government. It was strictly a cooperation and communication tool, we were putting into place."*  
—Kurt Danison, Highlands Associates

## Results of the Cooperative Agreement

In addition to creating an understanding of how the Colville Tribe and Ferry/Okanogan Counties would work together, the Cooperative Agreement prompted elected officials to discuss other issues of concern. County and Tribal officials set up meetings on those issues outside the venue of the planning process.

*"It built a measure of trust and respect among these entities that was not there before. They didn't know each other. (Or if they did, it was just barely.) It had real, positive results in communication and trust building."*  
—Terry Knapton, former Ferry County Planner

## Outcomes

Comprehensive land use planning between tribes and counties has not developed in this area. There is a joint permit process with one application form that everyone is using—whether applying to the Tribe or the local governments—and is generally considered to work well. A criteria check list for the planners determines whether the project is on fee land, and if not, what the land use designation is. This avoids having two permit processes.

The largest threat to continued cooperation is turnover in positions. Kurt Danison explains that turnover has been a major problem in Ferry and Okanogan Counties, as well as in tribal government. "There is not an orientation to intergovernmental land use planning, or agreement about what it does and its history," he says. "And we've had new county commissioners from both [counties] who really don't understand or haven't really been involved with it, so they have tended to be a bit negative."



### Lessons Learned

1) According to representatives of this process, when individuals pledge their commitment to work together—and with a documented agreement in hand—the positive relationships will carry forward, so long as the same people remain in their positions. Sustaining cooperation becomes a problem; however, when people leave (thus the challenge of institutionalization).

2) Representatives also expressed that, from the start, it is important to involve a cross-section of community leaders—and not only elected officials—who want to work together. The group should include resource people, tribal members, private citizens, elected officials, and professional staff, whether attorneys or planners. Building common ground among this diverse group is key.

3) One special interest group from east of the reservation, near an area that did not allow development, threatened a sit-in, causing the signing ceremony to be canceled. Documents instead were hand-carried to each entity for signing. Finding ways to get the community involved and keep the cooperative process moving forward is a constant challenge.

*"People need to respect other cultures, that there are other ways to do business besides the way you know. Because they don't do business the same way as you doesn't mean they are right or wrong. You need to be patient and willing to start over again on a regular basis to get back to where you were. It isn't...that you start at point A, go to B, in a linear progression. This is circular because you keep coming back. Ideally, you keep moving forward each time you come back. But that's not always the case. You need to keep things going. You really need to keep after it, need to have really good, positive reasons for getting people together. Not like, we are in this rut where the only thing that happens is when something bad is going on and we have to get together to fix it. I think we'd be a lot farther if we say things in a more positive view."*  
—Kurt Danison, Highlands Associates

### How do you think the Cooperative Agreement has stood the test of time?

*"I don't think it's stood very well and I'll tell you the primary reason. Turnover in all of the players, turnover in the business council, turnover in all of the planners, turnover in the attorneys. Because of all this, and not revisiting the purpose, goals, objectives or the mission (which was to preserve and protect the land)...people lost sight of it and became entrenched. With new players who didn't understand and didn't have any stake or ownership in this, it has eroded over time."*

*"It's a natural progression, people change. You need a regular review process, but you have to come back to your mission statement—why you did it in the first place—at least twice a year, and dedicate a whole meeting just to that. [Otherwise,] the day to day issues become the issues and entrench people. They forget what they were there for."*

—Terry Knapton, former Ferry County Planner



## "Speaking With One Voice:"

### HOOD CANAL COORDINATING COUNCIL REORGANIZATION

The Center's ongoing work with the Hood Canal Coordinating Council (HCCC) expanded the scope of government-to-government cooperation during the Tribes and Counties Project. Representing three counties, two Indian tribes, and (after reorganization) federal and state agencies as well, the HCCC provides a valuable case study for institutionalizing intergovernmental cooperation within a regional forum.

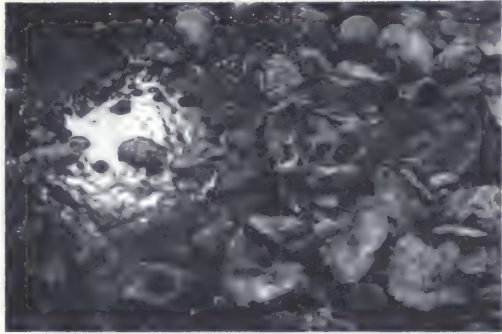


Photo by Natalie Fobes

When the Center agreed to act as the facilitator for HCCC's reorganization in 1991, the Council comprised officials from Kitsap, Jefferson and Mason Counties, all of which border Hood Canal; from the Skokomish Indian Tribe, based at the mouth of the Skokomish River in the south; and from the Port Gamble S'Klallam Tribe, located on Port Gamble Bay to the north. The HCCC was established in 1986 to "ensure the protection and enhancement of the environment of the [Hood Canal] area."

Center staff led the HCCC through a major reorganization from 1991-1993, allowing them to "speak with one voice" and become a more effective forum for the region. The Council has developed a new mission statement, goals, operating procedures, and organizational structure, greatly alleviating long-standing tensions between county and tribal representatives. According to several tribal and county representatives, improved relationships have produced better coordination between the HCCC's tribes and counties.

*"There aren't a lot of forums where counties and tribes can sit down together. There are lots of forums where the tribes and the state can sit down, and the tribes and federal agencies can, of course, because of the trust responsibility....But there aren't forums for tribes and counties to even sit down and talk. A lot of the action that happens is at the local level, and there are no forums to have civil dialogue. And Hood Canal Coordinating Council at least is an opportunity for that."*



Jay Watson

Photo by Natalie Fobes

Jay Watson, Planning Director, Port Gamble S'Klallam Tribe

## Hood Canal: A Resource Unique in Washington State

To fully appreciate the role of the Council and why its reorganization was vital to the watershed region, it is essential to understand Hood Canal and its unique features.

Hood Canal is not an artificial channel as the name implies. It is a 61-mile long glacier-carved fjord forming the westernmost portion of the Puget Sound Basin. The Canal connects with Puget Sound's Admiralty Inlet at Tala Point and Foulweather Bluff; extends 45 miles south-southwest along the eastern side of the Olympic Peninsula, curves eastward at the



--- Hood Canal Watershed

hook-shaped Great Bend (Annas Bay), and extends another 15 miles to end in the shallows of Lynch Cove. The entire watershed covers 550 square miles.

## Rapid Growth and Development are Transforming the Canal

More than 30,000 people now reside in the Hood Canal area. Its three bordering counties are among the fastest growing in Washington State. Nonetheless, the Hood Canal watershed is still sparsely populated compared to the

densely urbanized central Puget Sound region. Most communities are small and there are no incorporated towns. Heavy industry consists of logging, a large lumber mill at Port Gamble, two hydroelectric power facilities in the Skokomish River watershed, and the U.S. Navy Submarine Base at Bangor.

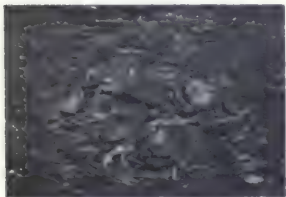
Aside from the rate of population growth which has occurred in the watershed, it is the type of growth and development that continue to influence its future socio-economic characteristics. As development spreads into rural areas and an increasing number of commuters work outside the watershed, the Hood Canal region is becoming a "bedroom community." Much of the original, close-knit social character of its people and their communities is being lost as growth advances.



## Piecemeal Management Led to Creation of the HCCC

Like other Puget Sound watersheds, the Hood Canal watershed is multi-jurisdictional. Over 60 federal, state, local, and tribal government institutions have an interest or authority in the area's natural resource management and protection. These jurisdictions have their own, and sometimes overlapping, resource management policies and regulations.

Land and resource management objectives differ among government agencies. The U.S. Forest Service and Washington State Dept. of Natural Resources, for example, manage multiple uses, while the U.S. Park Service emphasizes resource protection and preservation. The U.S. Navy, another important landowner, manages resources on the 7,100-acre military reservation on the east side of the Canal.



Northern Renewable Resources Center photo

Before the Council was created in 1985, various jurisdictions managed the land and natural resources in a piecemeal fashion, based more on political boundaries than ecological considerations. This was one of the primary concerns which led to the

## HCCC: Cooperative Water Quality Protection is a First

The Commission's report laid the foundation for what was to become one of the first cooperative county-state-tribal efforts to plan and carry out water quality protection strategies on a **watershed ecosystem basis**.

HCCC's union of governments was considered a bold and untried experiment in watershed management. For the first time, an organization had been formed on the assumption that successful water quality and natural resource protection programs must be based on the mutual cooperation of those with primary interest and authority.



Photo by Nanette E. Olson

creation of the Hood Canal Coordinating Council. Citizens and government agencies had watched Hood Canal grow from a scenic, sleepy vacation spot to a crowded home for thousands. They began to pressure then governor John Spellman to take action.

The governor responded by directing the Washington State Ecological Commission, with assistance from the Washington State Department of Ecology (DOE), to prepare a policy that would protect the environmental integrity of Hood Canal. The most significant component of the Ecological Commission's report was to establish the Hood Canal Coordinating Council (HCCC).

In creating the HCCC, the Commission placed county, state, and tribal representatives at the same table, recognizing the counties' jurisdiction over land and resources; the tribes' treaty-guaranteed resource management and harvest rights; and the larger, statewide interest. Within

this structure, it also sought to rectify long-standing lack of communication and an atmosphere of distrust among these governments.

*"The tribes and the counties seem to get along better in the Coordinating Council, as a forum, than we do if we are invited out to the Skokomish to talk over the Skokomish flood plan or the Squaxins to talk about shellfish harvesting. We seem to get politicized then, but at the Council (although there are times every once in a while) I think that everybody's more relaxed with each other than they are in other meetings with the tribes."*

—Mary Faughender, Mason Co. Commissioner

In addition to planning and coordination, the Commission charged the HCCC with targeted programs for public involvement and education.

## A Changing Watershed Prompts HCCC Reorganization

Eight years after its founding, population growth in the watershed prompted the HCCC to make significant changes in its membership and structure. Key factors included:

- 1) Declining populations of critical Hood Canal salmonid stocks, and the fear of a listing under the Endangered Species Act
- 2) The region's high current and projected population growth rate
- 3) Evidence of increasing water quality problems and shellfish beach closures
- 4) The sudden visibility given Hood Canal by the book, *Hood Canal: Splendor at Risk*, published by *The Sun* newspaper earlier that year
- 5) Several HCCC members supported a more aggressive and proactive response to problems facing Hood Canal
- 6) Growing recognition of the need for federal and state agencies, as well as local citizens, to participate cooperatively in the Hood Canal effort



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Renewable Resources  
Center, Inc. 1993

## Reorganization Fosters New Level of Government-to-Government Cooperation

Initiated by Kitsap County and assisted by the Northwest Renewable Resources Center, HCCC's reorganization culminated not only in many structural changes, but added seven federal government agency representatives, nine state agency representatives, and four local Watershed Management Committee representatives as ex-officio (non-voting) members. To correct an imbalance between the HCCC's county and tribal membership, tribal representation increased from one member representing each tribe to three, for a total of six tribal members.

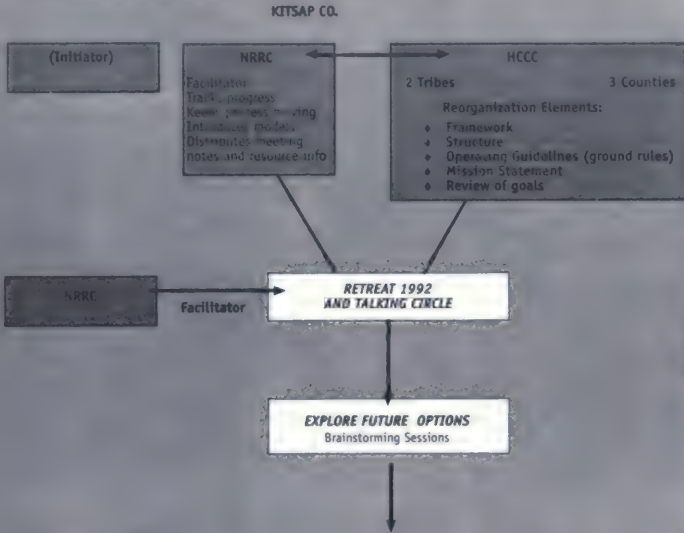
The schematic diagram on the following pages summarizes key steps in the HCCC reorganization process from 1991-1993. The Center continued to provide professional facilitation services in the five years during and after HCCC's reorganization.<sup>1</sup>



## Hood Canal Coordinating Council Reorganization, 1991-1993

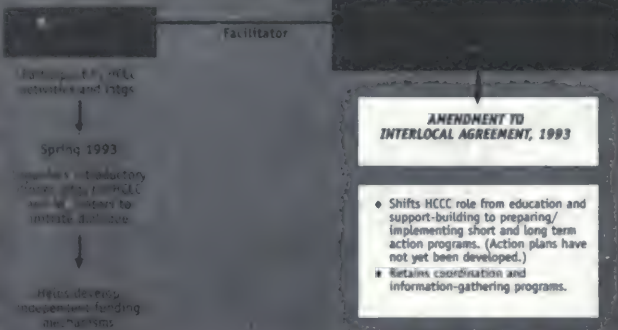
**Goal:** *Redefine the place of the HCCC in efforts to preserve and protect the Hood Canal Watershed, making the organization a more effective forum for the region.*  
*The HCCC comprises officials from Kitsap, Jefferson, and Mason Counties, and from the Skokomish and Port Gamble S'Klallam Indian Tribes.*

*Phase 1 (1/92) - (Needs identified mid-1991)*



## Hood Canal Coordinating Council Reorganization, 1991-1993

Phase 2 (1992-93)



## Hood Canal Coordinating Council Reorganization, 1991-1993

### Phase 3

Facilitator

"Facilitation has been helpful in getting everyone together. There was a lot of resistance to the idea of a coordinating council. But once we got everyone together, they didn't want to leave. They were all in it for the long haul."

—Marty Paudhender, Mason Co. Commissioner

#### REORGANIZATION

- ◆ Adds 4 tribal members to correct imbalance
- ◆ Adds 7 Federal Agency reps
- ◆ Adds 9 State Agency reps
- ◆ Adds 4 Local Watershed Mgt. Committee reps
- ◆ Creates Technical Committee
- ◆ Establishes working relationship between the 2 tiers of the HCCC Policy Body
- ◆ Has new mission, structure, operating guidelines, and goals in place

#### OUTCOMES

- ◆ Model water quality protection effort
- ◆ Technical arm provides accurate status on water quality and resources
- ◆ Improved communication among HCCC regular and ex-officio members, and others with interest in the Canal
- ◆ Increased awareness and respect for programs of individual jurisdictions
- ◆ Clearly recognizes the autonomy of tribal and county governments
- ◆ Reduced dependency on unpredictable funding sources

"We're getting more better communication between the Tribe, Western and Eastern. They're not just sitting there and waiting for us. They're taking action. That's a very big jump. It shows that we're making progress. But it's not just us. It's the whole area. We're all working together."

—Marty Paudhender, Mason Co. Commissioner

## The Center's Role: Identifying Needs and Facilitating Discussion

NRRC's facilitator joined the HCCC effort in January 1992, at a quarterly meeting held in Port Townsend. At this meeting, the current needs of the HCCC were identified. These included:

- 1) A definite framework, structure, and operating guidelines (ground rules)
- 2) A clear mission statement
- 3) A thorough review of HCCC's goals
- 4) Defining how a newly structured HCCC would *figure it out*
- 5) Protocols to be used
- 6) Extent of the facilitator's role
- 7) Identifying funding sources
- 8) How the HCCC would interact with outside interests



*Hood Canal Coordinating Council President and Kitsap County Commissioner: Paul Best*

This was to be the first of many meetings, some lasting all day, and countless hours of intense discussion as the HCCC worked to redefine its place in the Hood Canal effort.

In addition to guiding these discussions, NRRC staff tracked progress, kept the process moving, and made certain that all voices were heard by recording ideas and decisions as they emerged. To encourage review of alternative options, NRRC staff provided information on similar models, including the Lake Roosevelt Water Quality Council and the Kitsap County Rural Policy Roundtable. They also worked with HCCC chairpersons and staff to develop meeting agendas, and helped arrange regular and special meetings, as well as events.

## The Retreat and Talking Circle

In 1992, the Center organized a Council retreat, combined with a salmon dinner hosted by the Port Gamble S'Klallam. At this retreat, NRRC staff facilitated a "talking circle," allowing tribal and county members and staff to share personal experiences and feelings they had about the watershed in an informal, non-political setting. Participants agreed that the retreat promoted an understanding of shared values and improved communication at a personal level.



*Northwest Renaissance Resources Center photo*

## Special Achievement Awards are Presented to NRRC

Expressing its appreciation for NRRC assistance, the HCCC made a token contribution to the Center in the amount of \$250.00, in January 1993. The Council further demonstrated its appreciation by presenting a **Special Recognition Award** to NRRC Project Director, Shirley Solomon, at its December 1994 Annual Environmental Achievement Award Program ceremony held at Alderbrook Resort. This award is one of only two such special recognition awards ever presented by the HCCC. Most recently, the Council recognized the role of the Center by presenting an **Environmental Achievement Award** to the NRRC "for outstanding efforts to protect and enhance the environmental quality of Hood Canal," October 16, 1996.



## Brainstorming Helps Answer Tough Questions

During many brainstorming sessions, NRRC staff explored a variety of future options with the Council. Among these was a broader, multi-dimensional approach that integrated social/cultural elements into environmental protection strategies. At every opportunity, the facilitator encouraged participants to consider tough questions.

When not involved in regular meetings or special events, the NRRC facilitator participated in Council activities. Many extra hours were spent in meetings, traveling long distances, and following up on organizational tasks. Project staff attended several meetings of the Council's Ways and Means Committee, held in Silverdale and Shelton in 1993, and helped develop independent funding mechanisms later adopted by the HCCC.

NRRC staff also helped to organize and carry out an introductory dinner meeting between HCCC members and key state legislators in Spring 1993. Center staff not only participated in the evening discussion, which provided information about Hood Canal's problems and the role of the Council in bringing about improvements, but helped initiate a dialogue between the HCCC and elected officials, emphasizing the importance of legislative support for the Council's programs and activities.



*HCCC Education Coordinator  
Donna Simmons*

## Looking Toward the Future

Through hours of discussion, HCCC members and others have explored a variety of options for the Council's future role and direction. While some still favor a more active role,

the general trend is for the Council to function primarily as a forum for intergovernmental cooperation, and to encourage stewardship through its education program. As a result, decisions made by HCCC, as a body, deal more with procedural and administrative matters, not policy issues.



*Richard Woyt, Jefferson County  
Commissioner*

## After Reorganization: Ongoing Assistance by the Center

The NRRC played a major role in an all-day HCCC retreat, held in Port Townsend in March 1994.

The first segment of the retreat was devoted to listing and prioritizing commonly held values. The second segment focused on alternative approaches which the Council might pursue. Participants agreed that the event reinforced the idea of commonly held values and established a "comfort level" in the Council's present role and direction.

The Center's staff person was a member of the Strategic Planning Retreat Team which planned, carried out, and evaluated the retreat. NRRC staff also worked with a Town and Regional Planning Consultant to facilitate the day's productive discussions.

## Amending the Interlocal Agreement

During the 1991-1993 reorganization period, Council members showed renewed support for a more active role. This position was outlined in the 1993 amendment to the Interlocal Agreement, calling for a shift from education and support-building programs to preparing and implementing short and long term action programs. The Council's ongoing coordination and information-gathering programs would continue as before.

### Lessons Learned

1) Although the Council overall has a positive effect on the region, internal and external factors have slowed the Council's action plans. Changing HCCC membership and the political atmosphere, coupled with lack of funding, staff resources or clear constituency support (and failure to receive baseline information for laying the groundwork) have prevented development of a timely Action Plan.

2) The dynamics of turning plans and policies into action depends, in large part, on the Council's membership. Participation, especially by ex-officio members, has been lacking. Some regular and ex-officio members do not attend meetings regularly or participate actively, while others may not place a high priority on the HCCC. Over the years, local watershed planning group representatives—largely citizen-based—have not fulfilled their role as ex-officio members of the HCCC. These positions finally were discontinued in 1996, when three of the four groups became inactive after fulfilling their primary purpose.

In most instances, however, the problem is simply insufficient government resources to allow full participation in the Council's activities on a regular basis.

3) An even greater problem has to do with regular changes in membership brought about by county and tribal elections. These changes have made it difficult for the Council to maintain continuity (time is lost while new members get up to speed) and have hampered its efforts to "stay the course." Most importantly, changing faces often go hand-in-hand with changing political viewpoints and priorities. Much of the Council's time and energy has been spent re-evaluating its mission and attempting to reach consensus about what its future role and approach in the Hood Canal effort should be. As Port Gamble S'Klallam tribal planner Jay Watson states:

*"The Council is so dependent on the personalities that are there. It's an institution, but really, it's who's at the table. And sometimes with different folks at the table, it's been a lot harder to talk. I think it's pretty friendly and free-flowing these days but I've seen it when it's been very tense. People were there because they felt that they had to be there to say...that they're working cooperatively, but they just wanted to be able to say that but not do it."*

### Outcomes

1) The HCCC now has an expanded and better coordinated water quality protection effort—one that will continue as a model for similar efforts in other watersheds.

2) It now has a Technical Committee to provide current and accurate information on the status of water quality and related natural resources.

3) Communication has improved among HCCC's regular members, ex-officio members, and others with an interest in Hood Canal.

4) Awareness of and respect for the programs and activities of individual jurisdictions has increased. Further, establishing a working relationship between the two tiers of the Council's Policy Body clearly recognizes the autonomy of tribal and county governments.

5) New opportunities for coordinated efforts and funding sources have been identified and pursued, and the HCCC has reduced its dependency on unpredictable funding sources.

The Council has been instrumental in working for more efficient management of water and related resources by reducing gaps and duplications. Key state legislators are better informed about the HCCC's efforts in Hood Canal. Now, more than ever, public and government interests are focused on the important connection between the health of Hood Canal's fish and shellfish resources and the water on which they depend. Finally, and perhaps most importantly, NRRRC has assisted in strengthening the spirit of mutual cooperation between Hood Canal county governments and tribal nations, the principle on which the HCCC was founded.

In spite of the many challenges HCCC has faced in its 11-year history, most observers believe that its accomplishments far outweigh its challenges. This is because regular and ex-officio members have come to agree more than they disagree on major issues. Responding to an interview question, Michael Jones, Tribal Council Member for the Port Gamble S'Klallam, describes current relationships within the HCCC:



Michael Jones

Photo by the National Tribes

**Q:** If faced with a serious conflict or disagreement today, would Council members be more likely to enter into discussions rather than litigation?

**A:** *"I think it would go to discussion because of everyone that's involved there, everyone that participates in the Hood Canal Coordinating Council. That spurs a lot of diplomacy. I think that's what this is all about. We're all neighbors and we're trying to get along."*

Armed with a spirit of cooperation and acknowledgment of shared values, the HCCC continues to carry out an important role in the Hood Canal effort.

## Endnotes

<sup>1</sup> Comprehensive Plan (1974); Land Use Plan (1977); Overall Economic Development Plan (1979); Water Resource Plan (1980); Forest Management Plan (1981); Land Use Ordinance (1981); and Skokomish Environmental Protection Act (1988).

<sup>2</sup> Discussions about the need for a facilitator began in mid-1991, as Council members began to reconsider their present course in light of changing conditions and needs. Because there was no funding for facilitation services to assist in its reorganization effort, the HCCC looked to the Center for assistance as part of the Tribes and Counties Intergovernmental Cooperation Project.

## Chapter 5

Significant changes are needed to improve tribal/county relations, not only in attitudes and agreements, but in administrative structures. Ongoing efforts to educate and raise awareness on many fronts—to expand the network beyond individuals to the community and region—have become increasingly important.

As facilitator and neutral party the Center functioned as a catalyst, but the substantive work (together with the risks and rewards) belongs to the tribal and county participants. NRRC consistently has sought to raise and shape public dialogue around the issue of tribal participation at the state and regional level, and to frame and create opportunities for collaboration at the local level. In developing this approach, the Center's goal has been to foster normalization of Indian/non-Indian interactions, then institutionalize these relationships on many fronts through:

- ♦ Existing Organizations  
(Regional Forums, State Offices/Departments, Professional Organizations)
- ♦ Education and Information Dissemination
- ♦ Capacity Building
- ♦ Gatherings and Presentations

Using this multi-faceted approach, the central message and themes of the Tribes and Counties Intergovernmental Cooperation Project have been carried throughout Washington State and the region. Building bridges and expanding the network is a critical piece of the effort, if intergovernmental cooperation is to be sustained in the long term.



## Educating and Expanding the Network



Following is a summary of these diverse efforts. All of these activities have combined to raise public awareness and create new opportunities for constructive Indian/non-Indian interaction.



Photo by Nature Center

## WORKING WITH EXISTING ORGANIZATIONS

The Center has worked with a number of organizations in the tribal/county "network." Those highlighted here have undertaken a wide range of endeavors to foster intergovernmental cooperation.

### Washington State Association of Counties (WSAC)

WSAC was a co-sponsor of the Tribes and Counties Project, along with the Washington Department of Community Development (now CTED), the Governor's Office of Indian Affairs, and the federally recognized tribes.

The NRRC worked with WSAC on many efforts:

- **Panel on County/Tribal Coordination.** WSAC Fall Meeting, 1990. Center staff helped organize the panel and participated in it.
  - **"Natural Resource Management and Growth Management: Fostering Intergovernmental Relations Between Counties and Tribes,"** WSAC 86th Annual Convention, June 18, 1992. The Center organized and facilitated this gathering at the invitation of Association leadership. *"Tribal/County Alliance."* This historic event marked the first time in the 86-year history of the Convention that Indian issues held a place on the agenda. Over 50 county and tribal leaders discussed ways to find common ground and develop working relationships. At their request, the Center took the lead in coordinating this event.
  - **Convention Follow-up Meeting: Explore the Value in Hosting a Series of Regional Educational/Discussion Forums for Elected Officials and their Staff,** November 19, 1992. (Series to be co-sponsored by the NRRC, WSAC, Northwest Indian Fisheries Commission, and tribes and counties of the region.) Center staff took the lead and provided assistance at the request of local and tribal leaders who had attended the June 18th convention workshop on tribal/county relations. Participants in this follow-up meeting came together to share their experiences and strategize on ways to move forward.
- The Center and WSAC also took the opportunity presented by the gathering, "Working Effectively at the Local Level," June 1993, to spotlight this effort and "move it along." Key tribal and county leaders agreed to pursue the a quarterly meeting to discuss subjects of interest and report back to the counties and tribes.
- **Implementing WSAC's Resolution to Support Working Relationships Between Counties and Tribes, 1994.** WSAC asked the Center to follow up on the resolution and move this program ahead. This resolution, passed at WSAC's 1994 annual convention, represents a great leap forward in support of intergovernmental cooperation.

### Lessons Learned

1. WSAC's role as co-sponsor of the Tribes and Counties project, and its sponsorship of activities such as the June 1992 workshop and the 1994 resolution, were extremely important to the project's success. Approval of project goals by the counties' statewide organization made it easier for individual counties to consider participation in project activities and/or face-to-face discussions with neighboring tribes. Further, it sent an important signal to the tribes that the project was a two-way effort: that it wasn't only the tribes reaching out to unresponsive counties.
2. In developing support for WSAC's resolution to foster working relationships between counties and tribes, Center staff capitalized on a sympathetic WSAC president; and the experience of an enthusiastic Skagit County commissioner who offered a compelling description of the benefits gained from improved relationships between the governments.

### Connections Within the Project

- Pilot Fellowship Circle
- Skagit Fellowship Circle
- Workshop on Tribal/County Relations, WSAC Annual Convention, June 1992
- "Working Effectively at the Local Level," Gathering, June 1993
- "Tribes and Counties: The Spirit of Cooperation in Changing Times" Conference, December 1996

The "enthusiastic commissioner from Skagit County" was **Bob Hart**, a participant in the Skagit Fellowship Circle who also attended the 1993 Gathering.

WSAC staffer **Paul Parker** participated in the Pilot Fellowship Circle. Many attendees at the June 1992 workshop were tribal leaders, county leaders, or staff who played a key role in other project elements, such as intergovernmental discussions between individual tribes and counties, community-building activities, and gatherings. Some, by their commitment to improving county/tribal relations (developed through other project elements) helped make WSAC's activities succeed. For others, it was the workshop or other WSAC activities that first put them on this path.

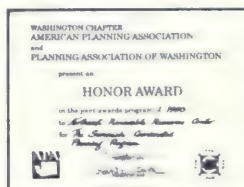
### Planning Association of Washington (PAW)

Founded in 1963, the Planning Association of Washington provides an inclusive forum for sharing problems and solutions, developing needed knowledge, and putting the know-how of planning into the hands of citizens and their elected officials.

PAW has a history of being inclusive and open to new approaches, ideas and subjects. Eastern Washington and rural communities are well-represented on the PAW board, membership roster, and agenda, in contrast to many statewide organizations where urban and western Washington often dominate.

For several years, PAW has actively pursued and built partnerships with groups whose missions and perspectives differ but who share a common interest in planning. Proud of its inclusiveness, reaching out to include the tribes was a "natural" for PAW.

NRRC staff have worked with PAW throughout the Tribes and Counties Project to include tribal issues on the organization's agenda. Having project staff serve on the board has facilitated this effort. Regular time on the agenda for tribal issues at PAW conferences has become the norm during the 1990s.



- **PAW/APA Awards Program:** has recognized exemplary tribal planning achievements, including the *Swinomish/Slaight Joint Comprehensive Plan* (described in Chapter 2) in 1989-90, and *Eastern Washington University/Colville Confederated Tribes Moses Mountain Study* of 1991, evaluating the possibility of a ski resort on the Colville Reservation.
- **Panel Discussions on Tribal Solid Waste Management Planning and Tribal Responses to Growth Management** at PAW's Fall Conference in Kennewick, Washington, October 1990. Center staff organized and moderated these panel discussions.
- **Technical Aspects of Intergovernmental Coordination and Growth Management, Gathering in Tacoma, Washington, April 1991.** This event, which brought 60 county and tribal planners together, was co-sponsored by the Center, Dept. of Community Development, and the Northwest Tribal Planners Forum (NWTPF) in cooperation with PAW and the Washington Chapter of the American Planning Association (APA).
- **PAW Fall Conference, "Growth Management and Natural Resource Management: Emerging New Partnerships,"** in Mount Vernon, Washington, 1991. The Center assisted in coordinating this event, which focused on coordination between Indian and non-Indian governments, as well as cultural pluralism and cross-cultural communication.
- **Short Course on Tribal/County Intergovernmental Coordination, 1992.** Center staff developed this self-contained component of PAW's Short Course on Local Planning. Since that time, the three-hour Tribal Short Course has been on the agenda of nearly every joint conference PAW/APA have coordinated or co-sponsored. It is also presented as a 20-minute segment of every Short Course on Local Planning, and a section on coordinating with tribal governments was included in the third edition of the Short Course on Local Planning Manual, published in May 1994.

PAW has also created an ex-officio position on its board of directors for a representative from the Northwest Tribal Planners Forum and has revised its by-laws to include tribes in its membership categories. The organization has actively recruited tribal planners and other tribal representatives into the organization, and provided special introductory membership rates.

### *Lessons Learned*

- 1) In many ways, PAW provides a model of how an organization can normalize and institutionalize relations with tribal communities. It has taken a multifaceted approach: putting tribal issues on its agenda, actively recruiting tribal membership, making room for tribal participation on its board, and providing educational materials on tribal issues to its members and others.
- It is important to note that none of this required PAW to make major changes in its structure, goals or operations. It was not a disruptive change for the organization.
- 2) It is also important to point out that all of this was greatly facilitated by having Tribes and Counties project staff actively involved on PAW's board and event planning committees. Whether the inclusion of tribes would have occurred without this involvement (and whether it will continue when that involvement ceases) is an open question.
- 3) This highlights the importance of developing "advocates" for continued cooperation, individuals who have become sensitized to these issues and will naturally think, "What about the tribes?" when presented with a list or activity or agenda that leaves them out. The discussion presented in Chapter 3, *Community Building and the Fellowship Circle*, focuses on one approach by the Tribes and Counties Project to develop such advocates. The Tribal Short Course, mentioned above, is a similar approach.



### Connections Within the Project

- Pilot Fellowship Circle
- "Technical Aspects of Intergovernmental Coordination and Growth Management," NRRC Tacoma Gathering, April 1991, PAW co-sponsored
- PAW Fall Conference, 1991
- Tribal Short Course
- Northwest Tribal Planners Forum, ex-officio membership on PAW Board

Activities encouraging tribal inclusion in PAW overlap with several aspects of the Tribes and Counties Project. PAW co-sponsored many project activities, including conferences, workshops, and gatherings. Similarly, the project (and especially the Tribal Short Course) is on the agenda of most PAW activities since the project began.

Northwest Tribal Planners Forum liaison to the PAW board (and Port Gamble S'Klallam staff member) Jay Watson was also a member of the first Fellowship Circle. PAW Board member and CTED employee Ted Gage administers the Short Course on Local Planning.

### Northwest Tribal Planners Forum (NWTPF)

The Northwest Tribal Planners Forum, established in 1989, is dedicated to the advancement of professional skills and knowledge in tribal planning, and is committed to the future well-being of Indian communities.

*"The Forum is an association, the professional association for tribal planners in the Northwest. It is dedicated to the advancement of professionalism in tribal planning and the advancement of tribal communities. Its most important contribution is being able to network and direct problems toward solutions, through the experiences that we all share as working professional people in Indian Country."*—Nick Zaferatos, Planning Director for the Swinomiah Indian Community

The NWTPF also fosters interjurisdictional cooperation and coordination by advancing tribal sovereignty and governance capabilities in several ways: through effective use of planning principals; cooperation; and through education in all areas of government and management.

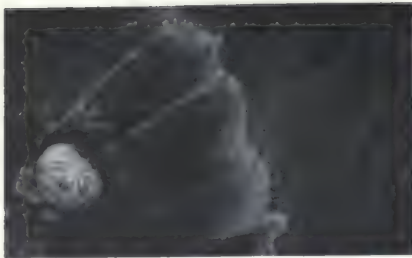
- **The Western Planner, April/May 1992 Edition Showcases Indian Issues in Planning.** The Center, in cooperation with the NWTPF and PAW, assisted in compiling, writing and editing this special issue. This platform carried the message of what is being done and what is possible through cooperation to resolve intergovernmental challenges.

- **Discussions with the Growth Strategies Commission Advocating Tribal/County Coordination in GMA:** Joining with the NWTPF, the Center pursued these discussions to ensure that language specifically addressing tribal/county coordination would be included in the Commission's recommendations to Governor Gardner. It was hoped that these recommendations would form the basis of executive-sponsored legislation to augment the Growth Management Act of 1990. Despite these efforts, GMA was not amended to include cooperation with the tribes.



Photo by Nathan Huber

Larry Campbell,  
President  
Northwest  
Tribal  
Planners  
Forum



## Education And Information Dissemination

### Tribal Short Course

NRRC staff developed the first **Short Course on Tribal/County Intergovernmental Coordination** in 1992, as a component of the Short Course on Local Planning. This educational program was created by the Planning Association of Washington (PAW) in 1975, and is administered by the Washington State Department of Community, Trade and Economic Development (CTED).

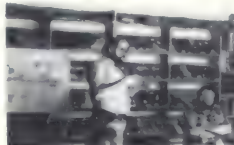
The PAW Short Course on Local Planning provides education and training to elected officials, planning commission members, agency personnel, citizen groups and the general public. There have been many positive comments about the new Indian Country segment, developed by project staff. The segment includes basic information on tribal government and profiles the federally-recognized tribes in Washington.

Available as a three-hour presentation or as a 20-minute segment of every PAW short course, the Short Course on Tribal/County Intergovernmental Coordination is designed to prepare Indian and non-Indian officials and staff for cooperative activities. It includes sections on federal Indian law and policy, the status of tribal/county coordination, Indians in the State of Washington, on- and off-reservation issues, and examples of intergovernmental coordination. Groups across the state can access the Tribal Short Course in a variety of workshop formats, and it can be tailored to fit the needs of individual tribes, counties, or other organizations.

### The Tribal Short Course: Statewide and Regional Exposure for Intergovernmental Cooperation

- April 1992: First presentation of the Tribal Short Course to 62 people attending the Washington Chapter of the American Planning Association APA/PAW Joint Spring Conference in Bellingham, Washington
- October 1992: Presented at the PAW Fall Conference in Pasco, Washington.
- Fall and Spring 1993: Presented at PAW Conferences in Olympia and Spokane, Washington
- May 1994: Attended by nearly 50 people at the Joint Spring Planning Conference, co-sponsored by PAW, APA, the Washington State Department of Ecology, the Washington State Department of Transportation and Northwest Tribal Planners Forum
- May 1994: A section on coordinating with tribal governments was included in the third edition of the PAW Short Course on Local Planning.
- October 1994: Presented in Portland, Oregon at the

APA Fall Conference, co-sponsored by the Washington and Oregon chapters. Over 40 people attended (even



Dr. Dick Winchell, Eastern Washington University  
Presenting at a recent Tribal/County Short Course

though it was held on a Saturday at 8:30 a.m.).

- An average of **50 PAW short courses a year are held throughout Washington State**, as well as standard two-day sessions at the annual PAW Spring and Fall Conferences. The enormously popular third edition required a third printing.

NRRC staff have received a steady stream of requests for copies of the compendium of materials that accompanies the Short Course on Tribal/County Intergovernmental Coordination. The Center has distributed copies in-state, regionally, nationally, and even to an Australian senator looking for models to offer his Aboriginal Affairs Committee. A revision of the Tribal/County Short Course is currently underway with the help of the Northwest Tribal Planners Forum, CTED, PAW, and Dr. Dick Winchell of Eastern Washington University.

### Lessons Learned

- 1) The Short Course is an excellent way to educate non-Indians about tribal history, culture, government, and planning issues.
- 2) It has also been a good vehicle for introducing tribal concerns to Washington's mainstream planning organizations. Hundreds of professional planners and non-professionals interested in planning have been exposed to these issues through the Short Course. Hundreds more possess copies of the Short Course on Local Planning with its section on the tribes, or the compendium of materials that accompanies the Tribal Short Course. At their fingertips is a resource to help them answer questions about the tribes or to provide addresses and phone numbers.
- 3) Developing a compendium from existing and contributed sources is an excellent way to provide resource materials.

### Connections Within the Project

- Government-to-Government Models
- Tribal Inclusion in the PAW Short Course Manual
- Presented at all major regional Planning Conferences

By creating the Tribal Short Course, the Tribes and Counties Project has put in place an important educational tool, providing solid background information and models of cooperation for Indian and non-Indian governments.

Inclusion of tribes in the PAW Short Course Manual constitutes a significant leap forward on the road to institutionalizing tribal presence on the local and regional planning scene. As the list of presentations indicates, the Tribal Short Course has become a regular feature of planning conferences in the region, an important step in normalizing and institutionalizing working relations between tribal and county planners, and keeping tribal issues on the area's planning agenda.

All of these outcomes further the goals of the Tribes and Counties project and the cause of Indian/non-Indian intergovernmental coordination. The Short Course has also played an important role in cementing tribal inclusion in PAW.



Northwest Renewable Resources Center photo

### Reports

- NRRC Surveys of Tribal and County Planning Department Staffs

In June 1992, the Center conducted a survey analyzing the status of tribal/county cooperation and coordination in Washington state, examining obstacles to coordination, and making recommendations for further cooperation. The survey has been widely distributed to every county and tribal government in the state. Authored by Karen Doering, the survey's recommendations provided direction for Tribes and Counties project activities.

In the Summer of 1996, a similar survey was distributed to tribal and county planners throughout the state. As of this report, the survey findings are being compiled. When compared to the earlier survey, results reflect the frustration many participants are experiencing, due to turnover occurring in tribal and county governments.

## Publications

The Center has assisted several publications in writing, compiling, and editing articles about the Tribes and Counties Project and the topic of Indian/non-Indian intergovernmental coordination:

- *Consensus*, July 1991: Article describing the Swinomish/Skagit cooperative process and introducing the Tribes and Counties Project. NRRC project staff helped write this article for *Consensus*, the journal of the Harvard Law School Program on Negotiation.
- *The Western Planner*, April/May 1992: Articles focusing on Indian Country and cultural diversity as it relates to land use planning. The Center provided material and direction for this issue of a journal serving professional planners in 12 western states. In his introductory "Notes," the journal's editor commended every page to his readership and said that he found the material "tremendously humbling" and that it "changed his frame of mind forever."
- *Planning and Zoning News*, October 1992: "Coordinating Jurisdiction on Indian Reservations," Article by Kristine M. Williams prominently featuring the Tribes and Counties Project. The Center provided background material and graphics.
- *Northern Lights Magazine*, Spring 1993: Article about the Tribes and Counties Project, "Nurturing the Art of Empathy," by freelance writer Marjane Ambler, with assistance from the NRRC.
- *Portrait of a Tribe: An Introduction to the Skokomish*, June 1993. The Center assisted the Skokomish tribe in their efforts to compile this profile of tribal history, governmental structure, policy, and goals. Intended for distribution to the county and other non-Indian governments and organizations, it is a valuable resource in communicating with non-Indian neighbors.
- *Cultural Survival*, Fall 1995: "Tribal/County Cooperation: Making it Work at the Local Level," by NRRC project director Shirley Solomon. She has written several articles featuring the Tribes and Counties project.
- *Additional Media Coverage*: Press releases developed by the Center were published by newspapers and newsletters throughout the project. These outlets were important in carrying the message to a wider audience: of what is being done, and what else is possible, in resolving intergovernmental challenges through improved cooperation.

## CAPACITY-BUILDING

### American Indian Heritage High School

Introducing cooperative problem solving to the next generation of Indian leaders was the goal of NRRC's 1992-93 internship program for students from Seattle's American Indian Heritage High School. Focusing on natural resource management from a tribal perspective, this internship program is one example of the educational/capacity-building component of the Tribes and Counties Project.

Six students who had only limited contact with tribal government, reservation life, and their Indian heritage had the opportunity to tour the Skokomish and Swinomish reservations and Northwest Tribal College on the Lummi reservation. They also attended a meeting of the Hood Canal Community Council and participated in the ATNI 1993 Winter Conference. The program opened and closed with a "Talking Circle," facilitated by Ken Jackson of Sacred Circle Storytellers.



NORTHWEST TRIBAL COLLEGE/LENNER PHOTO  
Larry Campbell leads students on a tour of the Swinomish Reservation

### Lessons Learned

- 1) Getting the program off the ground required patience and persistence. The school had little experience with internships, and Center staff had to put in place every piece—from designing and coordinating activities, to investigating and developing insurance and permission forms for the students and the school.
- 2) The success of the program certainly justified the effort. In each case, the students were warmly welcomed by the host community. They heard discussions about resource management and the call for cooperation among all entities. They also heard Indian leaders tell them how welcome they are in Indian Country, and encourage them to continue their education so they could return to their tribe (or another tribe) and make a difference.



### Connections Within the Project

- "Creating Cross-Cultural Connections"
- Fellowship/Community Circle

The youth program was designed to help train the next generation of leaders for tribal communities, and to reestablish the link between these urban Indian students and their heritage. It also served as the pilot for another Center program, "Creating Cross-Cultural Connections." That program, conducted in 1994, developed cross-cultural



Northwest Regional Center, Seattle (photo)

communications skills in a group of ten racially and economically diverse high school students from Indian Heritage and three other Seattle schools. This project adapted the Fellowship/Community Circle model (discussed in Chapter 3) so that it could be applied to youth—in hopes that they would carry the message to their families and communities, and grow up to be leaders and advocates for cooperation.

### Externships

#### Participants

Anne Pavel, Skokomish Indian Tribe

Larry Campbell, Swinomish Indian Community

Through the Tribes and Counties' capacity-building component, the Center provided externships to Anne Pavel of the Skokomish Indian Tribe and Larry Campbell of the Swinomish Indian Tribal Community, to help them increase their leadership capacity and ability to serve as a "bridge" between Indian and non-Indian communities. The externship allowed Anne (at that time Chair of the Skokomish General Council) to become more active in regional policy discussions. During her externship, she was elected Chair of the Hood Canal Coordinating Council.

Larry devoted his externship to pursuing higher education and assisting the Swinomish Tribe to develop the infrastructure needed to implement the Swinomish Comprehensive Plan. He is now Program Manager for the Swinomish Planning Department.

#### Lessons Learned

1) These externships demonstrated that targeting project resources to support the personal growth and professional development of individual tribal members is an effective means of capacity-transfer. Coupled with their participation in the first Fellowship Circle and other project activities, this support helped both Larry Campbell and Anne Pavel to do an excellent job of "bridging" between their Indian communities and the non-Indian world. Both are still working in this arena. They have excelled in the areas in which the externship focused, becoming strong advocates for the cooperative

approach to Indian/non-Indian relations at the local level.

Anne Pavel is still active on the Hood Canal Coordinating Council and Larry Campbell continues to be a valuable and versatile member of the Swinomish staff. He

is now the president of the Northwest Tribal Planners Forum, is finishing his undergraduate degree at Western Washington University, and is considering graduate study in planning or law.



Anne Pavel, Skokomish Tribal Councilmember

### Connections Within the Project

- Pilot Fellowship Circle
- Indian Heritage Internships
- SkokomishTribe/Mason County Government-to-Government
- "Portrait of a Tribe: An Introduction to the Skokomish"
- Hood Canal Coordinating Council
- Planning Association of Washington, 1991 Fall Conference

Both Larry Campbell and Anne Pavel participated in the Pilot Fellowship Circle (see Chapter 3) and hosted the Indian Heritage Youth Program participants during their tours of Skokomish and Swinomish. Anne also participated in discussions between the Skokomish Tribe and Mason County, and in producing "Portrait of a Tribe: An Introduction to the Skokomish," a document produced by Center staff and the Skokomish General Council that provides background information about the Tribe. As mentioned above, Anne spent several years as Chair of the HCCC and Larry participated in the 1991 PAW Fall Conference, which spent its second day on the Swinomish Reservation.

## GATHERINGS AND PRESENTATIONS

### Gatherings

Throughout the Tribes and Counties Project, the Center has made innovative use of platforms and venues such as conferences, conventions, and workshops to introduce Indian issues to mainstream organizations. As the project evolved, the Center sponsored or co-sponsored a number of gatherings that brought tribal and county representatives together:

#### April 1991

- "Building Relationships Between Tribal and County Planners," April 1991, NRRC Gathering - Tacoma, Washington

This "first of its kind" gathering, convened by NRRC project staff, was attended by 60 county and tribal planners. They discussed technical aspects of intergovernmental coordination, growth management and ways to build relationships.

Participants completed a survey at the start of the gathering about the current state of relationships they shared with their counterparts in county/tribal planning, and what they hoped to see in the future. They listened to speakers address issues from the county and tribal perspectives, and took part in several facilitated open dialogues. The Center brought together as co-sponsors many organizations which had never worked together before: Planning Association of Washington (PAW), American Planning Association (APA), Dept. of Community, Trade and Economic Development (at that time, DCD), the Association of County and Regional Planning Directors, the Association of Washington Cities Planning Directors, Northwest Tribal Planners Forum (NWTPF), and Affiliated Tribes of Northwest Indians (ATNI).

### Lessons Learned

- 1) This gathering was significant because it brought people together who had much in common, but had rarely interacted. Surveys completed at the conference revealed strong support for more formal relationships between tribal and county planners.
- 2) The gathering demonstrated that there was much to be gained by bringing tribal and county officials and staff together in a controlled but informal environment. It was a new situation for most of them, one where they could interact but were not under pressure to make policy decisions or take action. For once, they were not in an adversarial setting and did not need to promote or defend their tribe's or county's position on a specific issue. It was an open dialogue. Everyone seemed to feel that the gathering was a step in the right direction.

### Connections Within the Project

- Future Tribes and Counties gatherings and workshops
- Participant Survey
- Many attendees and speakers were regular participants at later gatherings

This gathering laid the foundation for later gatherings and workshops sponsored by the Tribes and Counties Project. It demonstrated the value of such gatherings in fostering communication and better relations between counties and tribes. The survey administered here was distributed again at gatherings in 1993 and 1996, allowing NRRC staff to track issues and changes over time. Many of the attendees and speakers at this gathering became regular and significant participants in later Tribes and Counties activities.

#### Fall 1991

- "Growth Management and Natural Resource Management: Emerging New Partnerships," Planning Association of Washington 1991 Fall Conference - Mount Vernon, Washington

Building on accomplishments of the Tacoma gathering, NRRC staff served as conference coordinators for PAW's Fall Conference. This conference focused



A view of Mt. Baker from the Swinomish Reservation

Photo by National Tribes

on coordination between Indian and non-Indian governments, as well as cultural pluralism and cross-cultural communications.

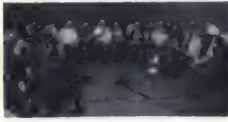
Panelists and presenters included State agency directors, Indian leaders, local and tribal officials, and staff. They outlined landmark statutes, accords, and agreements guiding natural resource management and land development in Washington state, and described the policies, directions, and cooperative working relationships that are evolving as a result.

Once again, the Center brought together a diverse group of co-sponsors: PAW, Northwest Tribal Planners Forum (NWTFF), The Swinomish Indian Tribal Community, the City of Mount Vernon and Skagit County.

Of special note was the conference segment held on the reservation of the Swinomish Indian Tribal Community. Presentations there included a panel on the context of planning in Indian Country; a lecture on tribal governments and the law; and workshops on Indian world view, windows into Indian Country, and off-reservation resource management. The day concluded with an interpretive walking tour around the Swinomish Village, with stops at the traditional smokehouse building (at that time under construction), an archaeological dig of the prehistoric village site, the fishing fleet, and the totem pole. Dinner was a salmon feast, followed by traditional dancing and story-telling.

### Lessons Learned

- 1) For many attendees, the conference provided their first visit to an Indian reservation. This firsthand experience helped make tribal planning (and issues of concern to tribal planners) "real" for them. Seeing the people and places behind the words of tribal leaders and staff meant that the tribal environment was no longer abstract.
- 2) For the tribes, and for the Swinomish in particular, it was gratifying to be in the role of host—to have an outside organization come to them, wanting to learn. It conveyed a respect and interest in the tribes and their issues that opened the door to greater dialogue and understanding.
- 3) The conference also spotlighted new intergovernmental partnerships and relationships emerging across the state and region. Attendees carried away with them information, ideas, and a new sense of what was possible to achieve in Indian/non-Indian relationships.



Northwest Renewable Resources Center photo

### Connections Within the Project

- Tribal inclusion in PAW
- Skagit County, Swinomish Reservation
- Skagit Fellowship Circle
- Externships

The 1991 Fall Conference was the first time that PAW, an organization formed in 1983, had showcased Indian issues and provided a forum for a significant number of Indian voices. The success of this conference helped to inspire PAW's efforts to further include the tribes in the organization's membership, leadership and activities (discussed above). The conference took place in Skagit County and on the Swinomish Reservation, tying it to other project efforts in that part of the state including the Swinomish/Skagit Joint Comprehensive Planning Process, described in Chapter 2; the Skagit Fellowship Circle (see Chapter 3, "Community Building") and Larry Campbell's externship.

As in gatherings that occurred before and after it, this conference reflected the Center's belief in the importance of developing and presenting new partnerships. These models clearly show what is possible in improving the working relationships between tribes and counties.

### June 1993

- "Working Effectively at the Local Level: Tribal/County Cooperation and Coordination," June 16-17, 1993 - Seattle, Washington

Over 140 participants attended this NRRC gathering, including elected officials and staff from 25 tribes, 15 counties, and other interested parties from 42 organizations. Participants assembled to share their experiences in the first three years of the Tribes and Counties Project and to frame what still needed to be done. The gathering was presented in cooperation with the U.S.

Environmental Protection Agency (Region 10), Affiliated Tribes of Northwest Indians (ATNI), Washington State Association of Counties (WSAC), Dept. of Community, Trade, and Economic Development (at the time, Dept. of Community Development), Northwest Tribal Planners Forum (NWTFF), and Planning Association of Washington (PAW).

Focusing on agreements developed and partnerships being formed between Indian and non-Indian governments, the gathering provided models for others seeking to improve working relationships through cooperation. The format included plenary

sessions, presentations by those who were successfully addressing cooperation and coordination, and group discussions.

On the first day, state and tribal leaders who had helped initiate the Centennial Accord and other landmark agreements spoke about intergovernmental cooperation. The day's activities concluded with dinner, followed by story-telling. Participants shared folk tales and other stories from their lives.

The second day opened with plenary addresses by county commissioners and a tribal leader on the challenge of bringing intergovernmental cooperation to the local level. Attendees then participated in concurrent sessions where over 20 examples of these "new partnerships" were described by those involved in them. In the afternoon, participants divided into four groups with a facilitator to discuss the barriers, opportunities, and strategies involved in fostering new partnerships at the local level. Afterward, the small groups reassembled into a facilitated plenary session to report back on their discussion and consider "Where to from here?" James C. Waldo, chair of the NRRC's board of directors discussed his perspectives on the future to end the gathering.

*"Think about some of the suggestions that have been made at this gathering. What is the pattern? The pattern is we do not have enough resources to carry them out. Let me suggest a thought that applies to the relationship between local governments and tribes: the idea of playing an 'enabling' role. What can you enable me to do and what can I enable you to do? That may be a dollar question, a staff question, a sharing of information. It may be an assurance of support if you proceed in a particular way. You will not have to consume 5,000 hours and 50 million meetings in order to reach a relatively simple decision. I can help direct you in a way that makes the best use of time and allows our governmental purposes to be compatible and accomplished more easily."*

The event was a great success. All sessions of the gathering were tape recorded; the proceedings were published in September 1993, and widely distributed as part of the Tribes and Counties information dissemination program.

#### Final Conference:

- "Tribes and Counties: The Spirit of Cooperation in Changing Times," December 9-10, 1996 - Seattle, Washington

This two-day NRRC conference was the culmination of the Tribes and Counties Intergovernmental Cooperation Project. It provided a forum for discussion on the full suite of topics

encountered during the project's six-year history, extending back to the Indian Land Tenure Project in the late 1980s.

In preparing this report, participants have been consistent in their remarks regarding the future. There is still a great deal of work ahead, very few guidelines, and fewer forums for discussion. This conference provided a forum for examples of ongoing cooperative efforts between tribal and county governments in the region (see Chapter 6 for more conference information). Co-sponsors of the conference with NRRC include Affiliated Tribes of Northwest Indians (ATNI), the Governor's Office of Indian Affairs, Washington State Association of Counties (WSAC), Dept. of Community, Trade, and Economic Development (CTED), Planning Association of Washington (PAW), and Northwest Tribal Planners Forum (NWTFF).

#### Presentations

The NRRC has made presentations about tribal/county cooperation to groups across the state and the region. These presentations have helped to spread the word about the project, sparking interest and leading to the involvement of many new individuals and organizations in project activities. Examples include:

- "Cross-Cultural Communications Segment," presented by the Center at a 1990 workshop on how to work with Indian tribes, organized by the Columbia River Intertribal Fish Commission (CRITFC) for the Bureau of Reclamation-Western Region.
- "Coordination and Cooperation Between Tribes and Counties," one-day panel discussion and workshop organized by the Center at the June 3, 1990 National Congress of American Indians mid-year meeting in Reno, Nevada.
- "Outreach to Indian Country," presented at the Western Planner Conference held in Rapid City, South Dakota, July 1992.
- "Neighbor Nations: Pacific Northwest Tribes in the Quincentenary," discussion of the Tribes and Counties Project by the Center as part of a Contemporary Issues Panel at Skagit Valley College, October 16, 1992.
- "Building Community Through Collaborative Decision Making," NRRC Tribes and Counties staff contributed this presentation to the Regional Short Course on Local Planning held in Winthrop, Washington, April 1995.
- "Community Building," Presentation of the Community Circle model at "Community and Diversity: The Place We Live," a seminar organized by the Florence R. Kluckhohn Center for the Study of Values and held in Bellingham, Washington, November 1996.



## Chapter 6:

*"The tribes will never get anywhere if they can't get along with their neighbors, because it is at the local level that the rubber hits the road. Implementation of all those policies, the federal ones and the state ones, takes place right here at the local level. We have been working for a long time to make things better for Indian Country but we've still got a long way to go with local governments. And I don't think we can do it all ourselves. We need allies, supporters and friends and an organization like the Northwest Renewable Resources Center. They have just kept chipping away at it and it is beginning to make a difference. Don't stop now, it's still too far to go."*

—Joe DeLaCruz, former President, Quinault Indian Nation

*"Successful intergovernmental efforts between tribes and counties have been few and far between. We need a continued effort by the Center because their successes make it easier for others to begin similar efforts. Their programs not only improve the institutional relationships between tribes and counties but bring our communities as a whole closer together."*

—Gary Lowe, Executive Director, Washington State Association of Counties

When combined, the Indian Land Tenure Project and the Tribes and Counties Intergovernmental Cooperation Project total nearly a decade of work in fostering communication and cooperation between Tribal and local governments, and the communities and networks of organizations that surround them. In every facet of the effort we have learned important lessons—lessons that have enabled the Center to develop, build upon, and refine a variety of processes and tools for cooperation.

Photo by Natalie Tabor

Looking back over this decade, the most important lesson we learned is that the "journey" toward normalization and institutionalization of local-level cooperation has only just begun. The cultural and jurisdictional discord existing between Tribal and County governments has set the stage for continued conflict into the foreseeable future. Normalization and institutionalization of the Tribal/County relationship is a goal requiring continuous work.

The Center's multi-faceted approach, developed to support this goal, takes into account the complex nature of the Tribal/County situation (see Introduction). The historical context of these disputes requires an approach that addresses the underlying relationships and institutional culture in which these governments operate.

Using a variety of tools, the Tribes and Counties Intergovernmental Cooperation Project resulted in:

- ◆ Opportunities for increased familiarity between Tribal/County leaders and staff
- ◆ Open lines of communication between individual tribes and counties
- ◆ Greater capacity for collaborative problem-solving
- ◆ Increased commitment within these governments to seek collaborative solutions
- ◆ Models for agreements and procedures
- ◆ Most importantly, a foundation that tribes and counties can use in future work

Looking toward the future and the next iteration of this effort, we have made the following observations.

### Third-Party Role of the Northwest Renewable Resources Center

As tribes and counties prepare to work together, long-standing barriers to communication must be broken down. Newly forged Tribal/County relationships are tenuous and fragile, requiring effort and commitment to sustain. On an ongoing basis, time must be allocated for education, orientation, and skills development.

The Center's approach to normalizing and institutionalizing intergovernmental cooperation was designed to create change in:

- 1) Government institutions
- 2) The communities and networks of organizations that surround these institutions
- 3) Indian and non-Indian relationships
- 4) The isolated, institutional culture in which these governments typically operate.

Functioning as a catalyst, the Center's role in this project has been to identify the key Indian and non-Indian players and assist them in determining whether they can work together to accomplish mutual goals. Project staff served as intermediaries, assisting individuals, groups, and governmental bodies that have much in common but have failed to build positive relationships due to a history of misunderstanding.

Our neutral third-party role proved essential, again and again, in moving participants beyond the conflicted and isolated positions that most tribes and counties occupy. In this role, the Center:

Allowed communication and working relationships to develop between individuals, departments, and governments.

Reduced the risks of coming together, allowing the parties to share in discussions, cooperative efforts, and information exchange.

Provided the parties with a variety of routes they could take. In some cases, the Center provided mediation and facilitation services; in others, it provided models to work from.

Created a safe environment for dialogue. Some situations required a neutral space; others needed information from a neutral source.

Provided services at little or no cost to the participants. Barriers to communication and cooperation are formidable enough, without the added pressure of deciding who should pay for the facilitator/mediator/convenor. Providing services at no cost made communication between the parties easier to achieve.

Introduced a "catalyst" when communication or cooperation had stalled, or had failed to develop by the will of the parties. This was true in the Community Building and Government-to-Government efforts. It was also true in fostering cooperation within the wide network of organizations we worked with.

### Lessons Learned

Reviewing the Tribes and Counties Project as a whole, we learned and relearned three crucial lessons:

- 1) **History is Important:** Indian people still suffer, among other losses, from the loss of their land base. The pain of this loss is a dominant theme in any discussion of land and resources. Understanding this history and its connection to the issues Indian tribes face today is a prerequisite for developing working relationships with Tribal governments.

Non-Indians also take great pride in their history and in their connections to the place they live. When Indians and non-Indians have the opportunity to educate each other about their histories—and the shared connections to their “place”—we found that they discover commonalities and gain respect for each other’s perspectives and values.

- 2) **Transformation Requires Trust:** Although Tribal and County governments share similar problems due to geographic proximity, they have operated largely in isolation from one another (see Chapter 1). Issues ranging from public health and safety to economic development and environmental protection have been treated separately by Tribal and County governments. This isolation stems from culturally destructive federal Indian policy, a history of anti-Indian sentiment, and a lack of established guidelines for how local governments and Indian nations should interact. As depicted in Figure 1, tribes and counties are caught in a vicious cycle of mistrust that drives isolated government practices, creating exploitation and defection from collaborative processes.

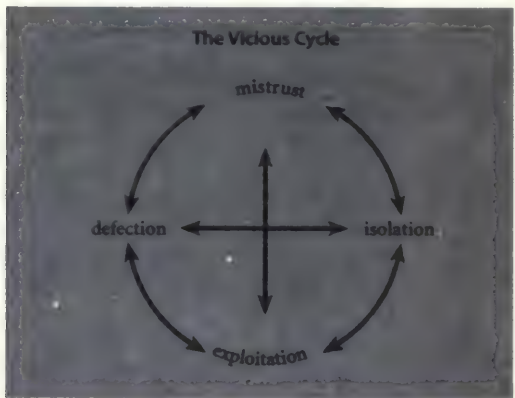
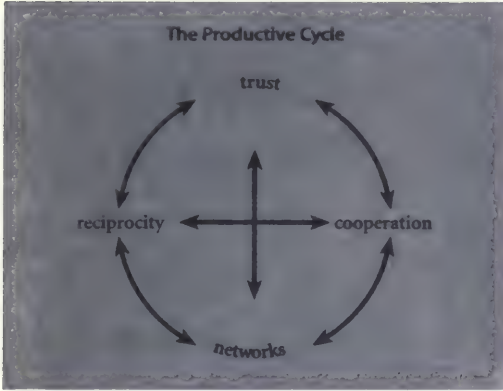


Figure 1'



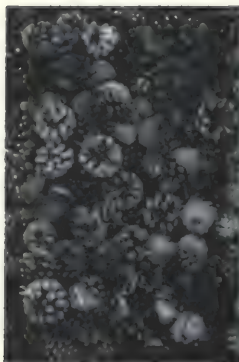
Figure 2<sup>1</sup>

In contrast, the productive cycle, depicted in Figure 2, shows the positive effects when governments, organizations, or individuals have built a measure of trust. They have acquired a foundation for cooperation, reciprocal sharing of information, and common networks to support them. The relationship is a productive one in which issues of common concern are addressed cooperatively.

Building trust is critical if Tribal and County governments are to free themselves from the isolated "vicious cycle" and enter a more productive mode. Although individuals may recognize that working cooperatively would be more productive, getting there is often beyond the power of any one group or individual. A neutral party that brings the two governments together can open the door, building a foundation they were unable to create on their own.

- 3) **Building Relationships Takes Time and Effort:** While the Center's approach in this project helped Tribal and County governments move from a vicious cycle to a productive one, we cannot say that the transformation was ever complete or permanently in place. Relationships between the Indian and non-Indian participants changed dramatically over the course of the project, but these new relationships will continue only if they are nurtured and sustained. Unless the individuals involved make a concerted effort, old patterns of behavior are likely to reassert themselves. The vicious cycle is well established in the tribal/county mode of operating. For this reason, normalizing relations and institutionalizing a productive cycle of cooperation is an ongoing challenge.

In addition, there were several lessons learned in each of the three project areas: Community Building, Government-to-Government, and Educating and Expanding the Network.



## Community Building

The Community Building component of the Tribes and Counties Project centered on Fellowship/Community Circles (see Chapter 3). "Building community" meant gathering government and community leaders together and providing them with an opportunity to learn about each other. This allowed them to break down the barriers to cooperation, and build the capacity to work together.

Needs and issues in each community vary greatly. As the Fellowship/Community Circle evolved, the Center successfully adapted the original Fellowship model to the needs of each community involved. From building a foundation for government-to-government work, the concept expanded to include community leaders as well. This method increased the capacity of a community to work together over time.

When members of a diverse community attempt to work cooperatively without knowing each other's backgrounds and perspectives—and without building trust and relationships—the first obstacle, conflict, or misunderstanding can be fatal to the effort. By taking the time to share different perspectives and values, Community/Fellowship Circle participants reached the point where they trusted each other enough to take a chance. In some cases this meant that participants could be open about what makes them uncomfortable. In others, it meant sharing information or moving forward to work collaboratively.

Early on, we learned that a Circle experience will have more power and impact if its focus is "place-based." The one thing that the Skagit and Hood Canal Circle participants had in common was the place they live. Starting there, participants built a common sense of place that included the perspectives of each participant, no matter how different. Creating this common sense of place is a powerful foundation for learning to work together cooperatively. The model is most powerful, we observed, when the community uses relationships formed during the Circle experience to continue working together on projects chosen by the group.

A great deal of energy or motivation is born from the experience of learning to work together. Through their efforts in the Circle, several participants have assisted one another professionally, testifying in support of each other's projects and initiatives. This outside activity is exactly what the Circle is meant to foster. In future applications of this approach, the Center hopes to be more successful at helping Circle participants make the transition from working with the Center to working together on their own.

With this lesson in mind, we are initiating community-building efforts in other states among communities with Indian and non-Indian residents. Work is under way in several Montana communities, and we hope to continue using the model throughout the Northwest as a foundation for long-term work.

### Government-to-Government

The government-to-government efforts of the Tribes and Counties Project provided opportunities and models for bringing county commissioners, tribal councilmembers, and their respective staffs together to create working agreements that address on-reservation land use issues.

Working through these issues collaboratively, breaking down personal and organizational barriers, and developing working relationships made it possible for these governments to develop agreements and share information. The result in all cases was a positive change in the complexion of Indian/non-Indian relations between the governments, although in some cases it was only for a short time. The challenge has been, and continues to be, how to maintain and strengthen these tenuous starts at working together.

In each example described in Chapter 4, the governments were, to some degree, "transformed" from isolation to a more productive, cooperative mode of operating. However, among those with a high rate of turnover in County and Tribal leadership, many have found themselves back at square one. Despite this, individuals who no longer hold office often continue speaking favorably on behalf of cooperation and the processes they used. What derails the cooperative stance that participants worked so hard to establish is a lack of re-education for new commissioners, tribal councilmembers, and their respective staff members.

Until jurisdictional issues are resolved and guidelines for working together developed, each individual Tribe and County must work to build relationships and mechanisms for working cooperatively (see Appendices 2-8 for examples of cooperative agreements). Our experience convening and offering models to Tribal and County officials has highlighted, again and again, the need for a neutral party to assist in normalizing and institutionalizing this relationship. Modern-day political and historical complexity surrounding the Tribal/County relationship still serves to pull these two governments apart. The help of a neutral party may be critical in establishing a productive working relationship.



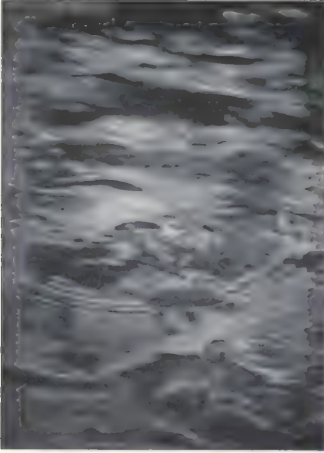


Photo by Nature Tribes

## Educating and Expanding the Network

Fostering the normalization and institutionalization of a Tribal/County cooperative relationship requires educating the network of organizations and individuals that surround and constitute these two governments. The Center accomplished this by working with existing organizations, through education and information dissemination, assisting with capacity building for cooperation among individuals, and by hosting gatherings and presenting information at conferences.

In many ways, the Planning Association of Washington (PAW) provides a model of how an organization can normalize and institutionalize relations with tribal communities. PAW has taken a multifaceted approach by putting tribal issues on its agenda, actively recruiting tribal membership making room for tribal participation on its board, and providing educational materials on tribal issues to its members and others. It is important to note that none of these activities required PAW to make major changes in its structure, goals, or operations. It was not a disruptive change for the organization.

*"The Center has helped the Planning Association of Washington become more inclusive as an organization by introducing PAW to Indian Country. We hope to help our members build more effective partnerships with their tribal colleagues."* -Ron Faas, Board member, Planning Association of Washington

The Tribal/County Short Course is an excellent mechanism for providing education about tribal history, culture, government, and planning issues. It has also been a good vehicle for introducing tribal concerns to Washington's mainstream planning organizations. Hundreds of professional planners and non-professionals interested in planning have been exposed to these issues through the Short Course. Hundreds more possess copies of the Short Course on Local Planning with its section on the tribes, or the compendium of materials that accompanies the Tribal Short Course. Very few organizations, we found, offer a way for non-Indian professionals and elected officials who work with tribes to become educated on tribal history, values, and perspectives. The Center hopes to continue updating and providing this education through future projects.



For individual tribal members, externships sponsored by the Center prove that targeting project resources to support the personal growth and professional development of these individuals is an effective means of capacity transfer. Coupled with their participation in the first Fellowship Circle and other project activities, this support helped Swinomish tribal member Larry Campbell and Skokomish Councilmember Anne Pavel do an excellent job of "bridging" between their Indian communities and the non-Indian world. Both are still working in this arena. They have excelled in the areas in which the externship focused, becoming strong advocates for the cooperative approach to Indian/non-Indian relations at the local level.

Similarly, two conferences sponsored by the Center during the project offered a unique opportunity for Indian/non-Indian professionals and community leaders to come together and share information and perspectives. Applying the same approach taken in other aspects of the project, Center conferences enabled participants to gain perspective, become educated, and learn to work cooperatively. We found that the Center is unique in offering this opportunity. Several organizations now offer a session or track dealing with tribal issues, but we learned of no other conference or organization that focuses on the ability of Indians and non-Indians to cooperate on the natural resource management, planning, and environmental issues so prevalent in Northwest communities. Giving presentations that included information and examples of Tribal/County intergovernmental cooperation—and cross-cultural communication at conferences sponsored by other organizations—was critical, too, in spreading the word about tribal and county efforts to work cooperatively.

## Challenges for the Future

### *"Tribes and Counties: The Spirit of Cooperation in Changing Times"*

The final conference and culmination of the Tribes and Counties Project was, "Tribes and Counties: The Spirit of Cooperation in Changing Times," held in December 1996.

Presenting content developed from central themes that ran throughout the Project, the conference drew 210 participants from a broad array of Tribal, County, State and other organizations (see Table 1). Attendees had the opportunity to gather information, learn perspectives, develop relations, and learn from others about the why and how of working cooperatively.

**Day One:** The first day was dedicated to the question, "Why should we cooperate?" Through informational sessions and experiential exercises participants explored and learned about each other's perspectives. In his opening address, NRRC Executive Director Martin Baker challenged participants to open their hearts and minds:

*"...And the single overriding fact of this reality is that when we look in the mirror, we see each other with our diverse histories, cultures, opinions and perspectives — and we can't hide. There is no new frontier; no free land; no free lunch, only our histories and cultures to appreciate and respect; only feasible agreements to forge..."*

*This conference, then, is an opportunity to explore a different path. It is a path that the heart, the spirit, and the mind must explore together. By being here, you have self-selected as the brave explorers of this other path. I congratulate you and applaud your effort and dedication."*

A dual keynote on the question, "Why should we cooperate?" by Skagit County Commissioner and Washington State Association of Counties President Bob Hart, and Henry Cagney, Lummi Indian Nation Chairman, set the stage for a day of introspection and exploration. Following the keynote address, educational and informational sessions gave participants an opportunity to ask questions and explore the structure of tribal/county conflicts. In the afternoon, participants were assigned to one of three experiential exercises. Each session enabled participants to become better acquainted with small sets of conference attendees.



Jovanna Brown of the Evergreen State College addresses the audience during a session regarding on and off-reservation issues.

**Day Two:** The second and final day of the conference explored the issue of "How do we cooperate?" The day began with a panel presentation examining this question. Panel members included Katherine Baril, Washington State University Cooperative Extension; Antone Munthorn, First Vice President of the Affiliated Tribes of Northwest Indians and Umatilla Indian Nation General Council Chair; Deborah Juarez, Director, Governor's Office of Indian Affairs; Kurt Danison, President of the Planning Association of Washington; and Bill Wilkerson, Executive Director of the Washington Forest Protection Association.

Each panel member related personal experiences, insights, and lessons learned from cooperative efforts. They urged participants to continue the quest for "How," i.e., to establish and maintain working, cooperative relationships once the conference was over. Concurrent sessions highlighted a broad array of cooperative efforts. Session topics focused on intergovernmental agreements, fostering cooperation in existing organizations, building community, planning and sustainable development, watershed-based efforts, and examples of habitat specific efforts.

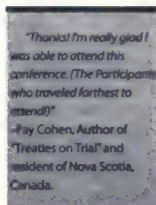
**Conference Evaluation:** To gauge the participants' thoughts on challenges for the future, the NRRC distributed a conference evaluation and survey. Out of 210 participants, 47 evaluations were returned. These responses confirmed the knowledge and insights we gained as the project evolved:

*What did you like most about this conference?*

- Opportunity to hear diverse viewpoints and learn about recent trends and activities
- Comfortable, relaxed, organized, stayed on task
- Good mix of Tribal and Non-Tribal speakers
- The array of speakers and the high number of constructive examples of collaboration
- The wonderful mix of perspectives
- Opportunities to hear very heartfelt emotions, heavy in interactions
- Education of county, state, city officials
- Open communication, very helpful information
- That there was a good faith effort and a true attempt to bestow respect and partnership

*What did you like least about this conference?*

- Not enough opportunities for informal discussion
- Not all presentations tied back to conference goals
- It was too short
- Needed more explanation on how to do cooperation
- Couldn't go to all the sessions
- Should have more take home information available, summaries of presentations
- Cramped space



*How could the conference be improved?*

- More time should have been spent on clarifying "County vs. Tribe" in terms of organizational structure, hierarchies of decision-making, protocols of contact and response
- Needed more structured networking opportunities
- Hold it again on a regular basis/have it yearly
- Talk more about treaties, Indian culture, rights
- Have sessions run more than once a day
- Some sort of greeting/song/ceremony would have been welcome to set a type of cultural respect
- Shorter meetings and more of them

*What are the most important issues facing Tribal/County Cooperation?*

Responses to this question tended to fall into two categories:

1) *Issues specific to natural resources:*

- Water quality and quantity
- Habitat preservation and restoration
- Cleanup of rivers and creeks on and off reservation
- Growth and development
- Impacts of casinos
- Land tenure
- Water rights

2) *Issues specific to Indian/non-Indian conflicts:*

- Communication
- Education
- Building trust
- Respect for diversity
- Support from the top down on cooperative attitudes
- Cooperative relations
- Racism
- Respect
- Understanding value differences

These responses confirmed that any attempt to address natural resources issues requires addressing how we relate to each other. The conference also confirmed that outside of this project, there is a serious lack of resources and opportunities to address the following persistent questions:

*Regarding natural resource conflicts:*

- 1) How can Indian and non-Indian government representatives and community members communicate effectively?
- 2) How can tribes, counties and other government agencies and communities develop the capacity to cooperate and work collaboratively?
- 3) How can tribes, counties and other government agencies and communities develop working relationships and sustain them?
- 4) How can resources and opportunities be offered to answer these questions on an on-going basis?

Although the Tribes and Counties Intergovernmental Cooperation Project created significant opportunities and models for answering these questions, the heavy weight of history still lingers, relations established are too easily dissolved. While normalization and institutionalization of Tribal/County intergovernmental cooperation has been our goal, by all measures, the work has only just begun. The Northwest Renewable Resources Center will continue its search for answers to these questions for Northwest communities, and will continue to develop funding sources for such work.



## Tribes and Counties Conference Attendance

Tribes and Tribal Organizations 30 tribal organizations, total of 60 attendees	Counties and County Organizations 21 organizations, total of 27 attendees	Other Governmental Organizations 25 other governmental organizations, total of 47 attendees	Other Organizations 47 other organizations, total of 69 attendees
Affiliated Tribes of NW Indians American Friends Service Committee Central Council of Tlingit & Haida Indian Tribes Coeur D'Alene Tribe (3) Colville Tribal Enterprise Corporation Colville Tribal Police Services Confederated Salish & Kootenai Tribes Confederated Tribes of the Umatilla Indian Reservation (3) Confederated Tribes of Warm Springs (10) Cooville Indian Tribe Intertribal Timber Council Jamestown S'Klallam Tribe Lummi Indian Nation (3) Native American Commission NW Indian Fisheries Commission NW Tribal LTAP/EWU NW Tribal Planners Forum Ononda Nation Port Gamble S'Klallam Tribe (2) Quinault Indian Nation (5) Shoalwater Bay Indian Tribe Skokomish Tribal Fisheries Office Suquamish Tribe (6) Swinomish Tribe (3) Tulalip Tribes (2) United Indians of All Tribes Foundation Yakama Indian Nation (2)	Benton County Planning Dept. (2) Bremerton-Kitap Co. Health District Chatham County Community Development Grays Harbor County Jefferson County (2) King County (2) Kitsap County Fair & Parks Maricopa County, Arizona Assessor's Office Mason County Dept. of Community Development Pierce County Pierce County, Government Relations Skagit County (2) Skagit County Planning & Permit Center Snohomish County Surface Water Mgmt. Snohomish Health District (2) Thurston Co. Health Dept. Thurston County Thurston County, Community & Environmental Program Umatilla County Sheriff Dept. (2) Washington Assoc. of Counties Whatcom County WA County Road Administration Board	Bellevue City Council City of Lynden City of Richland City of Seattle City of Yakima Governor's Office of Indian Affairs Puget Sound Action Team Puget Sound Regional Council (2) Seattle Water (4) USDA-Natural Resources Conservation Service WA Dept. of Community, Trade & Economic Development (3) WA Dept. of Ecology (5) WA Dept. of Fish & Wildlife WA Dept. of Health (4) WA Dept. of Natural Resources (6) WA Dept. of Transportation (5) WA Dispute Resolution Project WA Health, Office of Shellfish Programs WA State Senator - 20th District Western WA Growth Management Hearings Board (2)	Action/Culture ASOG Incorporated (2) Battelle Seattle Research Center Bonneville Power Administration Cascadia Quest (2) Citizen (2) Columbia-Pacific RC&D Education Consultant Creative Community Solutions Dungeness Valley Association EWU, Dept. of Urban Regional Planning (2) Grande Ronde Model Watershed Program Heartland (2) Highlands Associates (2) Honanie Architects & Planners Hood Canal Community Circle (3) Hood Canal Land Trust/Hood Canal Community Circle Hood Canal Salmon Enhancement Group Idaho Soil Conservation Commission (2) Jones & Jones Lake Roosevelt Forum Long Live the Kings Madrona Resource Associates National Center Associates, Inc. North Sound Regional Support Network Northwest Native American Business Development Center Northwest Research Institute (2) <i>(continues on the next page)</i>

## Tribes and Counties Conference Attendance

(continued)

	<p><b>Other Organizations</b>  <i>47 other organizations, total of 69 attendees</i></p> <p>NW Straits Proposed National Marine Sanctuary  Orion Group Associates, Inc.  Portland State University (2)  Rudolf Engineers and Associates, Inc. (2)  RSU/Eastern Oregon State College (2)  Rural Community Assistance Corporation (2)  School for Resource &amp; Environmental Studies  Skagit County PUD  T/F/W Policy Group  The Agreement Zone  The Evergreen State College (3)  The Wildlife Society  UW Community &amp; Environmental Planning Program  Upper Columbia RC&amp;D  Washington Rural Development Council  Washington Forest Protection Association  WSU Cooperative Extension (3)  WSU Learning Center - Jefferson County</p>
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## Endnotes

1. Based on Putnam, Robert. 1993. *Making Democracy Work: Civic Traditions in Modern Italy*. Princeton: Princeton University Press.
2. *Ibid.*

Appendix 1	Tribes and Counties Publication List and Order Form
Appendix 2	MOU for Establishing a Coordinated Planning Program Between the Swinomish Indian Tribal Community and Skagit County
Appendix 3	Swinomish Planning Advisory Board Rules of Conduct
Appendix 4	MOU for Establishing Procedures for Administering a Cooperative Land Use Planning Program Between the Swinomish Tribal Community and Skagit County
Appendix 5	Resolution Recognizing Tribal Governments in Skagit County and their Bonds with Skagit County Governments
Appendix 6	MOU Between the Skokomish Tribe and Mason County
Appendix 7	Resolution to Adopt an MOU Between the Quinault Nation and Jefferson/Grays Harbor County
Appendix 8	Intergovernmental Land Use Planning Agreement
Appendix 9	Photography Notes
Appendix 10	Sources



## Appendix 1

### TRIBES AND COUNTIES PUBLICATIONS LIST

1. **Tribes and Counties: Intergovernmental Cooperation Project Final Report (1997)** \$25.00  
*Considers the tools, models and strategies developed by the Tribes and Counties Project, and examines how they are being applied, what outcomes have occurred, and what conditions predict success.*
2. **Short Course on Tribal/County Intergovernmental Coordination (1996)** \$15.00  
*A compendium of materials that accompanies the Short Course presentation and covers topics such as federal Indian law and policy, the status of tribal/county coordination, Indians in the State of Washington, on- and off-reservation issues and examples of intergovernmental coordination.*
3. **Cooperation and Coordination Between Tribes and Counties in Washington: A Survey of Planning Department Staffs (1997)** \$1.15 (postage)
4. **Building Community within a Watershed (1996)**  
Video \$15.00  
*Representatives from 3 counties and 2 tribes describe their experiences in the Hood Canal Community Circle, a model for learning new ways of problem-solving and community-building around natural resource issues.*
5. **Voices of the Valley: A Skagit Valley Dialogue (1994)**  
17 minute video \$15.00  
*Individuals (Indian and non-Indian) tell of their experiences with the Fellowship Circle, an approach devised by the Center to facilitate a sense of common purpose and expanded understanding, enabling participants to chart a more cooperative course for the future.*
6. **The Draft Swinomish Comprehensive Plan (1990)**  
\$1.15 (postage)  
*A joint land use plan for the Swinomish Reservation developed by the Swinomish Indian Tribal Community and Skagit County in a process facilitated by the Center.*
7. **Working Effectively at the Local Level: Tribal/County Cooperation and Coordination (1993)** \$1.15 (postage)  
*Proceedings of a gathering held in Seattle, Washington June 16 and 17, 1993 to further dialog about tribal/county cooperation and coordination.*
8. **Special issue on cultural diversity, The Western Planner magazine (1992)** \$.85 (postage)  
*Issue of a journal serving professional planners in 12 western states that focused on Indian Country and cultural diversity as it relates to land use planning.*
9. **Coordinating Jurisdiction on Indian Reservations. Planning and Zoning News (1992)** \$1.15 (postage)
10. **Solid Waste Management Plan for the Confederated Tribes of the Umatilla Indian Reservation (1993)**  
\$1.15 (postage)  
*(See description below next item.)*
11. **Solid Waste Management Plan for the Spokane Tribe**  
\$1.15 (postage)  
*Developed by the Solid Waste Network, a cooperative, interagency program created by the US Environmental Protection Agency, Region 10 and coordinated by the Center that provides a pool of technical experts to assist tribal governments with municipal solid waste management.*
12. **Reservation Solid Waste Survey (1997)**  
\$5.00 (postage)  
*(On disk or hard copy.)*

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**Publications Order Form**

Name: \_\_\_\_\_ Phone: \_\_\_\_\_

Company: \_\_\_\_\_ Fax: \_\_\_\_\_

Address: \_\_\_\_\_

City/State: \_\_\_\_\_ Zip: \_\_\_\_\_

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Item Number \_\_\_\_\_ Cost: \_\_\_\_\_

Item Number: \_\_\_\_\_ Cost: \_\_\_\_\_

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Item Number: \_\_\_\_\_ Cost: \_\_\_\_\_

Item Number: \_\_\_\_\_ Cost: \_\_\_\_\_

Total Cost: \_\_\_\_\_

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Please remit payment and this order form to:

NRRC

1411 Fourth Ave.

Seattle WA 98101

206/623-7361

## Appendix 2

### Memorandum of Understanding for Establishing a Coordinated Tribal/County Regional Planning Program between The Swinomish Indian Tribal Community and Skagit County

This Memorandum of Understanding is made by and between the Swinomish Indian Tribal Community, a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934 ("Tribe") and Skagit County, a political subdivision of the State of Washington ("County"). The Tribe and County (collectively referred to as "governments") hereby acknowledge and agree as follows:

#### *Introduction*

Following a series of meetings held between November 1986 and February 1987, and coordinated under the Land Tenure Project of the Northwest Renewable Center, the Tribe and the County reached mutual understanding concerning the development of a Coordinated Regional Planning Program and a definable government-to-government relationship.

#### *Mutual Points of Understanding*

1. That the Tribe and the County are implementing separate comprehensive land use policy programs regulating land use activities on the Swinomish Indian Reservation; and
2. That the Tribe has assumed regulatory jurisdiction for all land areas within the exterior boundaries of the Swinomish Indian Reservation, regardless of ownership type, and that the County has assumed partial regulatory jurisdiction for those lands held in fee title lying within the exterior boundaries of the Swinomish Indian Reservation; and
3. That both parties recognize the need for due process representation of all residents of the Swinomish Indian Reservation; and
4. That in order to alleviate the potential conflict which may result from the concurrent application of both regulatory programs within the exterior boundaries of the Swinomish Indian Reservation, the parties to this Memorandum of Understanding agree to initiate a coordinated land use planning process for land areas contained within the exterior boundaries of the Swinomish Indian Reservation; and
5. That the coordinated regional planning effort is not intended to transfer any degree of jurisdiction held by one party to the other party, nor is it to be misconstrued as a recognition of jurisdiction which either party may duly claim; and
6. That it is in the interest of the residents of Skagit County and the Swinomish Indian Reservation, that a coordinated regional planning process be established whereby the Tribe and County cooperate and share resources in the promotion of land use planning within Skagit County, and
7. That in order to implement a coordinated regional planning process, the parties recognize that voluntary cooperation and an attitude of good faith towards the joint planning process is a prerequisite for successful coordinated planning.

*Strategic Activities for Coordinated Planning*

8. The Tribe and County do mutually recognize the benefits of entering into a Memorandum of Understanding to establish a long term, government-to-government planning and regulatory relationship in order to jointly commence a process for the update of the Tribal and County Comprehensive Land Use Plans; to formulate a single synthesized Comprehensive Plan, and to investigate alternative methods for the administration of the land use plan and other land use related regulatory codes for those land areas lying within the exterior boundaries of the Swinomish Indian Reservation.
9. The Tribe and the County recognize the benefits of actively pursuing future joint planning studies addressing regional concerns to both the County and the Tribe, which may include water quality studies in Skagit Bay and other such studies;
10. The Tribe and the County recognize that, for the purposes of initiating a coordinated comprehensive planning update process, that an Advisory Planning Board should be appointed, representing both the Tribe and the County, for purposes of identifying updating requirements to both the County Plan and the Tribal Plan in an effort to attain compatibility between plans;
11. The Tribe and the County recognize that in order to facilitate a coordinated comprehensive planning process for the Reservation area, the County should modify its existing "Island Sub-Area" and redesignate those land areas within the Swinomish Indian Reservation as a new sub-area known as the "Swinomish Indian Reservation Sub-Area;"
12. The Tribe and the County recognize that an operational and organizational strategy for jointly administering a land use policy should be established which will consider: 1) the jurisdictional claims to land use regulation by both parties, and 2) each government's concern with respect to fair and adequate representation of all people residing on the Swinomish Indian Reservation. Said organizational strategy will outline a procedure for implementing the provisions of a comprehensive land use plan;
13. The Tribe and the County recognize that the independent, third party assistance provided through the Northwest Renewable Resources Center (NRRC) is considered both helpful and necessary for the timely implementation of a joint planning effort, and the governments hereby request the ongoing participation of NRRC to assist in facilitating the joint planning effort. The governments further request NRRC to seek and provide funds for retaining a Coordinator to assist the parties in completing a joint comprehensive land use plan update process;
14. The parties mutually agree that efforts to initiate a joint planning process for the purposes of updating the Tribal and County Comprehensive Land Use Plan should commence during the summer of 1987;



### *Planning Process*

Pursuant to this Memorandum of Understanding, the Tribe and the County acknowledge their commitment to pursue a process leading towards the coordination of land use planning and regulatory activities on the Swinomish Indian Reservation, and have identified the following three major elements of a program to commence during the summer of 1987 as follows:

#### *A. Commitment for a Coordinated Planning Process*

- (1) The Tribe and the County will consider entering into a Sphere of Influence Agreement as an interim measure of land use coordination while the planning process is underway;
- (2) The Tribe and the County will formulate an Advisory Planning Board representing the Tribe and the County, which shall oversee the implementation of a joint comprehensive planning process.
- (3) Both the County and Tribe shall provide professional staff support to the Advisory Planning Board to facilitate the process of updating both Tribal and County Comprehensive Plans.
- (4) The Advisory Planning Board shall initiate review and drafting of the plan document and shall present recommendations to the County and Tribal Planning Commissions for public review and adoption by their respective governing bodies.

#### *B. Composition of Advisory Board:*

- (1) The Advisory Board shall be comprised of nine (9) members, with appointments made mutually by the Tribe and the County. The positions on the Board shall be filled as follows: A representative of the Skagit County and Swinomish Planning Commissions (2 positions); The Planning Directors of the respective governments (2 positions); the NRRC Coordinator, serving as Chairperson (1 position); Two positions appointed at-large and nominated by the County (2 positions); and Two positions appointed at-large and nominated by the Tribe (2 positions).
- (2) The Board shall serve at the discretion of, and shall make their recommendations to, the Tribe and the County.
- (3) The Board shall complete their assigned tasks and responsibilities within the one (1) year anniversary of their appointments.

### *C. Operational Procedures.*

- (1) In order to administer an updated Comprehensive Land Use Plan and subsequent regulatory codes, an administrative procedure shall be drafted by the Advisory Planning Board and shall outline procedures for joint administration of the Plan and associated regulations.
- (2) The Advisory Planning Board shall serve as a representative board making recommendations to each government's Planning Commission regarding land use activities on the reservation.
- (3) The Planning Board shall investigate alternatives for the resolution of any disputes, if any, between the Tribe and County in the implementation of the Plan and regulatory codes on the reservation and make recommendations on such procedures to each government's governing bodies.

### *D. Additional Planning Coordination:*

- (1) The Advisory Planning Board may pursue funding for special topical planning studies of mutual interest to the Tribe and County and may oversee the conduct of such studies.

### *Term of Memorandum of Understanding*

This Memorandum of Understanding shall commence on the date that it is approved by both the Tribe and County, and shall remain in effect for a period of eighteen (18) months. Either party may terminate this Memorandum of Understanding provided written notification of such intent to terminate is transmitted to the other party within thirty (30) days of actual termination. It is anticipated by the parties that following the Term of this Agreement, a subsequent Agreement shall be drafted and approved whereby the parties will mutually agree on methods for coordinated administration and maintenance of a coordinated land use policy.

### *Jurisdiction*

Nothing in this agreement shall limit or waive the regulatory authority or jurisdiction of either party.

## Appendix 3

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### SWINOMISH PLANNING ADVISORY BOARD RULES OF CONDUCT

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We, the members of the Planning Advisory Board, have adopted the general guidelines outlined below as a means of structuring our conduct and thereby facilitating the consensus decision-making process upon which we are embarked.

1. We acknowledge that we each bring with us the legitimate purposes and goals of our jurisdictions. We recognize the legitimacy of each others goals and assume that our goals will also be respected. We will attempt to maximize as much as possible the attainment of all goals.
2. We agree that this effort is a priority in terms of staffing and time commitments.
3. We will be as concerned about solving the problems of our fellow members as we are about solving our own.
4. We will listen carefully, ask questions in order to understand and be willing to make statements which explain or educate.
5. We agree that all land use policy issues identified by any member must be addressed by the group.
6. We will attempt to reach consensus on a plan.
7. We will be advocates for the MOU, the process and the eventual plan.
8. We request that if a member should disavow the process he first advise the group and allow the group the opportunity to seek a remedy.
9. We agree that all communications with the news media will be by periodic, approved press releases only.
10. We agree that, in the interests of frank and open dialogue, we will not attribute any suggestion, comment or idea to a particular member.
11. We are encouraged to seek advice and information from others.
12. We accept the responsibility for the progress of the discussions.
13. We agree to check rumors with the facilitator before taking any action.
14. In the event this effort is unsuccessful, we are free to pursue our interests in other forums.

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Appendix 4

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MEMORANDUM OF UNDERSTANDING

FOR ESTABLISHING PROCEDURES FOR ADMINISTERING  
A COOPERATIVE LAND USE PLANNING PROGRAM BETWEEN

THE SWINOMISH TRIBAL COMMUNITY  
AND  
SKAGIT COUNTY

This Memorandum of Understanding (MOU) is made by and between the Swinomish Tribal Community, a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934 and hereinafter the "Tribe," and Skagit County, a political subdivision of the State of Washington and hereinafter the "County," and both hereinafter collectively referred to as "governments".

This Memorandum of Understanding represents good faith commitments which are being made by each of the parties in a spirit of cooperation and are not intended as obligations that may be compelled by either party if both parties are not in full agreement. Rather, this MOU represents the belief that these commitments will be of mutual benefit to the parties.

WHEREAS, the Tribe and the County recognize that a common interest exists between the two governments with respect to land use regulation on the Swinomish Indian Reservation in that the Tribe claims regulatory authority over all lands within the Reservation, and the County claims regulatory authority over non-trust property within the Reservation; and

WHEREAS, the interests of the Tribe extends to all lands within the exterior boundaries of the Swinomish Indian Reservation and to land use activities in areas beyond the exterior boundaries of the Swinomish Indian Reservation that may affect or have impacts on Reservation lands; and

WHEREAS, the interests of the County extends to non-trust lands within the exterior boundaries of the Swinomish Indian Reservation; and

WHEREAS, the Tribe and the County have, with assistance from the Northwest Renewable Resources Center, cooperatively developed and independently adopted a Joint Comprehensive Land Use Plan for the Swinomish Indian Reservation pursuant to a Memorandum of Understanding passed by the Skagit County Board of Commissioners and the Swinomish Indian Senate in March 1987; and

WHEREAS, the Tribe and the County agree that it is in both their interests to cooperatively administer the plan and associated regulations and continue to build on the cordial government-to-government relationship established through the collaborative planning process; and

WHEREAS, the Tribe and County agree that, in order to address conflicts that may arise in the long-term implementation of this plan, the Tribe and the County should adopt an administrative approach that involves joint review and consultation regarding proposals for land use actions so that mutually agreeable decisions which acknowledge the broad interests of the community, both Indian and non-Indian, may be reached, and jurisdictional disputes avoided; and



WHEREAS, the Tribe and the County affirm that cooperative problem solving and consensus decision-making will be the preferred means of reaching consensus decisions relating to land use planning and regulatory activities on the Swinomish Indian Reservation; and

NOW THEREFORE, the Tribe and the County agree to proceed as follows:

#### I. AREAS OF INTEREST

Those lands subject to the Swinomish Comprehensive Plan Map attached hereto will be the areas covered by this agreement.

#### II. SWINOMISH PLANNING ADVISORY BOARD

A Swinomish Planning Advisory Board (hereinafter referred to as the "Advisory Board"), is a citizen board established to settle disagreements regarding land use actions by means of cooperative problem-solving and consensus-based negotiations. The Board will also make recommendations to each government's Planning Commission regarding land use activities on the Swinomish Reservation. The Advisory Board will be comprised of five members, with two appointments made by the Tribe, two appointments made by the County and one made jointly. The Advisory Board will facilitate the resolution of disputes stemming from any jurisdictional conflicts regarding the implementation of the plan and related regulatory codes. The Advisory Board will also monitor the progress of the cooperative planning processes and make recommendations to the Board of County Commissioners and the Tribal Senate to improve the effectiveness of these processes.

#### III. COMPREHENSIVE PLANS AND ZONING ORDINANCES

Both governments have jointly prepared a Comprehensive Land Use Plan and are jointly preparing implementing ordinances including, but not limited to, zoning and subdivision ordinances. It is the intent of the parties that these land use policy documents remain fully compatible, and that any future modifications to these documents take place through the joint review process established in this Memorandum of Understanding. Notwithstanding the fact that the land use policy and regulatory documents are compatible, they remain separate and distinct codes of each government.

#### IV. ADMINISTRATIVE RESPONSIBILITIES FOR JOINT PERMIT REVIEW

In order to avoid the economic burden on each government of independently administering separate permit review processes, both governments agree that the following administrative services will be provided by the planning departments of each government (lead agency) in the interest of achieving a joint implementation of the plan and related codes:

The County will be responsible, for processing permit and other land use applications on non-trust lands other than Indian owned fee simple lands. The Tribe will be responsible for processing permit and other land use applications on trust lands and Indian owned fee lands.

#### V. JOINT PERMIT REVIEW PROCESS

Discretionary Permits: Permit applications requiring discretionary review (i.e. requiring a public hearing and/or notice to adjacent landowners) will be forwarded by the lead agency to the planning department of the other government within 5 working days from the filing of a complete application. In the event that the lead agency does not receive written comments back within 15 working days from the date the application is sent, the application will be presumed acceptable to the other government and the lead agency will process the application pursuant to prescribed procedures. In the event comments are submitted, technical staff review pursuant to Section VI shall take place. The lead agency will give full consideration to the other government's concerns and make every attempt to address them. If the concerns cannot be resolved at the technical staff level, Advisory Board review pursuant to Section VII shall take place.

#### VI. CONSULTATION PROCESS

In the event that either government provides written comments, concerns and/or recommendations, they will be conveyed within the time prescribed in Section V, thereby triggering a staff-level consultation meeting. The consultation process will provide the opportunity for both governments to come together and discuss the various issues related to the specific application under review. The intent is to procedurally provide a mechanism through which to voice concerns, identify problems and explore solutions in a professional review manner during the early stages of the permit process.

#### VII. RESOLUTION OF DISPUTES

Should agreement not be reached at the staff-level through the consultation process, each government will prepare a staff report for submittal to the Advisory Board which will seek to bring about a mutually acceptable resolution. The Advisory Board will assist the governments in their search for agreement and will use conciliation, mediation, fact-finding, or any other method deemed appropriate, to reach a resolution.

In the event the Advisory Board is unsuccessful in bringing about agreement, it will forward its recommendations to the County Planning Commission/Hearing Examiner, and the Tribal Planning Commission. Each planning commission will follow their own prescribed procedures for decision-making and will forward their recommendations to their respective governing bodies. Should the recommendations be in conflict, the Tribal Senate and the Board of County Commissioners may decide to confer on the issue and may call a special meeting for that purpose. In the event that consensus is not reached, each government will issue its decision and be free to pursue its interests independent of the other government.

#### VIII. ANNUAL REVIEW

The Advisory Board will report to both governments after one year, biannually thereafter, regarding its activities. A joint review of the cooperative planning process will be conducted after two years. Based on the results of the review, as well as recommendations from the Advisory Board, the process will be refined as needed.

X. AMENDMENTS

The provisions of this Memorandum of Understanding may be amended by parallel resolutions of the respective governing bodies.

XI. JURISDICTION

Nothing in this Agreement shall limit or waive the regulatory authority or jurisdiction of either party. Likewise, nothing in this agreement, nor any decision made by the Tribe or the County, whether or not the decision is consistent with this Memorandum of Understanding, shall give any third party cause of action or claim. This Agreement is not intended to provide any remedy not already provided by law.

IN WITNESS WHEREOF, This Memorandum of Understanding serves to document the voluntary cooperation and good faith efforts between the Swinomish Tribal Community and Skagit County regarding the administration of a coordinated land use planning process by and between the parties. In full recognition of this understanding, the parties hereto have executed this Memorandum of Understanding on the day and year of the last date of signature below:

PASSED by the Board of Skagit County Commissioners this \_\_\_\_\_ day of \_\_\_\_\_, 1990

SKAGIT COUNTY BOARD OF COMMISSIONERS, SKAGIT COUNTY, WASHINGTON

\_\_\_\_\_  
 \_\_\_\_\_ Dave Rohrer, Chairman  
 \_\_\_\_\_ William Vaux, Commissioner  
 \_\_\_\_\_ Ruth Wylie, Commissioner  
 \_\_\_\_\_ Attest: Clerk of the Board of County Commissioners  
 \_\_\_\_\_ APPROVED AS TO CONTENT: Scott Kirkpatrick, Planning Director  
 \_\_\_\_\_ APPROVED AS TO FORM: John Moffat, Chief Civil Deputy Prosecuting Attorney

PASSED by the Swinomish Indian Senate this \_\_\_\_\_ day of \_\_\_\_\_, 1990

SWINOMISH INDIAN SENATE, SWINOMISH TRIBAL COMMUNITY

\_\_\_\_\_  
 \_\_\_\_\_ Robert Joe Sr., Chairman  
 \_\_\_\_\_ Chester Cayou Sr., Secretary  
 \_\_\_\_\_ APPROVED AS TO CONTENT: Nicholas Zaferatos, Planning Director  
 \_\_\_\_\_ APPROVED AS TO FORM: Allan Olson, Tribal Attorney

## Appendix 5

RESOLUTION # 15030

RECOGNIZING TRIBAL GOVERNMENTS IN SLAGIT COUNTY  
AND THEIR BONDS WITH SLAGIT COUNTY GOVERNMENT

WHEREAS, Slagit County residents pride themselves on a community character which crosses within its residents an attitude of congeniality, generosity, openness and fairness which we share with those in our community; and

WHEREAS, our community character relies on our sense of "place", which is integrally related to the farmland, forestland, mountains and waterways that make up our environment; and

WHEREAS, our community character also includes a variety of individuals and groups, all of whom combine to co-exist within this place we know as Slagit County; and

WHEREAS, factors such as population growth, land use planning changes, economic diversity and threatened resources have caused us to recognize and re-examine those elements of our community character which we residents of Slagit County cherish; and

WHEREAS, the Indian tribes located within Slagit County form an important part of our community character, our sense of "place", and our appreciation of the diversity of life in Slagit County; and

WHEREAS, a new bond has developed between the leaders of Slagit County and the leaders of the Tribes which binds them to each other in a spirit of goodwill; and

WHEREAS, the Tribes located within Slagit County are deserving of our recognition and support as partners in the enhancement and preservation of the quality of life and community character of Slagit County; and

WHEREAS, the United States of America and the State of Washington have recognized the Twincornish, Upper Slagit and Sauk-Sulatte Tribes.

NOW, THEREFORE, BE IT RESOLVED that the Slagit County Board of Commissioners hereby publicly recognize and affirm the following:

- 1) That the Twincornish Tribal Community, the Upper Slagit Tribe, and the Sauk-Sulatte Tribes are legitimate governments whose lands and properties share common boundaries with Slagit County;
- 2) That the sharing of resources, utilities and economic development opportunities benefit both Slagit County and the Tribal interests;
- 3) That Slagit County government and the three Tribal governments each have a vested interest in the preservation of the natural resources which support and nourish our communities and cultures; and
- 4) That continued cooperative relationships between County and Tribal governments should be maintained through open communications, inclusive agreements, and information sharing mechanisms, to further this shared responsibility for our community.

and we hereby commit to the restoring of the bond between the Tribal governments and ourselves in order to mutually preserve the character of our shared community.

WITNESS OUR HANDS AND THE OFFICIAL SEAL OF OUR OFFICE this 20th day of September, 1980.



BOARD OF COUNTY COMMISSIONERS  
SLAGIT COUNTY, WASHINGTON

Robert Hart  
Robert Hart, Chairman  
Robert Johnson  
Robert Johnson, Commissioner  
Harvey Walker  
Harvey Walker, Commissioner

ATTEST:

Stephanie Updell  
Clerk  
Slagit County Board of Commissioners



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Appendix 6Memorandum of Understanding between  
the Skokomish Tribe and Mason County

The Memorandum of Understanding is made by and between the Skokomish Tribe ("the Tribe"), a federally recognized tribe in the state of Washington and Mason County ("the County"), a political subdivision of the state of Washington.

The Tribe and the County, after a meeting on September 19 1991, have indicated mutual interest in developing a government-to-government relationship with each other which will enable cooperation on a wide variety of intergovernmental issues.

The Tribe and the County recognize that a cooperative government-to-government relationship will benefit their respective constituents and minimize jurisdictional and regulatory conflict.

Because the County is proceeding a full pace with the implementation of the 1990 Washington State Growth Management Act and because the Tribe exercises jurisdictional authority on the Skokomish Reservation and holds proprietary treaty rights throughout the county, both parties recognize a particular need for coordination and cooperation with respect to land use planning and regulatory issues.

The Tribe and the County, therefore, agree to establish a group consisting of up to three representatives of the Mason County Commission and one or more representatives of the Skokomish Tribal Council. A representative of the Northwest Renewable Resources Center will serve as coordinator and facilitator.

The group will jointly explore issues of mutual concern. Such issues of mutual concern will be identified as the first task of the group.

The group will develop recommendations, both substantive and procedural, for addressing issues of mutual concern and will bring such recommendations forward for consideration by both parties within six months of the execution of this agreement.

Each party agrees to give this effort high priority.

Nothing in this agreement limits or waives the jurisdiction or regulatory authority of either party.

## Appendix 7

JEFFERSON COUNTY  
STATE OF WASHINGTON

In the Matter of  
Adopting A Memorandum of Understanding  
Between the Quinault Indian Nation and  
Jefferson and Grays Harbor Counties

RESOLUTION NO. 134-92

**WHEREAS**, a portion of the Quinault Indian Reservation is located within the boundaries of Jefferson County; and,

**WHEREAS**, the Quinault Indian Reservation was set apart by Treaty and Executive Order of the President; and

**WHEREAS**, the decision by the United States Supreme Court in Round Bay Yakima Indian Nation leaves the issue of the land use regulation of non-Indian owned Reservation land, unresolved; and

**WHEREAS**, federal law requires local governments to consider the political integrity, economic security, and health and welfare of an Indian tribe when regulating uses of non-Indian owned Reservation lands; and

**WHEREAS**, in order to regulate the non-Indian owned land and comply with federal law, the County recognizes that a cooperative system of regulation by the parties will result in protection of the interest of the citizens of the respective jurisdictions; and

**WHEREAS**, the County desires to provide certainty and stability in land use decision making and to avoid costly and unnecessary litigation regarding the non-Indian owned lands within the Reservation; and

**WHEREAS**, the Counties and the Quinault Indian Nation have negotiated the attached Memorandum of Understanding and the Memorandum essentially incorporates the existing land use regulations of the respective jurisdictions; and

**WHEREAS**, RCW 30.34 provides for interlocal agreements between the County and Indian tribes.

**NOW THEREFORE BE IT RESOLVED**, that the Jefferson County Board of Commissioners adopts the attached Memorandum of Understanding between the Quinault Indian Nation, Grays Harbor County, and Jefferson County; and

**BE IT FURTHER RESOLVED**, that the County and the Quinault Indian Nation shall continue to negotiate an Interlocal Agreement to incorporate the standards and intent of the Memorandum of Understanding; and

**BE IT FURTHER RESOLVED**, that prior to adoption of the Interlocal Agreement the County shall hold public hearings pursuant to applicable State law; and

**BE IT FURTHER RESOLVED**, that upon promulgation and passage of land use laws pursuant to the Growth Management Act, the County will consider the standards and intent of the Memorandum of Understanding, the Interlocal Agreement and any other negotiations in order to incorporate the interests of the Quinault Indian Nation into the process of comprehensive land use planning.

## Appendix 8

### INTERGOVERNMENTAL LAND USE PLANNING AGREEMENT BETWEEN FERRY COUNTY, OKANOGAN COUNTY, THE CITIES OF OMAK AND OKANOGAN, THE TOWNS OF COULEE DAM, ELMER CITY AND NESPELEM AND THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

#### I. PREAMBLE

THIS AGREEMENT is entered into between the Confederated Tribes of the Colville Reservation (Tribes) and Okanogan County and Ferry County (Counties), and the cities of Omak and Okanogan, the towns of Coulee Dam, Elmer City and Nespelem (Municipalities) each acting in their representative capacity. The Tribes is authorized to enter into this Agreement pursuant to Article V, Section 1(a) of the Colville Tribal Constitution. The Counties and Municipalities are authorized to enter into this Agreement pursuant to the Interlocal Cooperation Act, RCW Chapter 39.34, which permits political subdivisions of the State to enter into cooperative agreements with Indian tribes for their mutual advantage and cooperation. The parties have determined that it is in their mutual interest to cooperate and coordinate land use planning and zoning within their respective jurisdictions and, if possible, to develop a uniform comprehensive plan and set of land use regulations for the Colville Indian Reservation.

#### II. RECITALS

- A. The Tribes, the Municipalities and the Counties recognize the opportunity for and advantages of cooperating in developing a uniform comprehensive plan and land use regulatory scheme for the Colville Reservation because:
  - 1). intergovernmental cooperation is necessary to achieve a desired consistency between the Ferry County Comprehensive Plan, the Okanogan County Comprehensive Plan, the comprehensive plans for the Municipalities and the Colville Tribes Planning Guidelines; and,
  - 2). intergovernmental planning will more likely produce a plan which effectively manages growth and development, protects natural resources, provides public facilities and services and stimulates economic development; and,

- 3). intergovernmental cooperation will increase the efficiency and reduce the costs of planning for the area because it will avoid duplicating the efforts of their jurisdictions and their citizens; and,
  - 4). interjurisdictional planning will promote a more predictable and certain process and produce more understandable and long lasting policies for residents, property owners, developers, and other agencies and jurisdictions; and,
  - 5). interjurisdictional cooperation will increase the visibility of their planning efforts making their decisionmaking more understandable to the public; and,
  - 6). by sharing knowledge, information and resources, the parties will better understand each others' interests, concerns and needs in those areas in which they have a mutual interest; and,
  - 7). intergovernmental cooperation will lay the foundation for future cooperation in land use and capital improvement project planning, development review and natural resources protection.
- B. Each of the parties has an obligation as governments to ensure that adequate planning is undertaken within their respective jurisdictions and that it is in the interest of the residents of Okanogan and Ferry Counties, the Municipalities, and the Colville Reservation, that a coordinated regional planning process be established whereby the Tribes, Municipalities and the Counties cooperate and share resources in the promotion of land use planning.
  - C. The Colville Reservation was established by Executive order by President Grant on July 2, 1872, as an exclusive homeland for the Colville Tribes and a place to preserve and protect their culture and way of life. The Colville Business Council, as the governing body of the Tribes has an obligation to preserve and protect that homeland for the benefit of the Indians living there.
  - D. EPA has approved the Tribes for "treatment as a state" under sections 106, 319 and 518 of the Clean Water Act (CWA). The Tribes was designated as the management agency under section 208 of the CWA in 1983 and has operated a comprehensive non-point source pollution control program since then. The Tribes is also the



first and only Indian tribe in the Nation whose water quality standards have been promulgated as controlling federal standards for the Colville Reservation.

- E. The Tribes has assumed regulatory jurisdiction for all lands within the exterior boundaries of the Colville Reservation, regardless of ownership type, and the Municipalities and Counties have assumed regulatory jurisdiction for those lands held in fee title lying within the exterior boundaries of the Colville Reservation. It is recognized that these jurisdictional claims may be in conflict in individual cases, and nothing in this agreement is intended to resolve competing jurisdictional claims. Nevertheless, the parties agree it is in everyone's best interest to immediately proceed with a mutual, cooperative planning effort.
- F. The Tribes currently has an Interim Land Use Development Ordinance and a Comprehensive Land Use Policy Guide; Ferry County has a Comprehensive Plan and no zoning ordinance; Okanogan County has a Comprehensive Plan and Zoning Ordinance which designates the Colville Indian Reservation within the minimum requirement district; and, each municipality either presently has a comprehensive plan and implementing regulations, is presently working on the same or is in the process of updating and revising existing documents. Each of the parties enforces various other laws which also impact land use within their respective jurisdictions. Representative examples include the Uniform Building Code, Washington State Energy Code, Platting and Sub-Division Ordinances, Solid Waste Management and On-Site Waste Disposal Ordinances and Flood Control and Shoreline Management Ordinances.
- G. This Agreement shall not be considered or construed to grant or cede any jurisdiction to the State of Washington, the Counties, the Municipalities, or any other governmental entity by the Tribes, or to grant or cede any jurisdiction to the Tribes or any governmental entity by the State of Washington, Municipalities or Counties for the substantive purposes set out in this Agreement, or for any other purpose. This Agreement shall not be considered or construed to be a recognition by the Tribes of the State's jurisdiction on the Colville Reservation and shall not be construed to be a recognition by the State of any tribal jurisdiction on the Colville Reservation.

- M. The United States Supreme Court's recent decision in Brundage v. Yakima Indian Nation underscores the merit and necessity for intergovernmental cooperation.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS;

### III. COORDINATING COMMITTEE

#### 1.1 Establishment

The Tribes, the Municipalities and the Counties recognize the desirability of establishing a forum to provide for discussion, consultation and cooperation of intergovernmental planning matters. The Coordinating Committee is hereby created and shall consist of eight (8) members.

#### 1.2 Composition of Coordinating Committee

The Tribes, Ferry County, Okahogan County and the Municipalities shall each appoint two (2) members to the Committee. The Director or designee of each of the party's respective planning departments shall be one of the appointees and no practicing attorney shall serve except in an advisory capacity. The Committee members shall serve until such time as this Agreement is terminated or they are substituted or removed by the Colville Business Council, County Commissioners or Council of Mayors as the case may be.

#### 1.3 Purpose and Duties

The Committee's primary purpose shall be to reach consensus on the development of a workable comprehensive land use plan and regulatory system for all lands of the Colville Reservation, including Indian lands (as defined in 18 USC §1151) on the North Half and the former Moses Columbia Reservation, for adoption by the respective governments. To that end the Committee shall:

- 1.) Study the current Comprehensive plans of the parties and develop processes and protocols that will guide all planning decisions.
- 2.) Draft recommendations to the governments on how to amend their Plans to make them consistent with each other.
- 3.) Schedule joint public hearings to solicit input from the community on the Committee's recommendations once consensus has been reached.

- 4). Develop a mechanism for processing all permits applicable to development activities on the Reservation.
- 5). Report on the efficacy of establishing a joint zoning board and/or appeal process applicable to fee land development activities on the Reservation.
- 6). Establish a timeline setting forth target dates to accomplish the goals of the Committee as set forth above.

#### 2.4 Meetings

The Coordinating Committee shall meet quarterly or as often as necessary to accomplish its mandate. Each of the Parties commits resources sufficient to enable its appointees to fulfill the Committee's obligations under this Agreement.

#### 2.5 Recommendations By the Committee

The Coordinating Committee shall, from time to time, make recommendations to the Parties for amendments to this Agreement which may be necessary to fulfill its purpose.

### IV. INTERIM COORDINATION

#### 4.1 Necessity

The Parties recognize the need to coordinate current and future planning, pending formal adoption of a reservation wide comprehensive plan and regulatory process as contemplated by this Agreement.

#### 4.2 Current Permits

Within thirty (30) days from the signing of this Agreement the Parties shall exchange copies of all existing permits issued and pending relating to Reservation lands.

#### 4.3 Trust Lands

The Municipalities and Counties will be treated as a consulted agency as that term is defined by the State Environmental Policy Act (SEPA) RCW 43.21C.030(d).

4.4 Fee Lands

The Parties shall establish processes and protocols for all applications proposing any type of development activity on Reservation fee lands.

4.5 Lands Adjoining the Reservation

The Tribes shall be treated as a consulted agency under SEPA for any development activity on lands adjoining the Reservation in addition to any existing adjacent landowner's privilege and notification rights it may have from the Counties and Municipalities. The Counties, Municipalities and landowners adjacent to land subject to tribal development activity shall similarly be notified whether on or off the Reservation.

V. Effective Date, Amendment and Termination

This Agreement shall be effective when executed by the Parties. This Agreement may not be amended except by written agreement of the Parties and shall continue in effect until terminated by joint agreement of the Parties. Provided, any party may terminate its participation in the Agreement by giving sixty (60) days written notice to the other Parties.

This Agreement consisting of seven (7) pages is executed by the persons signing below who warrant that they have the authority to execute this Agreement.

FERRY COUNTYBy: Mary L. SennDate: 12-21-92Title: ChairOKANOGAN COUNTYBy: Ray M. WaltonDate: 12-22-92Title: ChairmanCONFEDERATED TRIBES OF THE COLVILLE RESERVATIONBy: B. PolumentoffDate: 12/21/92Title: Chairman



## MUNICIPALITIES

By: Frank G. Anderson Date: 10-21-92Title: MayorBy: R. B. FultonDate: 10-21-92Title: MayorBy: Carely ClaytonDate: 10-22-92Title: MayorBy: F. Holt, SmithDate: 11-12-92Title: MayorBy: Rickard R. SpruceDate: 12-8-92Title: Mayor - Ebenezer City

## APPROVED AS TO FORM:

By: [Signature] FCPA  
Ferry CountyDate: 12/21/92

By: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

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Appendix 9

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Descriptive Notes on Photography by Natalie Fobes

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ISBN 0-16-057380-7



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